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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000846-MR
AND
NO. 2009-CA-000891-MR

BRIAN KEITH ANTIS — APPELLANT/CROSS-APPELLEE

v. — APPEAL AND CROSS-APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE KRISTI HOGG GOSSETT, JUDGE
ACTION NO. 95-CI-00132

MARY JANE ANTIS
(NOW MARY JANE GILLUM) — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART,
AND REMANDING IN PART

** ** ** ** **

BEFORE: ACREE, DIXON AND STUMBO, JUDGES.

STUMBO, JUDGE: Brian Keith Antis appeals, and Mary Jane Antis cross-appeals, from Findings of Fact, Conclusions of Law and Judgment of the Greenup Circuit Court arising from Brian's 2007 motion to reduce child support. He argues that the circuit court abused its discretion in assessing to him any adverse tax

consequences and penalties arising from the distribution of an IRA for the purpose of establishing an educational trust. Mary argues on cross-appeal that the court erred in its determination of child support. We find no error in the circuit court's assessment of the adverse tax consequences and penalties to Brian, and affirm on that issue. We remand the matter for additional findings in support of the court's child support ruling.

The parties' marriage was dissolved by the entry of a Decree of Dissolution of Marriage rendered in Greenup Circuit Court on April 20, 1995. The Decree incorporated the terms of a Separation Agreement entered into by the parties on April 18, 1995. The Separation Agreement established child support payable by Brian for the benefit of the parties' two minor daughters named Danielle and Kia. It also provided that an educational trust would be established for the benefit of both daughters. The trust was to be funded by a Fidelity IRA account which then contained $14,900.00. These IRA funds were expressly excluded from the division of marital property. The terms of the Separation Agreement provided that the funds would be made available for educational expenses when each daughter reached the age of 18.

On December 6, 2007, Brian filed a motion in Greenup Family Court to reduce his child support obligation because Danielle, having reached the age of majority, was emancipated and attending college. Brian also requested that the court determine which party was entitled to tax exemptions associated with the children.

Mary responded on December 10, 2007, and requested a hearing on the child support issue. She objected to Brian's method of calculating child support, alleged that he owed back child support, and claimed that the Fidelity IRA account was not being distributed in the manner called for by the Separation Agreement.

The matter proceeded in Greenup Circuit Court, where proof was taken. On March 10, 2009, the court rendered Findings of Fact, Conclusions of Law and Judgment, in which it found that the Kentucky Child Support guidelines called for child support in the amount of $1,225.00 based on the parties' combined incomes. In so doing, the court noted that the parties' combined gross monthly incomes exceeded the maximum contemplated by the guidelines, and that no testimony was given that the remaining minor, unemancipated child Kia, had needs which exceeded those called for by the guidelines.

The court went on to address the educational trust issue raised by Mary. The court found that at the time of Dissolution, the IRA in question had a balance of approximately $14,900.00. When the matter was before the court on the issue at bar, the balance had increased to $88,000.00. The court found that no amounts had ever been withdrawn from the account, nor had any educational trust been established as required by the terms of the Separation Agreement. The court addressed additional provisions of the Separation Agreement, which stated that the account resulted from Brian's employment and could not have been divided between the parties without economic hardship and adverse tax consequences.

Brian argued that he could not now withdraw funds from the account and establish an educational trust as called for by the Separation Agreement because he would incur a 10% penalty for early withdrawal and suffer a 31% income tax penalty. In response, Mary sought strict compliance with the terms of the Separation Agreement, which called for the establishment of the educational trust for the benefit of the parties' daughters.

The court concluded that the parties entered into a binding Separation Agreement, the terms of which were incorporated into the Decree of Dissolution. It ordered the establishment of the educational trust, and determined that Brian would be held responsible for any adverse tax consequences or penalties resulting from the liquidation of the IRA. In so doing, it noted that the IRA was held solely in Brian's name.

Brian filed a Motion to Alter, Amend or Vacate on March 20, 2009. He claimed that the circuit court improperly calculated the child support by failing to take into account the relative percentages of the parties' incomes. He also argued that there was no basis for the court to assess to him the adverse tax consequences, which he claimed would result in a 41% tax and penalty assessment because he has not reached the age of 59 when IRA funds may be properly withdrawn. The court was persuaded by Brian's argument on the child support issue, and reduced the child support award to $659.50 per month. The court did not amend its assessment to Brian of the adverse tax consequences arising from the distribution of the IRA. This appeal followed.

Brian now argues that the circuit court erred in assessing to him any adverse tax consequences or penalties arising from the liquidation of the IRA account to fund the educational trust. He maintains that this matter was not properly before the circuit court, which should not have ruled upon it. Additionally, he argues that because Mary received an equal distribution of marital assets upon dissolution, any adverse tax consequences should be borne equally by the parties. He characterizes the circuit court's resolution of this issue as "illogical" and evincing a "cavalier attitude by the trial court," and notes that Mary has not offered any evidence rebutting his claim that he would suffer a 41% tax and penalty assessment. In sum, he maintains that the court's assessment to him of the adverse tax consequences is not supported by the facts and the law, and constitutes an abuse of discretion entitling him to an Order reversing the circuit court's conclusions of law on this issue.

We have closely examined the written argument, the record and the law, and find no error. The basis for the circuit court's resolution of this issue was two-fold. First, the court noted that the Separation Agreement - which called for the establishment of the trust - was entered into voluntarily by the parties, and was found not to be unconscionable and was incorporated without objection into the Decree of Dissolution in April, 1995. Second, the circuit court determined that the IRA account arose as a result of Brian's employment and was held solely in his name since the Decree of Dissolution was rendered.

We agree with the circuit court's assessment that the terms of the Separation Agreement on this issue are clear and unambiguous. Those terms called for the establishment of an educational trust for the benefit of the parties' two minor children, to be funded by the IRA at issue and to be made available to the children at the age of majority. It is uncontroverted that the trust was never established. Because the IRA has been held at all relevant times *solely in Brian's name*, it is equally clear that Brian alone had the lawful authority to effectuate a distribution of the IRA funds into an educational trust.

Because Brian, and not Mary, had the sole authority to bring about a distribution of the IRA funds, we are not persuaded by Brian's contention that the circuit court's ruling on this issue is not equitable and constitutes an abuse of discretion. At the time of dissolution, the parties were availed of the full panoply of options to fund their daughter's educations, and Brian – as sole owner of the IRA account - was solely responsible for managing and distributing the IRA proceeds in a manner calculated to minimize or eliminate any adverse tax consequences or penalties. Additionally, Brian acknowledges in his written argument that he could produce no case law or statutory law to demonstrate that the circuit court's ruling on this issue was erroneous. Since the parties agreed in unambiguous terms to the establishment of an educational trust funded by the IRA, and because the IRA was held solely in Brian's name, we cannot conclude that the circuit court abused its discretion on this issue. The record contains evidence that Brian owned the IRA in question, and that he did not establish an educational trust

in accordance with the terms of the Separation Agreement as incorporated in the Decree of Dissolution. We find no error, and accordingly affirm on this issue.

In her cross-appeal, Mary argues that the circuit court erred in sustaining Brian's Motion to Alter, Amend or Vacate the child support award thereby reducing the award from $1,225.00 per month to $659.50 per month. She argues that the circuit court's initial award was properly supported by the facts and the law, and contends that she is entitled to the larger award because she provides most of the caretaking to the parties' minor child Kia and because the majority of the hours Kia spends with Brian are when Brian is asleep. Mary notes that the award was reduced without explanation, and she seeks an Order reversing the circuit court in this issue and reinstating the award of $1,225.00 per month.

In initially fixing the child support obligation of $1,225.00, the circuit court rendered findings of fact relating to the parties' combined income of more than $200,000.00, and also considered the amount of time that the parties' minor daughter Kia spent with each parent. In examining this issue, the court found that the parties' combined monthly gross income exceeded the amount contemplated by the statutory guidelines, and concluded that Brian should pay the full amount of $1,225.00 called for by the guidelines for one child.

Brian moved to vacate that award, and tendered a child support worksheet in support of his contention that the court should reduce the award to $731.00. After considering the matter, the court rendered an additional Order fixing Brian's monthly child support obligation at $659.50 per month.

The trial court is vested with broad discretion in the establishment, enforcement, and modification of child support. *McKinney v. McKinney*, 257 S.W.3d 130 (Ky. App. 2008). On appeal, the standard for examining a modification of child support is whether the trial court abused its discretion. *Goldsmith v. Bennett-Goldsmith*, 227 S.W.3d 459 (Ky. App. 2007). Abuse of discretion is found where a decision is arbitrary, unreasonable, unfair or unsupported by sound legal principles. *McKinney*, *supra.* In the matter at bar, while the circuit court rendered comprehensive findings of fact in support of its original modified award of $1,225.00, the amended award of $659.50 was made without explanation. Had the court awarded the sum of $731.00 per month as sought by Brian, we might reasonably assume that such an award would have been based on the arguments and documentary evidence propounded by Brian in support of his Motion to Alter, Amend or Vacate. The award of $659.50 per month, however, was an amount not sought by either Brian or Mary, nor reached as a result of the circuit court's Findings of Fact and Conclusions of Law. As such, we have no basis for determining whether, in the language of *McKinney*, *supra*, the award is arbitrary, unreasonable, unfair or unsupported by sound legal principles. Without forming any opinion as to the propriety of the award, we must remand the matter to the circuit court for additional findings on this issue. On remand, the circuit court shall produce findings in support of its award, which reasonably apprise the parties and appellate tribunals of the basis of the award.

For the foregoing reasons, we remand the April 16, 2009 Order of the Greenup Circuit Court fixing Brian's child support obligation in the amount of $659.50, and affirm the March 10, 2009 Findings of Fact, Conclusions of Law and Judgment assessing to Brian any adverse tax consequences and penalties arising from the distribution of the IRA.

ALL CONCUR.

BRIEFS FOR APPELLANT/
CROSS-APPELLEE,
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