RENDERED: May 26, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 1998-CA-002566-MR

THOMAS ELLIOTT — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE RICHARD FITZGERALD, JUDGE
ACTION NO. 93-FD-002058

RONDA HARTLAGE — APPELLEE

OPINION
AFFIRMING IN PART AND REVERSING IN PART
** ** ** ** **

BEFORE: BARBER, HUDDLESTON AND COMBS, JUDGES.

BARBER, JUDGE: This is an appeal from an opinion and order of the Jefferson Family Court (1) finding that the parties had an implicit agreement to divide the cost of tuition for their child's special educational needs; (2) ordering that the Appellant Thomas Elliott pay one-half of that tuition and expenses for so long as the child attends Summit Academy, or until evaluation indicates that such special educational placement is no longer necessary; and (3) awarding Appellee Ronda Hartlage a common law judgment for Elliott's proportional share of tuition expenses. We reverse in part and affirm in part.

The parties' marriage was dissolved in 1994. On August 21, 1997, Hartlage moved the court to enter an order "memorializing" the parties' agreement that Elliott pay one-half of their daughter's tuition and expenses at Summit Academy. By order entered September 2, 1997, the matter was referred to a Commissioner.

The Commissioner found no dispute that the parties' child suffered from numerous disabilities requiring special school, and that the parties had investigated and narrowed the choice of schools to Meredith-Dunn or Summit Academy on November 9, 1994. The Commissioner found that Elliott admitted having agreed to let Hartlage decide about Summit Academy and that Elliott had also admitted having acquiesced. The Commissioner noted that "acquiesce" is defined as to concur or agree. The Commissioner concluded that Elliott had agreed with Hartlage that their child would attend Summit Academy. The Commissioner noted the substantial disparity in the parties' incomes and that no reasonable person would assume Hartlage would bear the entire cost of the tuition.

The Commissioner concluded that the parties had an implicit agreement to equally divide the cost of tuition and expenses for their child to attend Summit Academy, based upon: (1) their agreement that the child needed special schooling, (2) their agreement that their child should attend Summit Academy, and (3) the disparity in the parties' income at the time of their agreement in 1994. The Commissioner recommended that Elliott be ordered to pay his proportionate share of the tuition effective

November 16, 1994, to continue for so long as the child attends that institution and that Hartlage be awarded a common law judgment for Elliott's proportionate share of the tuition for the academic years 1994-95 through 1996-97.

Elliott filed exceptions. A hearing on the exceptions was held July 23, 1998. In its opinion and order entered September 11, 1998, the trial court noted that Elliott had characterized the alleged agreement to divide the tuition as an oral modification to a contract presumably the parties' January 11, 1994, Marital Property Agreement. The trial court summarized Elliott's argument at the hearing — that under Whicker v. Whicker, Ky. App., 711 S.W.2d 857 (1986), the alleged oral modification was neither proven with reasonable certainty nor was it found to be fair and equitable by the Commissioner. Elliott also argued that the Commissioner did not make sufficient findings regarding the agreement. The court disagreed with Elliott's interpretation of the Commissioner's report as well as his reliance upon Whicker, id.

> Perhaps most important in reviewing the Commissioner's finding of an implicit agreement is that at the time of the investigation by the parties of Summit and the alleged agreement that Katherine should attend the academy with the financial responsibility to be equally born by the parties, the parties were joint custodians of Katherine, acting in the context of joint parents discussing the educational placement of their medically fragile child. Mr. Elliot [sic] points out the significance of the joint custodial arrangement himself in the order tendered with his October 31, 1994 motion asking that the decision concerning the educational placement of Katherine be made in that context.

The subject motion was also accompanied by Elliott's affidavit stating that as a result of an (agreed upon) evaluation at the Child Evaluation Center, it was recommended that Katherine's schooling be provided by either Meredith Dunn or Summit or "perhaps, if available, by an appropriate Jefferson County Public School Program." Elliott contended that Hartlage had already chosen Meredith Dunn; further, that the schooling decision was a "most critical one which should be made together by the parties . . . ." Elliott requested that the "best interest of this child" be met in accordance with the parties' joint custody agreement. The tendered order provides that neither parent shall "enroll Katherine at any school without the agreement of the other parent." That order was not signed. A note written on the subject order by Judge Corey dated November 1, 1994 reflects: "No hearing to be scheduled at this time. Parties are negotiating this issue."

> Accordingly, the Court . . . . [found] that the implicit agreement by Mr. Elliot [sic] to divide the costs of Katherine's tuition . . . . [was] not an oral modification of the parties' Marital Property Agreement and therefore subject to the requirements of Whicker, but rather an effectuation of the decisions made by the parties as joint custodians to first have Katherine evaluated and secondly follow the evaluations recommendation that she be placed in a special school. Even subject to scrutiny under Whicker, Ms. Hartlage and Mr. Elliot's [sic] agreement concerning their daughter was proven with reasonable certainty based upon the evidence before the Commissioner and this Court. Further, and as is the second requirement of Whicker, the agreement is fair and equitable to *the affected child under the circumstances*. Ruby v. Shouse, Ky., 476 S.W.2d (1972) as cited in

> Whicker v. Whicker, Ky. App., 711 S.W.2d 857, 859 (1986). [emphasis original].

On appeal, Elliott contends that the trial judge erred, as a matter of law, in determining that the alleged agreement was not a modification of the marital settlement agreement. Hartlage has not filed a brief.

We do not believe that the trial judge erred in finding that there was an agreement to divide the costs of Katherine's tuition; however, we cannot see that such an agreement is anything other than an oral modification of the parties' January 11, 1994 Marital Property Agreement. It was not until approximately October 1994 that Katherine was evaluated and the need for special schooling became apparent. Thus, there was a change in Katherine's circumstances necessitating a modification of the parties' Marital Property Agreement. As noted by the court below, an oral modification would be subject to the requirements of Whicker, id.

Whicker, id, at 859, holds that:

> oral agreements to modify child support obligations are enforceable, so long as (1) such agreements may be proved with reasonable certainty, and (2) the court finds that the agreement is fair and equitable under the circumstances. In order to enforce such agreements, a court must find that modification might reasonably have been granted, had a proper motion to modify been brought before the court pursuant to KRS 403.250 at the time such oral modification was originally agreed to by the parties. Furthermore, in keeping with prior decisions, 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. [citation omitted].

In the case sub juidice, the court determined that "[e]ven subject to scrutiny under Whicker, ... the agreement was proven with reasonable certainty . . . ." Elliott contends that the court's finding in this regard was clearly erroneous because it was not supported by substantial evidence.[1] We cannot agree. "We are constrained from overturning the findings of the trial judge unless they are clearly erroneous. [citation omitted]. This standard is especially true in domestic relations cases." Aton v. Aton, Ky. App., 911 S.W.2d 612, 615 (1995).

Elliott disagrees with the trial judge's interpretation of the evidence, and maintains that the parties could not have agreed about tuition because they could not agree about the simplest things at that point in time. Elliott ignores his October 31, 1994 motion and the fact that it was not set for hearing because the parties were negotiating the issue. Elliott points out that Hartlage had contended that there was indeed an agreement and that it was reached between the end of October and mid-November 1994. Thus, Elliott acknowledges that evidence was in conflict. "The trial court heard the evidence and saw the witnesses. It is in a better position that the appellate court to evaluate the situation . . . . When the evidence is conflicting, as here, we cannot and will not substitute our decision for the judgment of the chancellor." Wells v. Wells, Ky., 412 S.W.2d 568, 571 (1967).

---

[1]Elliott concedes that if the existence of the oral agreement is proven to a reasonable certainty, the agreement "would have been fair and equitable" to the child, thus satisfying the second requirement of Whicker, id.

In addition to requiring oral agreements to modify child support to be proven with reasonable certainty and to be fair and equitable (to be enforceable), Whicker, id, also requires the court to find that modification might reasonably have been granted, had a motion to modify been brought at the time of the parties' agreement. The court in effect made such a determination by ordering Elliott to pay half of the tuition and expenses at Summit on a continuing basis as a result of the undisputed fact that Katherine needed special schooling which was not known at the time of the parties' Marital Property Agreement.

Elliott also contends that the trial judge abused his discretion in enforcing the agreement by granting a judgment against him in the amount of $9,513.79, plus interest; further, that if there is any obligation for additional support, it should commence August 21, 1997, the date Hartlage's motion to enforce the oral agreement was filed. According to the Commissioner's report, Hartlage had spent a total of $19,027.57 on Katherine's tuition for the academic years between 1994-1995 and 1996-1997. One-half of $19,027.57 equals $9,513.79. These expenses were apparently incurred and paid before the filing of Hartlage's motion on August 21, 1997. Thus, we must reverse that portion of the court's September 11, 1998 opinion and order awarding the common law judgment because it amounts to an impermissible retroactive modification of Elliott's support obligation. Whicker, id.

The court also ordered that Elliott "shall be responsible for one-half of Katherine Elliott's tuition and

expenses at Summit Academy, effective November 16, 1994, and continuing so long as she attends the institution, or medical/developmental evaluation indicates a lack of need for special educational placement." We affirm that, except for the effective date, because it predates Hartlage's motion and would impermissibly modify Elliott's support obligation retroactively. We agree with Elliott that his obligation for additional support should commence effective August 21, 1997, and remand the case to the circuit court for entry of judgment consistent herein.

ALL CONCUR.

BRIEF FOR APPELLANT:

K. Tracy Rigor
Louisville, Kentucky

NO BRIEF FOR APPELLEE