

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001399-MR

STEVEN PAUL SAMUELS

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS WALLER, JUDGE
ACTION NO. 97-CI-00734

MARGARET ANN SAMUELS

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BARBER, GUDGEL, AND KNOPF, JUDGES.

KNOPF, JUDGE: Steven Paul Samuels appeals from an order of the Bullitt Circuit Court which, among other things, awarded Margaret Ann Samuels (Peggy) child support arrearages associated with bonus income earned by Steven in accordance with the parties' original settlement agreement. Finding no error in the circuit court's award of child support arrearages, we affirm.

The parties were married on November 8, 1980, and had two children during the marriage, Paul David Samuels and Brittany Nicole Samuels. On October 21, 1997, Peggy filed a petition to dissolve the marriage. At the time the petition was filed, Paul

was 16 and Brittany was 12. On April 23, 1998, the parties entered into a settlement agreement. Under the agreement, Peggy was named as the primary residential custodian of the two minor children. As child support, Steven was to pay Peggy \$158.00 per week in base child support; however, in addition, Steven was to pay Peggy additional child support based upon any bonus income he received from his employer. The child support provisions of the separation agreement stated as follows:

The Respondent [Steven] shall pay to the Petitioner [Peggy] the sum of \$158 per week as child support based upon the respondent's current weekly pay without reference to any bonuses. As bonuses are paid to the Respondent, the parties shall annualize said bonuses to determine what additional child support would have been paid and the Respondent shall become responsible to pay said additional child support within 30 days thereafter. (As an example and for illustration purposes only, if the respondent were to receive an annual bonus of \$1200 then child support would be re-figured by adding \$100 per month to the Respondent's monthly income figure on a child support worksheet and a new child support obligation amount determined accordingly.)

The final decree, which incorporated the settlement agreement, was entered on April 27, 1998.

In late August or early September 1999, for reasons related to Paul's desire to attend North Bullitt County High School, Steven rented a residence within the school district's boundaries and Paul moved in with Steven. After Paul moved in with Steven, Steven reduced his child support payments to Peggy to \$79.00 per week, one-half of the base child support as set forth in the settlement agreement.

On February 9, 2000, Peggy filed a motion to hold Steven in contempt for, among other things, his failure to pay child support pursuant to the settlement agreement. The motion alleged that Steven had failed to pay portions of the \$158.00 base weekly child support obligation, and, further, had failed to pay any support related to bonus income. On February 28, 2000, Steven responded by filing a motion to modify child support, alleging that the parties had orally modified the parties' child support agreement when Paul came to live with him.

The matter was referred to the domestic relations commissioner, and on May 3, 2000, an evidentiary hearing was held on the outstanding motions. However, because detailed information regarding Steven's bonus income for the years 1998, 1999, and 2000 was unavailable on the date of the hearing, child support issues related to bonus income were specifically reserved by the commissioner for consideration at a later time. At the hearing, Peggy contended that there had been no oral agreement to modify child support after Paul moved in with Steven, whereas Steven argued that Peggy had agreed to a modification based upon a recalculation under the child support guidelines.

On May 23, 2000, the commissioner submitted his report. The report included a finding that while the parties did not reach a specific agreement regarding modification of child support, there had been an agreement in principal to amend child support to reflect Paul's moving in with Steven, and that the modification should be in conformity with the child support guidelines. Based upon the relevant income levels, the

commissioner set Steven's child support at \$57.00 per week from September 7, 1999, when Paul came to live with Steven, through May 26, 2000, the date of Paul's graduation from high school, and \$140.00 per week thereafter. Peggy filed exceptions to the report and, eventually, on February 14, 2001, the circuit court entered an order adopting the commissioner's report and recommendation concerning this phase of the case. Neither the commissioner's report nor the circuit court's order adopting the report specifically addressed the issue of the settlement agreement's provision regarding child support associated with Steven's bonus income.

In May 2000 Paul, after having turned eighteen, graduated from high school, thereby terminating ongoing provisions for support concerning the older child.¹ In late August 2000, Brittany went to live with Steven, prompting Steven to file a motion to abate his child support obligation and to set child support payable to him by Peggy for the parties' daughter. On November 20, 2000, at the commissioner's recommendation, the trial court entered an order setting Peggy's weekly child support obligation at \$93.45 beginning the week of October 2, 2000. However, the order also provided that "[t]he parties further agree that no payment shall be forthcoming until such time as the back support issues are resolved in the Circuit Court," thereby implicitly recognizing that there were unresolved arrearage issues concerning amounts owed by Steven to Peggy.

¹Kentucky Revised Statutes (KRS) 403.213(3).

On March 22, 2001, Steven filed a motion seeking, among other things, a judgment against Peggy for \$2,429.70 in child support arrearages (26 weeks X \$93.45) based upon the child support obligation set in the November 20, 2000, child support order. In response, Peggy filed a motion seeking a judgment of \$8,130.72 relating to child support associated with bonus income earned by Steven in the years 1998, 1999, and 2000, plus interest. Peggy acknowledged that her judgment should be offset by any amounts she owed to Steven. The matter was referred back to the commissioner.

On May 10, 2001, the commissioner entered his report which stated, in relevant part, as follows:

The Commissioner finds that the Court's finding of an oral agreement to amend child support which was adopted by this Court in the Order entered February 14, 2001, supercedes the original Property Settlement Agreement. Therefore, the Commissioner recommends that [Peggy's] motion for child support arrearage be OVERRULED. [Steven] should be awarded a judgment for child support arrearage in the amount of \$3,707.70.

Peggy filed timely exceptions to the commissioner's report.

On June 13, 2001, the trial court entered an order rejecting the commissioner's recommendation to the extent that it denied Peggy's motion stating, in relevant part, as follows:

. . . the Court further finds that [Peggy] is entitled to a common law judgment in the amount of \$8,130.72 representing child support arrearage owed to [Peggy] by [Steven] in accordance with the Property Settlement Agreement made a part of the Court's final Decree Of Dissolution Of Marriage.

This amount reflects [Steven's] child support arrearage accrued from bonuses earned by [Steven] from 1998 to 2000, plus 12% interest

pursuant to KRS 360.040. Also, Stuart v. Raikes, Ky., 627 S.W.2d 586 (1982) holding that unpaid child support becomes a judgment upon the date at which it is due and payable.

Steven filed a motion to alter, amend or vacate, which was denied by order dated June 21, 2000. This appeal followed.

First, Steven contends that the trial court abused its discretion in entering a later judgment inconsistent with its prior findings of fact. Specifically, Steven contends that the commissioner's report of May 23, 2000, and the circuit court's order of February 14, 2001, adopting the report, had the effect of determining that the parties had orally modified their original child support agreement, including the provision of the agreement providing for additional child support to be made based upon Steven's periodic bonus income, and that the June 13, 2001, order is in conflict with the earlier order. We disagree.

The underpinning of the commissioner's May 23, 2000, report and the circuit court's February 14, 2001, order adopting the report was the May 3, 2000, evidentiary hearing. Prior to the witnesses being called at the hearing, Peggy's counsel raised the issue of child support relating to the bonus, stating, "I don't think that there's a dispute that portions of the bonus are owed as set forth in the Property Settlement Agreement." However, counsel further stated that she had first been provided tax returns for prior years immediately prior to the hearing, and that she was unprepared to address the issue of bonus income and the related child support without further opportunity to examine the returns. At this point the commissioner stated as follows:

If what you've got is tax returns, I'm not sure tax returns show how much of his wages - - how much of his W2 is wages and how much is bonuses. I'm not sure you're going to know anything more after you look at that. We'll just reserve on that and let you take a look at that. We'll address the issue of the [base child support] arrearage at this time. It's your motion so call your first witness. (Emphasis added.)

Further, contrary to the suggestion by Steven, neither the commissioner's May 23, 2000, report nor the circuit court's February 14, 2001, order makes reference to bonus income child support, much less makes a specific finding that the parties had agreed to modify that portion of the settlement agreement.

In light of the commissioner's explicit reservation of bonus income child support at the evidentiary hearing, the absence of litigation of the issue at the hearing, the absence of a reference to the issue in the commissioner's report, and the absence of any specific finding in the circuit court's February 14, 2001, order, we are persuaded that the February 14, 2001, order was intended to hold only that there had been an oral modification of the base support of \$158.00 per month, and was not intended to decide that there had been an agreement either retroactively or prospectively to modify Steven's obligation to pay child support under the bonus income provision of the settlement agreement.

Next, Steven contends that the February 14, 2001, order was res judicata as to the issue of whether there had been an oral modification to the child support provisions of the property settlement.

The rule of res judicata is an affirmative defense which operates to bar repetitious suits involving the same cause of action. The doctrine of res judicata is formed by two subparts: 1) claim preclusion and 2) issue preclusion.²

For claim preclusion to bar further litigation, certain elements must be present. First, there must be identity of the parties.³ Second, there must be identity of the causes of action.⁴ Third, the action must have been resolved on the merits.⁵ Here, the February 14, 2001, order is not res judicata as to the issue of child support associated with bonus income under claim preclusion because, as noted above, the issue was not resolved on the merits by that order. The February 14, 2001, order only determined that there had been an agreement to adjust base child support to reflect that Paul had moved in with Steven, not to change past due, or future, child support associated with bonus income.

For issue preclusion to operate as a bar to further litigation, certain elements must be found to be present. First, the issue in the second case must be the same as the issue in the first case.⁶ Second, the issue must have been actually

²Yeoman v. Commonwealth, Health Policy Bd., Ky., 983 S.W.2d 459, 464- 465 (1998).

³Newman v. Newman, Ky., 451 S.W.2d 417, 419 (1970).

⁴Id.

⁵Id.

⁶Yeoman at 465 (citing Restatement (Second) of Judgments § 27 (1982)).

litigated.⁷ Third, even if an issue was actually litigated in a prior action, issue preclusion will not bar subsequent litigation unless the issue was actually decided in that action.⁸ Fourth, for issue preclusion to operate as a bar, the decision on the issue in the prior action must have been necessary to the court's judgment.⁹ Issue preclusion does not apply because, again, the issue was not actually litigated at the May 3, 2000, evidentiary hearing, nor was it addressed in the subsequent commissioner's report, nor was it addressed in the circuit court's February 14, 2001 order.

Finally, Steven contends that the court's judgment of June 13, 2001, "was superceded by prior orders of the court." Steven asserts that the circuit court's February 14, 2001, order had previously determined that the child support provisions of the separation agreement were unconscionable, and that the June 13, 2001, order directs money to be paid to Peggy to compensate her for child support for a period where she did not have the children.

This argument substantially overlaps Steven's previous two arguments, so we will dispose of this argument, primarily, by again noting that we construe the February 14, 2001, order as not having resolved the issue of child support arrearages related to bonus income.

⁷Id.

⁸Id.

⁹Id.

We also note that Steven's argument is, for several reasons, somewhat disingenuous. The February 14, 2001, order, in fact, did not make any findings regarding the bonus income provisions of the separation agreement, much less determine that the provision was unconscionable. Further, pursuant to Peggy's arrearage calculation sheet,¹⁰ the circuit court's June 13, 2001, order awarded Peggy child support related to bonus income for the period beginning January 1, 1998, and ending August 2000. Paul changed residence to live with Steven in late August or early September 1999. Brittany went to live with Steven in August 2000. Hence, contrary to Steven's representations, for much of the period at issue, both children were residing with Peggy, and for all of the period at issue, at least one of the children was residing with Peggy. In addition, a significant portion of the bonus income arrearage applies to pre-September 1999, prior to any change of circumstances; Steven's argument that any subsequent oral modification should apply to these amounts is particularly untenable.

Peggy's calculations supporting the circuit court's arrearage determination are set forth in the record. Other than to claim that Peggy is not entitled to bonus-income child support, Steven does not challenge her calculations or provide alternative calculations of the arrearage. The circuit court offset Peggy's claimed arrearage by Steven's claims. Based upon the calculations in the record, we cannot say that the circuit court's determination of the net arrearages owed by Steven to

¹⁰Circuit Court record, page 238.

Peggy was clearly erroneous. Under settled principles of appellate review, this Court may not set aside findings of the trial court unless those findings are clearly erroneous.¹¹

For the foregoing reasons the judgment of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joseph J. Wantland
Shepherdsville, Kentucky

BRIEF FOR APPELLEE:

Sandra F. Keene
Tilford Dobbins Alexander
Buckaway & Black, LLP
Louisville, Kentucky

¹¹Kentucky Rules of Civil Procedure (CR) 52.01; Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986).