

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001444-MR

REBECCA BAKER (NOW HAYS)

APPELLANT

v.

APPEAL FROM CLAY CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
CIVIL ACTION NO. 99-CI-00358

RICKY BAKER

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, HUDDLESTON and JOHNSON, Judges.

HUDDLESTON, Judge: Rebecca Hays appeals from a Clay Circuit Court order overruling her objections¹ to the report of the court's domestic relations commissioner (DRC) and adopting the DRC's recommendation to grant Ricky Baker's motion "to reopen and for modification of tax dependency exemption" and modifying the decree

¹ In the instant case and commonly throughout this jurisdiction, the term "exception" or some variation thereof is used to describe the procedure by which a party obtains trial court review of the report of a domestic relations commissioner pursuant to Ky. R. Civ. Proc. (CR) 53.06. In actuality, CR 53.06 does not contain the term "exception" but rather speaks of "objections." To maintain consistency with the rule, we will use the term "objection" throughout this opinion.

so as to grant Ricky the income tax dependency exemptions for the parties' minor children.

Rebecca and Ricky were married on May 17, 1991, and separated on August 5, 1999. Three children were born to the marriage. On October 6, 1999, Ricky filed a "petition for dissolution of marriage and the care, custody [and] control of three infant children." In his petition, Ricky sought custody of the children with visitation for Rebecca. Because the parties wished "to reach an amicable resolution of the differences" which resulted in the petition being filed, on October 28, 1999, they entered into a separation and property settlement agreement "resolving all issues of this action."

Pursuant to the separation agreement, Rebecca and Ricky were to share joint custody of the children with Rebecca being the primary residential custodian and Ricky having "liberal and reasonable visitation." Ricky was to pay \$62.80 per week in child support, consistent with the statutory guidelines. In addition, Ricky was "entitled to claim the children as dependency exemptions for income tax purposes for all years" and Rebecca was to maintain health insurance for the children. By its terms, the agreement could "not be modified by the parties or by the Court, except concerning those provisions governed by [Kentucky Revised Statutes] KRS 403.180(6), custody, visitation and child support. Any modification shall be made only by like written agreement or Court order."

However, on November 3, 1999, the parties entered into an amended agreement which "superseded any and all prior agreements

entered into by the parties." The custody arrangement was altered in that the parties' roles were reversed – Ricky became the primary residential custodian, Rebecca was given "reasonable and liberal visitation," agreed to pay \$65.00 per month to Ricky as child support consistent with the statutory guidelines and was "entitled to claim the children as dependency exemptions for income tax purposes for all years." Ricky assumed the responsibility of maintaining health insurance for the children. Rebecca was unemployed at the time both agreements were executed but agreed to advise the court if her employment status changed.

With the exception of the foregoing alterations, the amended agreement closely parallels the initial agreement – the provision governing modification is identical. In a decree of dissolution entered on January 7, 2000, the circuit court dissolved the marriage between Ricky and Rebecca, specifically finding that the settlement agreement is "not unconscionable"² and "is hereby incorporated into and made part of this Decree in each element as if fully set forth herein and each provision thereof is adopted by this Court as the Judgment of the Court."

Subsequently, Ricky filed the aforementioned motion to reopen and modify the decree, citing Rebecca's alleged failure to

² In the present context, unconscionable has been defined as "manifestly unfair or inequitable;" a "bad bargain and unconscionability [are] not synonymous." Shraberg v. Shraberg, Ky., 939 S.W.2d 330, 333 (1997) (citations omitted).

Upon determining that an agreement is unconscionable, the trial court is vested with the authority to "request submission of a revised agreement or make its own determination as to disposition of property, support, and maintenance." Id. In cases of this nature, great deference is afforded to the view of the trial court as it is in the "best position to evaluate the circumstances surrounding the agreement." Id. (citation omitted).

regularly pay her child support as grounds and arguing that he "needs the tax exemptions in order to be able to afford to raise the children." On January 25, 2001, the DRC conducted a hearing on the matter, ultimately concluding as follows: ". . . [Ricky] is [c]ustodian of the children, is employed, and is providing more than 50% of the support for such children." Rebecca filed objections to the DRC's report, refuting the allegation that she had failed to regularly pay the child support ordered by the court and arguing that the separation agreement as amended precludes modification of the decree with regard to the dependency exemptions. On the same document, i.e., "order," containing the DRC's recommendation, the circuit court overruled Rebecca's objections by inserting a notation to that effect above his signature, simultaneously adopting the recommendation of the DRC, albeit implicitly.³

On June 13, 2001, Rebecca filed a motion for extension of time in which to file a notice of appeal, in which her counsel requested that the court "consider the fact that he was not served with a copy of the Court's order overruling exceptions as excusable neglect for his failure to timely file a notice of appeal." Following a short hearing on the matter, the court exercised its "broad discretion" in deciding that counsel's failure constituted excusable neglect and, on August 6, 2001, granted Rebecca an extension of one day from July 5, 2001, in which to file a notice

³ The DRC's recommendation was filed on February 23, 2001, while the order overruling Rebecca's objections was entered on May 4, 2001.

of appeal. As Rebecca complied with that order, the case is now ripe for decision.⁴

On the present facts, our standard of review is well established. "Since this case was tried before the court without a jury, its factual findings 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.'"⁵ If a factual finding is supported by substantial evidence, it is not clearly erroneous.⁶ "Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. 'It is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence.'"⁷

Under Kentucky Rule of Civil Procedure (CR) 52.01, "to the extent that the court adopts them," the findings of a DRC "shall be considered as the findings of the court." With respect to the report of the DRC, however, "the court may adopt, modify or reject it, in whole or in part, and may receive further evidence or may recommit it with instructions. In sum, the trial court has the

⁴ Ricky has failed to submit a brief as required by CR 76.12(1). Although CR 76.12(8)(c) authorizes this Court to invoke one of three penalties in the event that an appellee fails to comply with this requirement, we decline to do so in this instance as our decision will necessarily impact the lives of three young children. However, we take this opportunity to reiterate that such a blatant disregard for the civil rules is not acceptable and, in most cases, we will not hesitate to invoke the available penalties.

⁵ Cole v. Gilvin, Ky. App., 59 S.W.3d 468, 472 (2001).

⁶ Id. at 472-473.

⁷ Id. at 473.

broadest possible discretion with respect to the use it makes of reports of [DRCs].”⁸

Further, the circuit court is entitled to reevaluate the evidence and reach a different conclusion than the DRC. “While actions before the court without intervention of a jury are governed by CR 52, et seq., it seems apparent that on matters referred to a commissioner pursuant to CR 53.03, the specific provisions of the rules relating to commissioners prevail.”⁹ Our function, then, is limited to ascertaining whether there is substantial evidence to support the circuit court’s factual findings, i.e., that Ricky “is the [c]ustodian of the children, is employed, and is providing more than 50% of the support for such children,” and determining whether the circuit court abused its discretion in modifying the amended separation agreement based on those facts.

Here, the relevant facts are undisputed and there is no allegation that the circuit court did not make sufficient findings to support its determination, nor is that the case – limited as the findings might be, they are adequate for present purposes. On appeal, the sole issue raised by Rebecca is whether the “circuit court erred in modifying the amended separation agreement of the parties and thereby granting [Ricky] the ability to claim the children as dependency exemptions for income tax purposes.” Our analysis will focus on the merits of that dispositive issue.

⁸ Eiland v. Ferrell, Ky., 937 S.W.2d 713, 716 (1997).

⁹ Id.

KRS 403.180(1) explicitly authorizes separation agreements such as the one at issue, providing in relevant part as follows: “. . . parties may enter into a written separation agreement containing provisions for maintenance of either of them, disposition of any property owned by either of them, and custody, support and visitation of their children.” Promoting the “amicable settlement of disputes between parties to a marriage attendant upon their separation or the dissolution of their marriage” is the rationale behind this provision. Further, KRS 403.180(2) specifically provides that the terms of a separation agreement, “except those providing for the custody, support, and visitation of children, are binding upon the court” unless it finds “that the separation agreement is unconscionable” after “considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court.”

Pursuant to KRS 403.180(6), “the decree may expressly preclude or limit modification of terms if the separation agreement so provides,” with the exception of “terms concerning the support, custody, or visitation of children.” By expressly doing so, as the parties did here, “the parties may settle their affairs with a finality beyond the reach of the court’s continuing equitable jurisdiction elsewhere provided,”¹⁰ with the aforementioned exceptions. Otherwise, modification of a decree automatically modifies the terms of a separation agreement. Thus, there is no question that the court retains control over child custody, support

¹⁰ Brown v. Brown, Ky., 796 S.W.2d 5, 8 (1990).

and visitation and is not bound by the parties' agreement with respect to those issues.¹¹

In Hart v. Hart,¹² this Court was confronted with the question of "what effect, if any, does 26 [United States Code] U.S.C. § 152(e)¹³ have on the trial court's ability to allocate the income tax exemptions for dependent children of divorce?" That provision of the Internal Revenue Code "entitles the custodial party to claim the exemption unless that parent signs a written waiver that he or she will not claim the children as dependents."¹³ Ultimately, we concluded that Congress, in amending the section at issue, did not, either expressly or by implication, prohibit state courts from allocating the exemption.¹⁴ In so doing, we observed that the allocation of the exemption "has, or at least should have, a bearing on the amount of money available as child support," emphasizing that trial courts "should allocate the exemption so as to maximize the amount available for the care of the children."¹⁵

It is with that guiding principle in mind that we evaluate the propriety of the circuit court's order modifying the separation agreement at issue. Here, the circuit court's decision to modify the provision of the agreement regarding entitlement to the dependency exemptions, i.e., to reallocate the exemption, amounts to an implicit acceptance of Ricky's argument that he

¹¹ Tilley v. Tilley, Ky. App., 947 S.W.2d 63, 65 (1997).

¹² Ky. App., 774 S.W.2d 455, 457 (1989).

¹³ Id.

¹⁴ Id.

¹⁵ Id.

"needs the tax exemptions in order to be able to afford to raise the children." While it is true that Rebecca and Ricky specifically addressed this issue as well as that of modification in an otherwise binding agreement, terms relating to "the support, custody, or visitation of children" are an exception to the general rule of enforcing such agreements as written for policy reasons so intuitive that elaboration is unnecessary.

Apparently, the circuit court concluded both that allocation of the exemption is inextricably intertwined with the issue of child support and that the reallocation of that exemption was necessitated under the present circumstances in order to "maximize the amount available for the care of the children." Neither conclusion can properly be characterized as unreasonable, let alone as an abuse of discretion. Contrary to Rebecca's assertion, the circuit court did not "exceed its authority, in contravention of the express terms of KRS 403.180(6) and the amended agreement itself" in modifying the decree - quite the opposite, as the court fulfilled its duty to allocate the exemption consistent with the aforementioned directive. In modifying the decree as to a provision which necessarily implicates child support, the circuit court acted well within its authority. Because the court's decision was based on specific factual findings which are not only sufficient but unrefuted, its order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Allen B. Roberts
McKee, Kentucky

