

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002380-MR
AND
NO. 2001-CA-002447-MR

WILLIAM TERRY BADHAM, II

APPELLANT/CROSS-APPELLEE

v. APPEAL AND CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE REED RHORER, JUDGE
ACTION NO. 99-CI-00424

AMY O. BADHAM (NOW OAKLEY)

APPELLEE/CROSS-APPELLANT

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: BAKER, BARBER AND JOHNSON, JUDGES.

JOHNSON, JUDGE: William Terry Badham, II has appealed from an order of the Franklin Family Court entered on October 21, 2001, which denied both his motion to designate him as "primary residential parent" for his three children, and his motion to modify the timesharing agreement between himself and his former wife, Amy O. Badham (now Oakley). Oakley has cross-appealed from that same order. Having concluded that the trial court

erred by refusing to enforce the undisputed terms of the settlement agreement in question, and that Oakley's arguments on her cross-appeal are moot, we reverse and remand.

Badham and Oakley were married on August 31, 1992, and a decree of dissolution was entered on August 5, 1999. Three children were born of this marriage, William Terry Badham, III, born July 11, 1993, and twins, Jacob Quinton Badham and Daniel Hugh Badham, born December 29, 1994. Both parents sought custody of their three sons. On December 14, 2000, the trial court awarded the parties joint custody of all three children, but neither the father nor the mother was designated as the primary residential parent.¹

Approximately one month later, on January 9, 2001, the father filed a motion with the Franklin Family Court seeking to have himself designated as "primary care provider" for all three children and to modify the timesharing and support arrangements.²

¹ Throughout the proceedings below and in the briefs to this Court, the terms "primary caretaker," "primary care provider," "primary custodial parent," and "primary residential parent" have apparently been used interchangeably. This is incorrect. The term "primary caretaker" refers to the standard that some states employ to determine which parent should receive custody. Kentucky does not follow such a standard. See 16 Graham and Keller, Kentucky Practice, Domestic Relations Law, § 21.29 (1997). The term "primary residential parent" refers to the parent with whom the child resides most of the time. See Aton v. Aton, 911 S.W.2d 612 (1995). The term "primary custodial parent" refers to those cases where one parent has received custody of the child over the other. Id. The father apparently uses the term "primary care provider" synonymously with the term "primary residential parent."

² Prior to this motion, the father moved the family court to modify the joint custody order entered on December 14, 2001, and to grant him primary custody.

Attached to the father's motion were reports from Dr. Paul Stratton, a licensed psychologist, Dr. Robert Rapp, a professor of pharmacy and surgery at the University of Kentucky, and Susan P. Schweder, a licensed practical nurse with training in the recognition of substance abuse problems. All three reports opined that the mother's extensive use of prescription drugs could be indicative of a substance abuse problem. A hearing on this matter was scheduled for February 26, 2001.

Prior to the scheduled hearing date, the father and the mother met without counsel and purportedly reached a settlement agreement with regard to issues such as child support and visitation rights. In addition, this agreement provided that joint custody of the children would continue, but the father would be named primary residential parent. At the hearing scheduled for February 26, 2001, the agreement was read into the record by counsel for the father. After the agreement was read in open court, both the father and the mother stated affirmatively on the record that they each consented to the terms of the agreement. However, after a written agreement was drafted, the parties realized that they had differences as to the terms concerning the mother's weekly visitation rights.³

The family court, in an order entered on January 16, 2001, denied this motion. The father has not appealed from that order.

³ The dispute concerned whether the mother was entitled to overnight visitation on Tuesday and Thursday nights.

Therefore, the mother refused to sign the agreement as drafted by counsel for the father.

On March 16, 2001, the father moved the trial court to enter an order requiring the parties to comply with the oral agreement. The family court made a determination that the parties' agreement "fell through," denied the father's motion, and scheduled a hearing to once again consider the father's motion to have himself named "primary care provider." On August 29, 2001, one day prior to the date of the scheduled hearing, the mother moved the trial court to dismiss the father's motion. The basis for the mother's motion to dismiss was that the father had failed to file supporting affidavits along with his motion to modify custody as required by KRS⁴ 403.340 and KRS 493.350, and that the father was not presenting any new evidence which would warrant a modification of the original order awarding the parties joint custody.

On October 2, 2001, the family court denied the father's motion to have himself designated "primary care provider," without ruling on the mother's motion to dismiss. The family court found that the father had not presented any new evidence which was not also available to the court when the original order granting the parties joint custody was entered almost a year earlier on December 14, 2000. Hence, the trial

⁴ Kentucky Revised Statutes.

court ruled that there was no evidence which would warrant a change in the original joint custody order. Both parties then appealed to this Court.

The father's first claim of error is that the family court erred by not enforcing the terms of the settlement agreement as read in open court on February 26, 2001. Specifically, the father argues that "[p]lacing the terms of the parties' agreement upon the record effected a binding [s]ettlement [a]greement" on the parties. The father further argues that even if the provision related to the mother's weekly visitation rights could not have been enforced due to the misunderstanding of the parties, the mistake as to that provision does not preclude enforcing the other undisputed terms of the settlement agreement. We agree.

In Calloway v. Calloway,⁵ the parties to a divorce proceeding had reached an agreement as to all contested issues except for maintenance. Counsel for the husband read the agreement aloud in open court stating that "we'll consider it to be in force and effect as of today and we intend to reduce it to writing, but this will be the agreement of the parties."⁶ Both parties stated affirmatively on the record that they consented to the terms of the agreement. However, after the agreement had

⁵ Ky.App., 707 S.W.2d 789 (1986).

⁶ Id. at 790.

been reduced to a formal draft, the wife refused to sign it. As the basis for her refusal, she claimed that the agreement as read into the record was not binding because it did not comply with KRS 403.180, which requires that property settlement agreements be in writing, and that the agreement violated the statute of frauds since a transfer of real property was involved. This Court rejected both arguments and stated:

"In the administration of justice and the prompt dispatch of business, courts must and do act upon the statements of counsel and upon the stipulations of parties to pending causes. Where the parties have voluntarily entered into a stipulation, which appears fair and reasonable for the compromise and settlement of the issues of a pending cause, and where the stipulation is spread upon the record with the consent and approval of the court, as here, the parties are bound thereby and the court may, thereafter, properly proceed to dispose of the case upon the basis of the pleadings, the stipulation and admitted facts."⁷

Similarly, in the case sub judice, counsel for the father read the terms of the settlement agreement into the record in open court. Further, after the terms were read, both the father and the mother clearly and affirmatively stated on the record that they agreed to those terms. There was no misunderstanding concerning the term which provided for the father to be the primary residential parent. The only

⁷ Id. at 791 (quoting Peirick v. Peirick, 641 S.W.2d 195 (Mo.App. 1982)).

misunderstanding concerned whether the mother was entitled to weekday overnight visitation.

Thus, the question is whether the terms of the agreement concerning the father being the primary residential parent and the mother's weekday visitation rights were separate and enforceable independently of each other. While it is true that a contract may be set aside where there was a mutual misunderstanding or mistake as to the meaning of the contract terms,⁸ it is also well settled that the terms of a contract may be severed to enforce those terms the parties have agreed upon, if those terms are independent from the terms that could not have been enforced due to the misunderstanding.⁹

In the case sub judice, the settlement agreement between the mother and the father covered several issues including child support, tax-related matters, the designation of the father as primary residential custodian, and the mother's visitation rights. However, the only disputed term related to the mother's weekly visitation rights. We hold that this

⁸ Redford v. Thompson's Adm'r, 259 Ky. 536, 82 S.W.2d 796, 800 (1935). See also Haynes, Kentucky Jurisprudence, Contracts § 30-6 (1986). "[N]ormally a contract may always be avoided when there has been a mutual mistake of the parties as to the . . . terms of the agreement when the mutual mistake is of such a nature that shows that there was never a mutual manifestation of assent to the terms of the contract."

⁹ McHargue v. Scott, Ky., 305 S.W.2d 929, 932 (1957). See also Business Men's Assurance Co. of America v. Eades, 290 Ky. 553, 161 S.W.2d 920, 922 (1942)(holding that "[p]rimarily the question of whether a contract is entire or severable depends upon the intention of the parties, the objects to be attained and the common sense of the situation").

provision of the settlement agreement in question is severable from the other terms. Accordingly, the trial court erred by not enforcing those terms of the settlement agreement to which there was no dispute between the parties, including the provision designating the father as the primary residential parent.

The father's only remaining claim of error is that absent a finding that the settlement agreement should have been enforced, the trial court erred by not designating him as the primary residential parent under the circumstances of this case. Since we have agreed that the terms of the settlement agreement to which there was no dispute should have been enforced, this claim of error is rendered moot and will not be discussed on appeal.¹⁰

In the mother's cross-appeal, she argues that after the family court refused to enforce the settlement agreement, it was without jurisdiction to undertake a review to determine whether the original joint custody should be modified.¹¹ The mother further argues that the doctrine of collateral estoppel precluded the family court from reexamining her fitness as a parent after the family court refused to enforce the settlement

¹⁰ See Murphy v. Commonwealth, Ky., 50 S.W.3d 173, 184 (2001)(stating that "[a]ppellant Murphy raises several issues regarding the trial court's denial of his motion for probation. As we are reversing Murphy's conviction [on other grounds], these issues are moot and require no further discussion").

¹¹ The mother argues that the father failed to attach the necessary affidavits with his motion to modify the original order granting joint custody as required by KRS 403.340 and KRS 403.350.

agreement. However, our determination that the settlement agreement should have been enforced to the extent the parties had agreed upon the meaning of the terms renders these issues moot as well. Accordingly, we will not address the mother's claims of error on her cross-appeal.

Based on the foregoing, the order of the Franklin Family Court is reversed and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-
APPELLEE:

Michael L. Judy
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BRIEF FOR APPELLEE/CROSS-
APPELLANT:

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