

RENDERED: May 27, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001520-MR

WILLIAM TERRY BADHAM II

APPELLANT

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

AMY O. BADHAM (NOW OAKLEY)

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI, JUDGE; MILLER, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: William Terry Badham appeals from an order of the Franklin Circuit Court denying his motion to enforce a settlement agreement in a dissolution of marriage proceeding initiated by Amy O. Badham (now Oakley). For the reasons stated below, we affirm in part, reverse in part and remand.

Badham and Oakley were married on August 31, 1992.

The marriage produced three children, born in 1993 and 1994. On

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 100(5)(b) of the Kentucky Constitution and KRS 21.580.

August 5, 1999, the Franklin Circuit Court entered a decree of dissolution dissolving the marriage. The order provided in relevant part that the parties would share joint custody of the children.

On January 9, 2001, Badham filed a motion seeking to have himself designated as primary custodian² for the children and to modify visitation and support. A hearing on the motion was scheduled for February 26, 2001.

Before the hearing was conducted, the parties entered into an oral agreement without benefit of counsel, the terms of which settled custody, support, and visitation issues. Under the agreement, the parties would retain a joint custodial arrangement but Badham would begin serving as "primary residential parent". Oakley was also to begin paying child support in the amount of \$630.90 per month (by way of a reduction in her entitlement to Badham's 401k) until such time as she obtained a degree. After obtaining a degree, the parties were to negotiate new child support terms. At the February 26, 2001, hearing, the agreement was read into the record and both parties affirmatively stated that they consented to its terms.

Shortly thereafter, the agreement was reduced to writing. After reading the agreement, Oakley determined that

² The parties and the trial court interchangeably use the terms primary caretaker, primary care provider, primary custodial parent, and primary residential parent.

she did not agree with the terms concerning her weekly visitation rights. She refused to sign the agreement.

On March 16, 2001, Badham filed a motion seeking an order requiring the parties to comply with the oral agreement. On August 29, 2001, Oakley moved to dismiss the motion, arguing that it failed to comply with certain statutory provisions. Upon considering the motions, the trial court entered an order denying the motion to have Badham designated as primary custodian as set forth in the oral agreement, and denying Badham's request for child support as provided by the agreement.

Both parties appealed to the Court of Appeals. After considering the written arguments, a panel of this court rendered an opinion on November 7, 2003. The panel reversed the trial court's order and remanded the matter for enforcement of the oral agreement, holding that it was enforceable because the parties and the trial court may rely on affirmative declarations made in open court.

During the pendency of the first appeal, the trial court entered an order on July 10, 2003, temporarily adjudging that the children would primarily reside with Badham. It went on to order that neither party would be responsible for child support.

On January 13, 2004, Badham filed a motion seeking an order designating him as "primary residential parent". He also

sought a *nunc pro tunc* order requiring Oakley to pay \$630.90 per month in child support.

Lastly, on June 29, 2004, the trial court entered an order denying Badham's motion to designate him as primary residential parent, and further denying his request for child support. This appeal followed.

Badham now argues that the trial court improperly failed to enforce the oral agreement on remand. Specifically, he maintains that he is entitled to child support from Oakley (which was to take the form of a reduction in Oakley's entitlement to his 401k account) beginning on the date that the oral agreement was entered into the record. He notes that the agreement was clear and unambiguous, and further that a panel of the Court of Appeals reversed the trial court on this issue and remanded the matter for enforcement of the agreement. In the alternative, he argues that irrespective of the foregoing, he has been the de facto primary care provider since 2001 and is entitled child support in the amount of \$630.90 per month.

The issues Badham now raises may be resolved by reference to the record. First, it is uncontroverted that the parties orally agreed that Badham would become primary custodian (while retaining a joint custodial arrangement), and that Oakley would pay \$630.90 per month in child support. Second, it should also be clear that the opinion and order of this Court rendered

on November 7, 2003, stated in unambiguous terms that the settlement agreement was binding on the parties and that the trial court erred in failing to so rule. In the previous appeal, this Court stated that, " . . . the settlement agreement should have been enforced to the extent the parties had agreed upon the meaning of the terms" ³ The order on appeal was reversed and the matter remanded for the purpose of correcting the error.

Despite being directed to correct the error, the Franklin Circuit Court has not given effect to the agreement as ordered. The court failed either to permanently designate Badham as primary custodian or to give effect to the child support arrangement agreed upon by the parties.

The reasoning set forth in the November 7, 2003, opinion speaks for itself and need not be restated herein. On remand, the Franklin Circuit Court shall recognize and give effect to the November 7, 2003, opinion of this Court. That opinion specifically held, in relevant part:

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

³ Badham v. Badham (now Oakley), 2001-CA-002380-MR and 2001-CA-002447-MR, rendered November 7, 2003, slip opinion at p. 9.

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.⁴

We believe that the prior opinion of this Court is now the law of the case and must be followed.

While we are reluctant to micromanage the implementation of the agreement, and recognize that due respect must be afforded the trial court in the exercise of its discretionary power, the circuit court's failure to implement the November 7, 2003, opinion of this court must also be considered. Accordingly, we reverse numerical paragraphs (1) and (2) of the Franklin Circuit Court's June 29, 2004, order and remand the matter for entry of an order designating Badham as primary custodian and implementing child support payments in accordance with this opinion. The order is in all other respects affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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⁴ Slip opinion at pp. 7-8.