RENDERED: SEPTEMBER 9, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001249-MR
AND
NO. 2004-CA-001320-MR

MARGARET CULLEN — APPELLANT

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 95-CI-00304

ROBERT R. POWELL — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE AND GUIDUGLI, JUDGES; PAISLEY, SENIOR JUDGE.[1]

GUIDUGLI, JUDGE: Margaret Cullen (hereinafter “Peggy”) has appealed from two Opinion and Orders of the Woodford Circuit Court entered May 24 and June 22, 2004, adopting and affirming the Domestic Relations Commissioner’s recommendations that an oral agreement existed between her and her former husband,

[1] Senior Judge Lewis G. Paisley, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Robert R. Powell (hereinafter “Bobby”), to modify child support and that her request for attorney fees be denied. We affirm.

Peggy and Bobby were married in 1982, and three children were born of the marriage: Megan Marion Powell, born December 23, 1983; Christopher John Powell, born June 11, 1986; and Robert Steven Powell, born September 5, 1989. Margaret filed a Petition for Dissolution of Marriage in late 1995, and the Decree of Dissolution was entered on June 26, 1996. The decree incorporated the parties’ agreement as to property rights, maintenance, custody and support, which had been entered into the previous month. Pursuant to the agreement, Peggy and Bobby shared joint custody of the minor children, with Peggy designated as the primary residential custodian. Bobby was ordered to pay child support in the amount of $919 per month, and other provisions of the agreement addressed health insurance for the children, as well as the division of college and unreimbursed medical, dental, ocular and prescription expenses.

On August 18, 2002, Peggy filed a verified motion requesting a judgment in the amount of $8,963.96 for child support arrearages and medical expenses. In the motion, Peggy alleged that Bobby had refused to pay the full amount of his child support obligation since June 2001, when their oldest child Megan began living with him on a permanent basis. Megan had moved in with him on a temporary basis the previous March,

following a disagreement with Peggy. By June, when the stay became permanent, Bobby began reducing the child support payment by one-third, leading, she claimed, to an arrearage of $6,747 through August 2002.[2] Peggy denied that she and Bobby had reached an agreement to modify his child support obligation. She also demanded $2,166.96 in medical expenses. On the other hand, Bobby objected to the motion, asserting that he and Peggy entered into an oral agreement that he was to provide for Megan's support and pay the tuition for her senior year at Woodford County High School.[3]

A hearing on the motion took place before the DRC on October 24, 2002, on the issue of whether there was an oral modification of child support. The DRC and the parties agreed that it was Bobby's burden to establish that an oral agreement existed.[4] To that end, Bobby testified that he and Peggy agreed at the end of May 2001 to reduce the amount of child support he would pay to two-thirds of the original amount, which would at that point be in support of their two sons. According to him, they also agreed to a 50/50 split on tuition for Megan, which was $1,750 per year. Peggy, on the other hand, testified that

[2] When Peggy filed her motion, Megan had reached the age of 18 and had graduated from high school, thereby becoming emancipated.
[3] In 2001, during Megan's junior year at Woodford County High School, Peggy moved the family from Woodford County to Scott County. At this point, Megan moved in with Bobby, who lived in Fayette County. In order to complete her high school education at Woodford County High School as a non-resident of the county, tuition had to be paid.
[4] See Arnold v. Arnold, 825 S.W.2d 621 (Ky.App. 1992).

she never agreed to a one-third reduction in child support, although she did admit that she thought an adjustment should be made when Megan began living with Bobby on a permanent basis. She told Bobby that her boyfriend (now husband), an attorney, would be glad to compute the figures, which Bobby refused. She also testified that Bobby did not ask her to pay half of Megan's tuition costs.

Prior to the hearing, and stipulated to during the hearing, the parties agreed that Bobby's current child support obligation for the two boys was $982 per month based upon the new guideline calculation, which was to take effect as of the date of the filing of Peggy's motion.[5] At the conclusion of the hearing, the DRC stated that Bobby was not entitled to reimbursement for the tuition costs or to a credit for the months when Megan was temporarily living with him. However, the DRC stated that Bobby had established the existence of an oral agreement, starting June 1, modifying the amount of child support to two-thirds of the original payment. Based on the DRC's calculation, Bobby was in arrears in the amount of $2,448 for credits he had taken, presumably for Megan's tuition payments. Following the hearing, Peggy filed an affidavit from her attorney detailing the attorney fees charged. In a later document, Bobby indicated that consistent with the DRC's remarks

[5] Peggy's income had gone from $2,616 per month in 2001 to $1,833 per month in 2002, when she returned to school.

at the hearing, he, on November 1, 2002, paid Peggy $2,448 in child support arrearages, $1,509.20 in medical expenses, and $900.29 as the difference in the current amount of support due.

By October 2003, the DRC had not issued a report from the October 2002 hearing. Therefore, Peggy filed a motion with the circuit court, requesting a report. On November 20, 2003, the DRC issued his report, in which he recommended denying Peggy's motion for a judgment on support arrearages pursuant to Whicker v. Whicker,[6] based upon findings that an oral agreement was proven with reasonable certainty and that the agreement was fair and equitable. The DRC also denied Peggy's motion for an award of attorney fees. Peggy timely filed exceptions to the DRC's recommendations, asserting that the DRC erred in his application of the Whicker test, having applied the test backwards, as well as in the denial of attorney fees, and requesting a finding of an arrearage in the amount of $6,734.98. Bobby responded, arguing that he had met the Whicker test, that a portion of the arrearage Peggy was claiming in her exceptions had already been paid, and disputing that he should be charged with any of Peggy's attorney fees.

On May 24, 2004, the circuit court entered its first Opinion and Order ruling on Peggy's exceptions:

[6] 711 S.W.2d 857 (Ky.App. 1986).

This matter is before the Court upon the exceptions of Petitioner, Margaret Cullen, to the recommendations of the Domestic Relations Commissioner ("DRC") entered November 20, 2003. The Court apologizes to the parties for taking such a long time to respond to these exceptions.

Petitioner argues that the DRC was wrong in his application of the two-prong test set forth in Whicker v. Whicker, Ky.App., 711 S.W.2d 857 (1986), in that the DRC first made a determination that the oral agreement was fair and equitable and then determined that the agreement was proved with reasonable certainty. Petitioner argues that under the Whicker two-prong test, the DRC was required to determine whether there was sufficient proof to establish an oral agreement between the parties and then determine if the agreement was appropriate. Although the Whicker opinion listed the two-prong test in the particular order set out by Petitioner, this Court does not see how the order of determination is prejudicial in any way. The Court cannot conceive of any circumstance in which it would matter whether the DRC started with part two of the test or part one, provided that the record is sufficient to show that the DRC was correct in his application of the two-prong test. In this case, the DRC specifically found that the potential oral agreement would have been approved had it been submitted to the Court since the agreement required Respondent to pay more than he would have been required to pay under KRS 403.212(6). In fact, Petitioner never argues that the DRC was wrong in his determination that the modified amount in the alleged agreement was not appropriate.

The only argument Petitioner really makes in this case is that there is not sufficient proof to show "with reasonable certainty" that the parties had an oral

agreement to modify Respondent's support obligation. Petitioner bases her argument on the fact that there was no specific proof as to the amount of the modification or the date of the modification. It is undisputed that the parties discussed a modification of child support. Respondent argues that they agreed to a specific reduction, but Petitioner testifies that while they discussed a reduction, no specific amount was ever agreed to. In determining whether there was an oral agreement, the Court must look to the actions of the parties. In this case, everyone agrees that they discussed a reduction and the controversy is limited to the amount of the reduction. It is also uncontested that Petitioner accepted the reduced sum without question for a period of one year while the child in question lived with Respondent. This is clear evidence that there was an agreement concerning the amount. This is a clear case of where actions speak as loud as, if not louder, than words. Petitioner's failure to object during any reasonable time after receiving the checks reflecting a modification supports the DRC's finding that there was a specific oral agreement.

Therefore, it is the decision of this Court that the DRC's report entered November 20, 2003[,] is appropriate.

ORDER

The Court having considered the exceptions filed by Petitioner, the response thereto filed by Respondent, and all other matters;

IT IS HEREBY ORERED that the recommendations of the DRC filed November 20, 2003[,] in the above styled action be and are hereby adopted by this Court.

It is from this order that Peggy filed appeal No. 2004-CA-001249-MR. On June 22, 2004, the circuit court entered a second Opinion and Order, once again reviewing the DRC's ruling on the modification of child support, but also ruling on Peggy's motion for attorney fees:

> This matter is before the Court upon Margaret Cullen's ("Petitioner") exceptions to the Recommendations of the Domestic Relations Commissioner's ("DRC") report filed and entered on November 20, 2003, and Robert R. Powell's ("Respondent") response thereto.
>
> "[T]he trial court has the broadest possible discretion with respect to the use it makes of reports of domestic commissioners." Eilant v. Ferrell, Ky., 937 S.W.2d 713, 716 (1997)(citations omitted). "The trial court can adopt, modify or reject the domestic relations commissioner's recommendations." Basham v. Wilkins, Ky.App., 851 S.W.2d 491, 484 (1993)(citing CR 53.06(2))(holding unrelated to issues herein has been overturned by statute).
>
> The record herein consists of the parties' pleadings, previous orders and findings of DRC and this Court; as well as DRC's report entered November 20, 2003. The Court having considered Petitioner's exceptions and supporting memorandum, Respondent's response memorandum, DRC's report, the record as a whole, and the applicable law, issues the following Opinion and Order:
>
> OPINION
>
> Petitioner raises two exceptions to the recommendations found in DRC's November 20, 2003, report. This Court will address each issue in turn.

Modification of Child Support

Petitioner argues that DRC erred in recommending that her request for judgment on a child support arrearage should be denied. It is undisputed that the oldest child of the parties moved in with Respondent. The Respondent asserts that after it became apparent that the move would be a permanent arrangement the parties entered into an oral agreement to modify the then existing child support obligations so that Respondent would only be obligated to pay child support for the two children that remained with the Petitioner. Petitioner does not contest the existence of this agreement but asserts that no particular amount was ever agreed upon. However, she accepted the reduced support payments tendered by the Respondent and waited more than a year to take other action.

The recommendations entered by DRC on November 20, 2003[,] correctly found that parties may orally agree to modify an order of support under certain conditions. Whicker v. Whicker, Ky.App., 711 S.W.2d 857 (1986). Relying upon Whicker as the relevant test DRC determined that the existence of the agreement had been proved with reasonable certainty and that the agreement was fair and equitable as applied to the facts. Consequently, DRC's recommendation is sustained.

Attorney Fees

Petitioner also objects to DRC's recommendation that no attorney's fees be awarded. As Petitioner was unsuccessful in her claim, and given the assertion by Respondent that he paid Petitioner $2,448 at the conclusion of DRC's hearing, DRC's recommendation is sustained.

ORDER

> The Court having considered Petitioner's exceptions and supporting memorandum, Respondent's response memorandum, DRC's report, the record as a whole, the applicable law, and for the reasons set forth above, HEREBY ORDERS:
>
> (1) That the Recommendations entered November 20, 2003, by DRC are AFFIRMED in their entirety.

It is from this Opinion and Order that Peggy filed appeal No. 2004-CA-001320-MR. On Peggy's motion, the two appeals were consolidated by this Court on August 11, 2004.

On appeal, Peggy continues to argue that the circuit court erroneously found that an oral agreement existed to modify Bobby's child support obligation, as they never agreed to a specific amount. On the other hand, Bobby argues that the circuit court did not commit any error and that the evidence of record supports the existence of an enforceable oral agreement.

CR 52.01 sets out the standard of review applicable in this case:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment. . . . Findings of fact 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.

In Moore v. Asente,[7] the Supreme Court of Kentucky addressed this standard, and held that a reviewing court may set aside findings of fact,

> only if those findings are clearly erroneous. And, the dispositive question that we must answer, therefore, is whether the trial court's findings of fact are clearly erroneous, i.e., whether or not those findings are supported by substantial evidence. "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence. (Citations omitted.)

Furthermore, it has long been settled that issues of law are reviewed *de novo*. With these standards in mind, we shall review the circuit court's decision in this matter.

For decades, the law in this Commonwealth has permitted parties to enter into private oral agreements

[7] 110 S.W.3d 336, 354 (Ky. 2003).

modifying child support.[8] The seminal case on this issue is Whicker:

> [W]e hold 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.[9]

The Supreme Court of Kentucky reinforced the Whicker decision in Price v. Price,[10] holding that private oral agreements between parents will be enforced by the courts if proven with reasonable certainty and if shown to be fair and equitable.

In the present matter, our review of the record supports the circuit court's decision that an enforceable oral agreement existed between Bobby and Peggy to modify his child support obligation. Looking to the first prong of the Whicker test, there is no dispute that the parties agreed that a modification was necessary when Megan began living with Bobby on a permanent basis. It is the amount of the modification that is

[8] See Story v. Story, 423 S.W.2d 907 (Ky. 1968).
[9] Whicker, 711 S.W.2d at 859.
[10] 912 S.W.2d 44 (Ky. 1995).

at issue in this case. Peggy argues that because they had not agreed on a specific amount, there was no oral agreement between them. The circuit court held that because Peggy did not object in a reasonable time after receiving the reduced checks and having agreed that a modification was necessary, her actions reflected a specific oral agreement as to the amount. While we acknowledge that a court cannot find that a "tacit" oral agreement has been entered into,[11] we nevertheless agree with the circuit court that Peggy's failure to object to the reduced payments after she had agreed that a modification was necessary supports the existence of an oral agreement to not only its existence, but to its amount as well. We also recognize that Bobby acted reasonably in refusing the help of Peggy's boyfriend to calculate the amount of child support payable. Based upon the substantial evidence of record, we hold that the circuit court's finding that an oral agreement existed is not clearly erroneous, and we therefore uphold it.

Looking to the second prong of the Whicker test, we also agree with the circuit court's determination that the oral agreement was fair and equitable. Based upon the relevant information, the circuit court properly held, in adopting the DRC's recommendations, that had a motion to modify been brought before it in June 2001, the motion would have been granted and

[11] See Arnold, supra.

that according to the applicable guidelines, the amount payable for the two sons would have been less than the amount Bobby was paying pursuant to the oral agreement. Based upon this finding, we must conclude that the circuit court did not abuse its discretion in determining that the oral agreement was fair and equitable to the children.[12]

Finally, we shall briefly address Peggy's request for attorney fees, which was denied below. Having noted that Peggy only briefly mentioned the issue in passing in the conclusion of her brief and slightly more in her reply brief, we must hold that the circuit court did not abuse its broad discretion in refusing to award attorney fees, especially in light of the largely unsuccessful result of her motion.

For the foregoing reasons, the decisions of the Woodford Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael Davidson
Lexington, KY

BRIEF FOR APPELLEE:

Anita Britton
Lisa D. Hart
Lexington, KY

[12] Whicker, 711 S.W.2d at 860.