

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002171-MR

JUDITH HART DIMAGHANI

APPELLANT

v.

APPEAL FROM FAYETTE FAMILY COURT
HONORABLE JOHN P. SCHRADER, JUDGE
ACTION NO. 82-CI-01347

DENNIS JAMES SHOWALTER, III

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

LAMBERT, SENIOR JUDGE: Judith Hart Dimaghani appeals from the findings
of fact and conclusions of law of the Fayette Family Court entered on October 20,
2009. The family court dismissed Judith's motion to recover a maintenance

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

arrearage judgment from her former husband, Dennis James Showalter, III. At issue is whether the family court correctly determined (1) that Judith and Dennis had orally modified the maintenance provision of their settlement agreement, and (2) that such an oral modification was valid and enforceable. We affirm.

The decree dissolving Judith and Dennis's marriage was entered on July 8, 1982. Under the terms of a settlement agreement which was incorporated by reference into the final judgment, Dennis agreed to pay Judith weekly maintenance of \$100 until such time as she remarried, and weekly support for their two minor children of \$100 per child. The agreement further provided that all alterations or modifications to the terms of the agreement would be memorialized by the written, mutual consent of the parties. The parties did amend the agreement shortly thereafter, on June 20, 1983, when an order was entered transferring title and equity in the marital residence to Judith. Dennis agreed to continue paying the mortgage on the home in exchange for a reduction in child support to \$50 weekly per child.

Judith remarried on March 20, 2002. On January 5, 2009, she filed a motion alleging that Dennis had not paid her any maintenance during the almost twenty-year period between the dissolution of their marriage in 1982 and her remarriage in 2002, with a resulting arrearage of \$102,000. Dennis responded that the couple had orally modified their settlement agreement in 1984, eliminating the \$100 weekly maintenance requirement.

After a hearing, the trial court concluded that the parties had verbally agreed to modify their settlement, although the date of the agreement was unclear. The trial court found the terms of this oral agreement to be as follows: Dennis's maintenance obligation would be reduced from \$400 to \$200 per month in exchange for continuing to pay child support for their eldest child, who would reach the age of eighteen in 1990 and was planning to attend art school in Hawaii. Maintenance and child support payments would terminate completely in 1992, when the youngest child was emancipated. The trial court concluded that Judith's claim on the modified contract was not asserted within the applicable limitations period, and it dismissed her claim. This appeal followed.

Our review is governed by the rule that the trial court's factual findings shall not be set aside unless clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01; *Largent v. Largent*, 643 S.W.2d 261 (Ky.1982). A factual finding is not clearly erroneous if it is supported by substantial evidence. "Substantial evidence" is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky.App.2002). The trial court's application of law is reviewed de novo. *Monin v. Monin*, 156 S.W.3d 309 (Ky.App.2004).

The first issue is whether the trial court's finding that an oral modification had occurred was clearly erroneous. The trial court made extensive findings, noting that because much of the pertinent history had occurred at least twenty years ago, much of the documentation had been lost or destroyed, and the

parties were unable to recall specific dates or times. It concluded nonetheless that Dennis was not deceptive in his testimony that the agreement had been orally modified. “[D]ue regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Kentucky Rules of Civil Procedure (CR) 52.01. The trial court’s finding is supported by substantial evidence and will not be reversed on appeal.

The second issue is whether the maintenance provisions of a settlement agreement may be modified orally when the agreement itself provides, as it does in this case, that any modifications must be in writing. In *Whicker v. Whicker*, 711 S.W.2d 857 (Ky.App. 1986), the Kentucky Supreme Court held 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.” *Whicker*, 711 S.W.2d at 859.

Judith argues that *Whicker* is not applicable to oral modifications of maintenance obligations due to the operation of KRS 403.180(6), which provides as follows:

Except for terms concerning the support, custody, or visitation of children, the decree may expressly preclude or limit modification of terms if the separation agreement so provides. Otherwise, terms of a separation agreement are automatically modified by modification of the decree.

In *Brown v. Brown*, 796 S.W.2d 5 (Ky. 1990), the appellant raised an argument similar to Judith’s, contending that, due to the operation of KRS

403.180(6), the rule in *Whicker* did not apply to the modification of a maintenance agreement. The Supreme Court disagreed, explaining as follows:

This would be giving KRS 403.180(6) an opposite effect from the one intended. There is an exception to this equitable principle just stated provided for in KRS 403.180(6), but its purpose is to expand rather than to limit the parties' ability to settle. . . . Thus, KRS 403.180(6) states that "[e]xcept for terms concerning the support, custody, or visitation of children," by expressly doing so the parties may settle their affairs with a finality beyond the reach of the court's continuing equitable jurisdiction elsewhere provided. Since the original Agreement now under consideration made no such express provision for finality, it follows that there was no such limitation on subsequent modification. Simply stated KRS 403.180(6) has no bearing on this case.

Brown, 796 S.W.2d at 8.

Thus, "[p]ursuant to KRS 403.180(6), the terms in a settlement agreement related to maintenance are subject to modification unless the agreement expressly prohibits modification." *Wheeler v. Wheeler*, 154 S.W.3d 291, 295 (Ky.App.2004).

Under contract principles, such a modification may be verbal, even if the contract specifies otherwise:

Though the parties to a contract may stipulate that it is not to be varied, except by an agreement in writing, they may, by a subsequent contract not in writing, modify it by mutual consent, and the parol contract will be enforced, unless forbidden by the statute of frauds.

National Union Fire Ins. Co. v. Duvall, 104 S.W.2d 220, 222 (Ky. 1937).

Judith argues that the Statute of Frauds does apply in this instance.

“Where a contract is required by the Statute of Frauds to be in writing, a subsequent agreement which changes its terms must also be written and signed by the party to be charged to be enforceable.” *Cox v. Venters*, 887 S.W.2d 563, 566 (Ky.App. 1994).

In construing the Statute of Frauds, the general rule is that, if a contract may be performed within a year from the making of it, the inhibition of the Statute does not apply, although its performance may have extended over a greater period of time. However, there is a well-recognized exception to the general rule, and that is that when it was contemplated by the parties that the contract would not, and could not, be performed within the year, even though it was possible of performance within that time, it comes within the inhibition of the Statute. This Court must look to the evidence to determine whether the contracts in question fall within the rule or the exception.

Sawyer v. Mills, 295 S.W.3d 79, 84 (Ky. 2009) (internal quotation marks and citations omitted).

The trial court in this case reasoned from *Whicker* that the Statute of Frauds was never raised as a defense even though child support payments to be made pursuant to the oral modification could extend beyond one year, “Judith could have remarried or died, thus making it conceivable that the maintenance obligation could be performed in one year.” The trial court’s findings in this regard are supported by substantial evidence; testimony was heard, for instance, that Walter was aware that Judith began dating at the time of the dissolution. “Past due payments for child support and maintenance become vested when due. Each

payment is a fixed and liquidated debt which a court has no power to modify[.]”

Pursley v. Pursley, 144 S.W.3d 820, 828 -829 (Ky. 2004). It would be inequitable to allow a party to agree to an oral modification, as the trial court found had occurred in this case, and then allow that party to return many years later, seeking a large lump sum of accumulated arrearage.

The Fayette Family Court’s dismissal of Judith’s motion is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Michael Davidson
Ann D’Ambruoso
Lexington, Kentucky

BRIEF FOR APPELLEE:

Carl Devine
Elliott C. Miller
Frankfort, Kentucky