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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000055-ME

ROBYN SMITH — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 09-CI-501482

DOUGLAS ALAN LURDING, JR. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; LAMBERT AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: Robyn Smith appeals the Jefferson Family Court's November 22, 2013 order granting appellee Douglas Alan Lurding's motion to set child support and to alternate the child tax exemption. The sole issue before us is whether the family court abused its discretion when it modified the parties' separation agreement as to the tax exemption. We affirm.

I. Facts and Procedure

Robyn and Alan are the parents of a minor child born of their marriage. In 2009, the parties sought to dissolve their marriage. They entered into a Property Settlement Agreement wherein they agreed to joint custody, to equal time sharing, and to no award of child support. The agreement included a provision that "Robyn shall be awarded the income tax exemption every year." The agreement provided that any term could be modified by mutual agreement. However, it also included a more specific provision for modification, contained in a section entitled "Children." One paragraph in that section addressed all of the following topics together: child support, extraordinary medical expenses, the child's college education, medical and dental insurance, child-care costs, and the income tax exemption. This paragraph concludes with the following sentence: "The provisions of this paragraph notwithstanding, the parties specifically reserve future rights to seek modification as set forth in KRS." (R. at 52).

The family court found the terms of the parties' settlement agreement to be conscionable and incorporated it by reference into the decree of dissolution, which was entered on July 27, 2009.

Sometime thereafter, Robyn remarried and relocated to Virginia; the parties' child began living primarily with Alan in Kentucky. On September 17, 2013, Alan filed a motion to set child support and to modify the tax-exemption provision of the Agreement so that the parties would alternate claiming their child as a

dependent for income tax purposes. Robyn did not and does not dispute the propriety of revisiting child support itself.

At the hearing on Alan's motion, Robyn claimed the tax-exemption was an award to her of a bargained-for property right received in exchange for allowing Alan the equity in the marital home and her agreement to pay the debt owed on motor vehicles retained by Alan. Therefore, Robyn argued, the award of the tax exemption was distinct from the child support provision and could not be modified except by mutual agreement.

On November 22, 2013, the family court considered the parties' relative incomes[1] and ordered Robyn to pay $467.33 per month in child support. The court did not agree with Robyn's argument that the tax exemption could not be modified, noting it was included in the modifiable paragraph addressing all other aspects of support for the minor child including medical expenses, higher education, *etc.* The court awarded Alan the right to claim the exemption "for 2013 and all odd-numbered years thereafter[,]" and awarded Robyn that right "for 2014 and all even-numbered years thereafter." Robyn moved the family court pursuant to CR[2] 59.05 to alter, amend, or vacate its order. The family court denied the motion. Robyn appealed.

II. Standard of Review

[1] The family court determined Alan's income as $5,472 per month. Robyn's income was $2,917 per month; however, the court determined that she was a voluntarily underemployed attorney and imputed to her a total monthly income of $4,500.

[2] Kentucky Rules of Civil Procedure.

The family court enjoys broad discretion "in the establishment, enforcement, and modification of child support." *Artrip v. Noe*, 311 S.W.3d 229, 232 (Ky. 2010). We review child-support decisions only for an abuse of that discretion. *Commonwealth, Cabinet for Health and Family Services v. Ivy*, 353 S.W.3d 324, 329 (Ky. 2011). An abuse of discretion occurs where the family court's decision is "unreasonable, unfair, arbitrary or capricious." *Caudill v. Caudill*, 318 S.W.3d 112, 115 (Ky. App. 2010).

The interpretation of a contract, however, is a question of law subject to *de novo* review. *McMullin v. McMullin*, 338 S.W.3d 315, 320 (Ky. App. 2011).

III. Analysis

Robyn argues the family court impermissibly amended the parties' agreement as to the tax exemption. She first claims the tax exemption was a contractual right bargained for in the parties' property settlement agreement and should be treated as such. Robyn next argues that the Agreement could only be modified to the extent authorized by Kentucky statute. No Kentucky statute, Robyn asserts, addresses modification of a previously allocated dependent income tax exemption. Therefore, Robyn maintains, the family court lacked authority to grant Alan's motion to reallocate the agreed-upon tax exemption. We disagree.

We begin our analysis by interpreting the Agreement to ascertain the parties' intentions. The Agreement in this case is an integrated document. Because it was incorporated into the decree of dissolution, its terms became part of the final judgment. *See Pursley v. Pursley*, 144 S.W.3d 820, 824 (Ky. 2004) (permitting

trial courts to "incorporate and enforce, as terms of the decree," separation and property settlement agreements); *Burke v. Sexton,* 814 S.W.2d 290 (Ky. App. 1991). It is well settled that the "terms of a settlement agreement, as incorporated into a decree of dissolution of marriage, are enforceable according to contract principles." *McMullin*, 338 S.W.3d at 320; KRS[3] 403.180(5) (indicating terms of separation agreement are enforceable both as contract and as judgment).

Robyn argues passionately that the parties did not intend for the tax-exemption provision to be swept up with child support. During the hearing on Alan's motion before the family court, Robyn testified at length regarding the parties' contractual intent. She claims now, as she did before the family court, that the dependent tax exemption was designed to be independent of and separate from child support, and was intended to be non-modifiable. The Agreement indicates otherwise.

We previously held that:

> Absent an ambiguity in the contract, the parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence. A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations. The fact that one party may have intended different results, however, is insufficient to construe a contract at variance with its plain and unambiguous terms.

Cantrell Supply, Inc. v. Liberty Mut. Ins. Co., 94 S.W.3d 381, 385 (Ky. App. 2002) (citations omitted). And so, we look to the Agreement.

[3] Kentucky Revised Statutes.

The language of the Agreement is clear and unambiguous. Like the family court, we see no justification for considering Robyn's offer of extrinsic evidence to explain the parties' contractual intent. *Baker v. Coombs*, 219 S.W.3d 204, 207 (Ky. App. 2007) (Rules of statutory construction "dictate that the parties' intentions be discerned from the four corners of the document itself. Absent ambiguity, extrinsic evidence should not be considered.").

From the four corners of the Agreement, we discern two facts relevant to Robyn's argument. First, the parties chose to place the tax exemption in the paragraph addressing child support and related expenses. This is clear indication that the parties intended for the tax exemption to be part of their agreement relating to the support of the child. Second, the parties included a separate modification provision specifically for this child-support-related paragraph, which included the tax exemption. The sentence regarding modification clearly applies to the provisions of this paragraph and it does not make exception for any topic addressed therein. It permits a party to seek modification – to the extent permitted by Kentucky's statutory scheme – of any term identified in that paragraph, including the tax-exemption provision.

Robyn draws our attention to the separate provision, six pages after the provision entitled "Children," allowing modification only by the written agreement of the parties executed with formality. This is something of a red herring. To the extent the more general modification provision conflicts with the specific modification provision, described above, the specific provision prevails. *See FS*

Investments, Inc. v. Asset Guar. Ins. Co., 196 F. Supp. 2d 491, 497 (E.D. Ky. 2002) (citing *International Union of Operating Engineers v. J. A. Jones Const. Co.*, 240 S.W.2d 49, 56 (Ky. 1951) ("It is a well-settled rule of construction that when interpreting contracts, the definite and precise prevails over the indefinite.").

We acknowledge that Kentucky law allows that "the decree may expressly preclude or limit modification of terms if the separation agreement so provides." KRS 403.180(6). However, the statute prohibits such limitation "for terms concerning the support, custody, or visitation of children[.]" *Id.* Neither the agreement nor the decree expressly precludes or limits modification of the tax exemption award. To the contrary, by placing tax exemption among the other child-support and custody-related terms, which Robyn acknowledges are modifiable in accordance with Kentucky statutes, that award is made expressly modifiable.

Furthermore, "allocation of the exemption has, or at least should have, a bearing on the amount of money available as child support." *Hart v. Hart*, 774 S.W.2d 455, 457 (Ky. App. 1989). It is at least arguable that the allocation is one of those "terms concerning the support, custody, or visitation of children" which cannot be excluded from modification under KRS 403.180(6).

Notwithstanding *Hart*, Robyn argues that Kentucky, unlike other states, has not interwoven issues of child support and tax exemptions. We need not decide whether we agree with Robyn on this point because she and Alan have eliminated this argument; by their unambiguous agreement, *they* have interwoven the

exemption with child support, to be considered together with other child-support-related terms and modified as they provided. Accordingly, we need only conclude that if a tax-exemption provision is part and parcel of the agreement's provision relating to child support, the exemption, like child support, is modifiable.

Alan filed a motion both to set child support and to reconsider the tax exemption. It was then left to the family court's sound discretion "to allocate the tax exemption between the spouses[.]" *Pegler v. Pegler*, 895 S.W.2d 580, 581 (Ky. App. 1995). Robyn has failed to persuade us that the family court's decision to divide the tax exemption between Robyn and Alan amounts to an abuse of discretion.

But Robyn argues in the alternative that, if the award of the exemption is modifiable, Alan has failed under *Hart* to carry his burden to prove that the re-allocation of the exemption will "maximize the amount available for the care of the [child]." *Hart*, 774 S.W.2d at 457. We do not agree.

It is true that "[t]he [family] court is to maximize the benefit of the exemption"; however, the court "has a *broad* discretion in doing this." *Marksberry v. Riley*, 889 S.W.2d 47, 48 (Ky. App. 1994) (emphasis added). A tax exemption is an economic asset that exists by virtue of the parents' relationship to the child, and the family court's primary charge relative to that asset is to see that it is not wasted, or lost. "[T]he dependency exemption and the concomitant tax savings would be lost" by allocating it *in toto* to a parent "in a low tax bracket, not working, or for any reason was not required to file an income tax return[.]" *Id.*

(quoting *Hart*, 774 S.W.2d at 457, n.3). *Marksberry* recognizes this while still indicating the breadth of the family court's discretion.

The mother in *Marksberry*, as the family court in that case noted, "is presently unemployed and is a full-time student." *Id.* at 48. Under *Hart*, then, it would have been wrong to award the exemption entirely to the mother because the full value of the exemption would have been lost until she became employed. The family court might have "maximized" the value of the exemption by awarding it entirely to the father who was earning an income. Instead, the family court "gave the tax dependency deduction to each of the parties on alternating years." *Id.* at 47. On review of that decision, this Court noted that the mother "may subsequently have income and can benefit from a tax exemption" and, therefore, we "decline[d] to say that the trial court abused its discretion in permitting each of the parties to take the benefit of the tax exemption in alternating years." *Id.* at 48.

Here, in reviewing the same kind of alternating award of the exemption, we do not have to speculate as we did in *Marksberry* about when or whether both spouses will have income sufficient to give maximum the value of the exemption. The record shows both Alan and Robyn earn enough that the exemption will not be wasted in the least. If we could not find abuse of discretion in *Marksberry* in which only one party was earning income, we certainly cannot find it here where both parties are wage earners.

IV. Conclusion

For the foregoing reasons, we affirm the Jefferson Family Court's November 22, 2013 order.

ALL CONCUR.

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