

RENDERED: OCTOBER 31, 2014; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2014-CA-000063-MR

MONTE MOSHER

APPELLANT

v. APPEAL FROM WARREN FAMILY COURT  
HONORABLE CATHERINE R. HOLDERFIELD, JUDGE  
ACTION NO. 05-CI-01624

DORCEY MICHELLE MOSHER  
(NOW ELIASON)

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, LAMBERT, AND TAYLOR, JUDGES.

LAMBERT, JUDGE: In this post-dissolution action, Monte Mosher has appealed from the October 30, 2013, order of the Warren Family Court ruling on his motion to enforce the settlement agreement and reimburse intercepted tax refunds as well as from the December 30, 2013, order ruling on his former wife's motion to alter,

amend, or vacate that ruling. We have carefully reviewed the record and the parties' arguments, and finding no error, we affirm.

Monte and Dorcey Michelle Mosher (now Eliason) were married on September 17, 1983. Three children were born of the marriage; Amanda in 1989 and twins Samantha and Dillon in 1995. The parties separated on September 2, 2005, and Dorcey filed a verified petition to dissolve the marriage on October 6, 2005. In the petition, Dorcey sought custody of their three minor children, child support, restoration of the parties' nonmarital property, and an equitable division of the marital property and debts. A status quo order was put in place in January 2006.

The parties entered into a mediation agreement, which was filed with the court on April 18, 2006. Pursuant to the terms of the mediation agreement, the parties had joint custody of the three children, with Dorcey designated as the primary residential custodian and Monte ordered to pay \$728.41 per month in child support. The agreement also addressed the division of property and debts. As related to the present appeal, Dorcey was awarded the marital residence pursuant to paragraph 2 "with the proviso that she immediately list it for sale." Dorcey was to use the proceeds from the sale to pay the costs of the sale, the first mortgage lien, and the 2005 tax debts to the Internal Revenue Service (\$14,460.00), the State of Iowa (\$5,133.00), and the Commonwealth of Kentucky (\$39.00), in addition to any penalties and interest. Pursuant to paragraph 8, Dorcey was to pay several debts, including the tax debts listed in paragraph 2. Paragraph 10 provided that "if either

party fails or refuses to perform their obligations herein, they shall pay any costs and attorney's fees necessary in order to enforce this agreement.”

In May 2006, Dorcey filed a motion to enforce the parties' separation agreement and for the entry of findings of fact, conclusions of law, and a decree of dissolution. She stated that the agreement was complete, was not unconscionable, and should be adopted by the court. She attached a copy of the mediation agreement to her motion. Dorcey also included her Deposition Upon Interrogatories, which provided the court with the jurisdictional basis to enter the decree.

On June 21, 2006, the family court entered its findings of fact, conclusions of law, and decree of dissolution of marriage. The court concluded that the terms of the property settlement agreement, which included the division of property and debts, was fair and equitable, and was not unconscionable.<sup>1</sup> The court then adopted the property settlement agreement and incorporated its terms into the decree. The decree was amended by order entered October 6, 2006, to restore Dorcey's maiden name. In July 2011, Monte's child support obligation was reduced to \$589.00 per month due to the emancipation of their oldest child, and his payments were redirected through the Division of Child Support. The following

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<sup>1</sup> As discussed later, the parties signed two agreements; the mediation agreement, which was reached at the April 4, 2006, mediation and filed with the court on April 18, 2006, and the property settlement agreement, which was signed and notarized on June 2, 2006. The property settlement agreement contained an additional paragraph providing that any changes to the property settlement agreement must be by agreement of the parties and in writing.

month, by agreed order, Monte's child support obligation was reduced to \$450.00 per month.

On August 8, 2013, Monte moved the family court to enforce the parties' mediation agreement; specifically, paragraph 8 in which Dorsey had agreed to be responsible for the debt to the IRS in the amount of \$14,460.00. Monte stated that his 2006 and 2007 income tax refunds in the amounts of \$5,318.00 and \$2,446.00, respectively, had been intercepted and applied to the tax debt Dorsey had agreed to pay. Monte had been unable to work out this issue with Dorsey. He requested reimbursement of the intercepted tax refunds as well as payment of his attorney fees pursuant to paragraph 10 of the agreement.

The court held a hearing on Monte's motion on September 17, 2013. The parties discussed the mediation agreement they had entered into in April 2006 as well as the formal property settlement agreement they had entered into in June 2006, which did not appear in the record. The court decided to deem the property settlement agreement filed as of the date of the first decree. Pursuant to paragraph 8 of the mediation agreement or paragraph 9 of the property settlement agreement, Dorsey had agreed to pay several debts, as well as the 2005 IRS tax debt.

Dorsey was the first witness to testify. Upon questioning by Monte's attorney, Dorsey testified about the mediation held in April 2006 and stated that she had agreed to pay several of the debts, including the 2005 IRS tax debt. She signed the mediation agreement and property settlement agreement, which were consistent with her agreement to pay the debt at issue. She stipulated to the tax

interception of Monte's 2006 and 2007 tax refunds. She had not reimbursed Monte for any of the funds that had been intercepted.

On examination by her attorney, Dorsey stated that she had agreed to pay for the 2005 IRS tax debt if she sold the marital residence; the debt was to be paid through the proceeds received from the sale. While she had listed the property for sale pursuant to the agreement, the house did not sell. She did not have any other assets with which she could have paid the tax debts, and she thought Monte knew this. She and Monte had discussed the tax debt out of court. Monte had informed her of the tax interception in mid-2007. He asked that he be able to claim one of the children on his 2007 tax return as a fair resolution of her inability to pay the 2005 tax debt. This would permit him to get the tax credit, which was \$1,000.00. She submitted a form to the IRS to permit Monte to claim their twin son on his taxes. She believed she was giving up the \$1,000.00 income tax credit to satisfy the 2005 tax debt, and this amount would go to what was intercepted from Monte. She did not know the exact amount of tax benefit he had received, but it exceeded the amount of the tax interception amounts.

Monte was the next witness to testify. He was seeking reimbursement of the tax intercepts from his 2006 and 2007 taxes, and he stated that there was no writing relieving Dorsey of her debt to the IRS. Monte stated that he began claiming one of his children in 2007 for tax purposes. There was no written agreement relieving Dorsey of her tax obligation for giving him one of the children. He stated that the agreement was made due to his payment of child support. They never discussed

the 2005 IRS tax debt. As a result of his claiming one of his children, he had obtained at least \$8,000.00 in tax benefits through the exemption and tax credit.

At the conclusion of the testimony, the parties argued their respective positions, which conformed to their filed memoranda. In her written response, Dorcey stated that she had been unable to sell the marital residence and therefore did not have the funds from the sale to satisfy the 2005 tax debts. She had been able to satisfy the Iowa and Kentucky tax debts by using a loan against her IRA. For a number of reasons, including her income, college costs, a lower credit score due to the foreclosure of Monte's Iowa property, and her diagnosis of breast cancer and associated medical expenses, Dorcey stated that she and Monte had reached an agreement in 2007 whereby he would begin to claim the younger child for tax purposes. She completed the IRS form 8832 designating Monte as the proper person to claim the minor in future years. Monte claimed the child from 2007 through 2011 and realized a \$1,000.00 tax credit each year. Only after that child reached the age of emancipation did Monte seek relief with the family court. Dorcey argued that her obligation to satisfy the 2005 IRS taxes was discharged by novation pursuant to her agreement with Monte to permit him to claim the minor child; that the property settlement agreement was no longer conscionable due to subsequent events; that Monte was equitably estopped from enforcing the IRS tax provision; and that Monte had waived any breach. She also requested attorney fees.

In his position statement, Monte stated that he and Dorcey had executed a property settlement agreement on June 2, 2006, which had been notarized.

Pursuant to paragraph 9 of the property settlement agreement, Dorcey had agreed to pay the \$14,460.00 IRS tax debt. Paragraph 12 of the property settlement agreement provided, “This is a full and complete agreement between the parties and there shall be no additions, corrections, or deletions to same without prior agreement by both parties in writing. The parties also covenant that this agreement is not unconscionable and should be adopted by the Court.” Because Dorcey had not produced any document or writing satisfying paragraph 12, she was still responsible for the IRS tax debt. Monte also disputed that they had negotiated an agreement with regard to his claiming one of the children for income tax dependency credits.

Following the hearing, on October 4, 2013, the family court entered a second amended decree of dissolution memorializing its ruling as to the property settlement agreement. In the order, the court noted that at the hearing, it had been determined that the property settlement agreement had not been filed of record with the court, “despite the fact that the parties had executed a written property settlement agreement on or about June 2, 2006.” The parties and their counsel stipulated and agreed that the property settlement agreement had been executed and notarized, and the agreement was filed with the court. The court ordered that the property settlement agreement be filed, *nunc pro tunc*, to June 21, 2006, and that it be given full force and effect and incorporated into the previous decree. The

court found that the terms of the agreement were fair and equitable, and were not unconscionable. We note that the property settlement agreement referred to in this order has not been included in the certified record on appeal, but Dorcey attached it as an exhibit to her appellate brief.

On October 30, 2013, the family court entered an order ruling on Monte's motion to enforce. The court considered Kentucky Revised Statutes (KRS) 403.180 in considering the separation agreement. After noting that the mediation agreement was silent regarding who was to claim the children as dependents, the court indicated that the parties disagreed about the reason Dorcey permitted Monte to claim one of the children as a dependent. She claimed they had an agreement about the tax debts whereby the debt would be paid off by her giving him one of the exemptions, but Monte claimed this was related to his payment of child support. He also argued that she lacked a written document to alter the mediation agreement with respect to who could claim the children as dependency tax exemptions. The court determined that because this issue was not addressed in the mediation agreement, it was not a "change" to the agreement. The court determined that Dorcey had given up one of her two dependency exemptions in order to make payments toward the \$14,460.00 IRS tax debt, stating that "the Court is aware of no other reason why she would give up some exemptions without a court order requiring it." Both parties believed that Dorcey was allowed to claim both children. Because Dorcey had no logical reason to give up one of her dependency tax exemptions "other than to apply as a payment towards her IRS



debt from the divorce,” the court held that she should receive a credit for this as a matter of equity. The total value of the dependency exemptions and tax credits totaled \$8,000.00, and Dorcey was credited with this amount against the \$14,460.00 debt owed. The court ordered Dorcey to pay the remaining amount due of \$6,460.00, plus the accrued penalties and interest owed.

Therefore, the court granted Monte’s motion to enforce the settlement agreement and ordered Dorcey to pay the remaining amount of the IRS tax debt owed, and denied Monte’s motions for reimbursement of the intercepted tax funds and for attorney fees.

Dorcey moved the court to alter, amend, or vacate its order, arguing that with the \$8,000.00 credit she had received, her debt to Monte had been paid in full. The court held a hearing on December 17, 2013. At the hearing, Dorcey asked that the previous order be amended to reflect that the tax debt had been satisfied through the tax credit and exemption. The tax debt had been satisfied for some time, which is why Monte’s tax refunds had not been intercepted after his 2006 and 2007 refunds were intercepted. Dorcey had repaid the remainder of the tax debt due after the interception of the tax refunds. Monte continued to argue that the separation agreement could not be amended pursuant to its terms. Following the hearing, the family court granted Dorcey’s motion pursuant to her statement at the hearing that the remaining \$6,460.00 balance had been paid. The court clarified its original order to reflect this new information. This appeal by Monte now follows.

The sole issue Monte raises on appeal is that the family court erred in denying his motion to reimburse his intercepted tax refunds based upon paragraph 12 of property settlement agreement that required a written agreement to amend its terms. “The construction and interpretation of a contract . . . are questions of law to be decided by the court.” *First Commonwealth Bank of Prestonsburg v. West*, 55 S.W.3d 829, 835 (Ky. App. 2000), citing *Hibbitts v. Cumberland Valley National Bank & Trust Company*, 977 S.W.2d 252, 254 (Ky. App. 1998). Our standard of review is therefore *de novo*. *Id.*

Monty contends that the family court impermissibly rewrote the property settlement agreement between the parties in its ruling. In support of his argument, he cites to KRS 403.180(6), which provides that “[e]xcept 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.” Construing this subsection, the Supreme Court of Kentucky confirmed that “by expressly [limiting modification of the property settlement agreement] the parties may settle their affairs with a finality beyond the reach of the court's continuing equitable jurisdiction elsewhere provided.” *Brown v. Brown*, 796 S.W.2d 5, 8 (Ky. 1990). Monte has also cited to *Windham v. Cunningham*, 902 S.W.2d 838 (Ky. App. 1995), for the proposition that if the terms of a contract are clear and unambiguous, a court may not rewrite its terms under Kentucky law. Under the terms of the property settlement agreement,

Dorcey was required to pay the IRS tax debt, and she admitted that she did not do so, despite the language in the agreement that she “shall” pay that and other debts.

On the other hand, Dorcey contends that the family court did not modify the agreement, but rather it found that the obligation had been satisfied. Kentucky Rules of Civil Procedure (CR) 52.01 provides the general framework for the family court as well as review in the Court of Appeals: “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.” *See Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (footnote omitted) (An appellate court may set aside a lower court’s findings made pursuant to CR 52.01 “only if those findings are clearly erroneous.”).

Dorcey argues that the family court properly found that the IRS tax debt had been satisfied when she agreed to give Monte the exemption to one of their minor children, to which she was entitled under the law as that child’s primary residential custodian. Her agreement to give up the exemption and credit, which the parties agreed totaled at least \$8,000.00, represented her payment of the debt. These findings by the family court did not constitute a modification of the property settlement agreement, but only represented the conclusion that the debt had been satisfied.

We agree with Dorcey that the family court did not modify the property settlement agreement in reaching its conclusion that she had paid the IRS tax debt by providing Monte with the tax exemption and credit to which she was entitled. Rather, the family court found that the parties had reached a compromise with relation to Dorcey's repayment of the IRS tax debt after the IRS intercepted Monte's tax refunds. We note that Monte did not dispute the factual findings of the family court related to the agreement between them regarding the transfer of the tax exemption and credit, but he limits his argument to the contention that Dorcey failed to pay the IRS tax debt pursuant to the terms of the property settlement agreement. We disagree with Monte's argument. Dorcey's testimony and evidence establishing that she gave Monte the IRS tax exemption and credit for one of their minor children in order to pay back the refunds that had been intercepted represents substantial evidence supporting the family court's conclusion that she had paid that debt. Accordingly, we find no error or abuse of discretion in the family court's decision to deny Monte's motion for reimbursement and credit the value of the exemptions against Dorcey's IRS tax debt obligation.

For the foregoing reasons, the orders of the Warren Family Court are affirmed.

DIXON, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS.

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