

RENDERED: SEPTEMBER 23, 2005; 2:00 P.M.  
NOT TO BE PUBLISHED

## Commonwealth Of Kentucky

### Court of Appeals

NO. 2004-CA-001209-MR

DEBRA OFFUTT MARKS

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT  
HONORABLE CHARLES W. BOTELEER, JR., JUDGE  
ACTION NO. 95-CI-00026

WILLIAM MORRIS MARKS, JR.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM AND JOHNSON, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

JOHNSON, JUDGE: Debra Offutt Marks has appealed from the May 21, 2004, order of the Hopkins Circuit Court which adopted the December 31, 2003, report of the Domestic Relations Commissioner, allowing William Morris Marks, Jr. to claim two of the parties' three minor children as dependents for tax

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

purposes. Having concluded, after reviewing the record, that Debra failed to preserve the issue for appeal, we affirm.

Debra and William were married on December 31, 1987. They separated on October 29, 1994, and Debra filed a verified divorce petition on January 13, 1995. Three children were born of the marriage, namely Laura Frances Marks, (DOB December 21, 1989), Jennifer Dawn Marks and William Morris Marks III (DOB December 16, 1990). The children have primarily resided with Debra.

On May 11, 1995, the parties entered into a separation and property settlement agreement resolving all issues, including child custody, child support, property valuation and division, attorney's fees, and the allocation of the children as dependents for tax purposes. The agreement provided that Debra and William would alternate the tax exemptions, with William claiming two children and Debra claiming one child in odd numbered years, and Debra claiming two children and William claiming one child in even numbered years. Further, William's child-support obligation was set at \$700.00 per month for 18 months following the effective date of the agreement. This amount was a lower sum than the amount calculated pursuant to the child-support guidelines, but Debra was allowed to seek a modification following the 18-month period. The trial court

found the agreement not unconscionable and incorporated it into the decree of dissolution of marriage entered on May 18, 1995.

On December 5, 2003, William filed a motion for dependency exemption, wherein he claimed that he was providing over 60% of the children's support and should be entitled to claim all three children as tax exemptions. On the same date, Debra filed a motion to increase child support requesting that William pay child support in accordance with the guidelines. A hearing was held before the Commissioner on December 10, 2003.

On December 31, 2003, the Commissioner filed her report on the issues of visitation, child support, the parties' attendance at a cooperative parenting program, attorney's fees, and the allocation of the children as dependents for tax purposes. The Commissioner recommended that William's child-support obligation be modified to \$1,083.00 per month, which included reimbursement to Debra of uninsured healthcare costs. Further, the Commissioner recommended that beginning in 2004 William should be allowed to claim two of the parties' children as dependents for tax exemption purposes, and Debra should be allowed to claim one child, rather than the previous agreement where the parties alternated the exemption by tax year.

Debra filed exceptions to the Commissioner's report on January 12, 2004. She stated that under current Kentucky law she was entitled to claim all three children as dependents for

tax exemption purposes. William responded by asking the circuit court to adopt the Commissioner's recommendations. The trial court entered an order on May 21, 2004, adopting the Commissioner's report in its entirety. This appeal followed.

Debra's sole argument on appeal is that the trial court abused its discretion by awarding William tax exemptions for two of the children. In reviewing the trial court's ruling, our standard of review "is not whether [the appellate court] would have decided the issue differently, but whether the findings of the trial judge were clearly erroneous or that he abused his discretion" [citations omitted].<sup>2</sup> Findings of fact are clearly erroneous if they "are manifestly against the weight of the evidence" [citations omitted].<sup>3</sup> Abuse of discretion implies that the trial court's decision is unreasonable or unfair.<sup>4</sup>

It is well-settled law in Kentucky that a circuit court has the authority to allocate between former spouses the tax exemption for a child of the dissolved marriage.<sup>5</sup> Further, "[a] trial court should allocate the exemption so as to maximize the amount available for the care of the children" [footnote

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<sup>2</sup> Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982); Kentucky Rules of Civil Procedure (CR) 52.04.

<sup>3</sup> Wells v. Wells, 412 S.W.2d 568, 571 (Ky. 1967).

<sup>4</sup> Kuprion v. Fitzgerald, 888 S.W.2d 679, 684 (Ky. 1994).

<sup>5</sup> Marksberry v. Riley, 889 S.W.2d 47, 48 (Ky.App. 1994).

omitted].<sup>6</sup> However, the trial court's findings in this case do not address whether the tax exemptions were allocated so as to maximize the amount available for the care of the children.<sup>7</sup>

William argues to this Court that Debra waived this argument on appeal by failing to file a post-judgment request for additional findings pursuant to CR 52.04.<sup>8</sup> Debra argues in her reply brief that her opposition to the trial court's ruling is not based on inadequate findings of fact. Rather, she states that her argument is "that the trial court abused its discretion by entering the order granting [William's] motion for the dependency exemptions without any evidence to support it."

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<sup>6</sup> Hart v. Hart, 774 S.W.2d 455, 457 (Ky.App. 1989).

<sup>7</sup> The findings included the following:

[B]eginning with tax year 2004 . . . and continuing until further orders of the Court, William should be permitted to claim two children as dependents and Debra should be permitted to claim one child, if the financial circumstances of the parties remain as they have now indicated. (Should the financial circumstances of one or both parties change, or should federal or state tax laws be modified such that this determination would not provide the greatest amount of resources available for the children's support, one or both parties should file a motion for the Court to review this determination prior to January 1 of the year in which the tax returns are due.)

<sup>8</sup> CR 52.04 states as follows:

A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such a failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

Debra relies on CR 52.01 and CR 52.03 to support her argument that she properly preserved the issue on appeal. She argues that the dependency award was erroneous as a matter of law, because there was not sufficient evidence in the record to support the ruling.

In reviewing the record, it appears that both parties' pay stubs from their current employment were filed as evidence. The parties signed an "Agreed Narrative Statement" entered in the record on November 9, 2004, which reflects the contents of the December 10, 2003, hearing before the Commissioner regarding the dependency exemption issue. The narrative specifically states that the hearing ended with "neither attorney asking any questions and without either party presenting any evidence on the issue of entitlement to dependency for the children." However, having the parties' current income, the trial court had sufficient evidence to make adequate findings of fact regarding the dependency exemption award. Therefore, we cannot conclude that there was a lack of evidence, but rather the trial court failed to adequately explain how it used the parties' incomes to make the dependency exemption award.

We conclude that Cherry is dispositive, and since Debra failed to request a more definite finding of fact, the

issue is deemed waived.<sup>9</sup> Therefore, while we also conclude that the trial court's findings of fact regarding the dependency exemption award are inadequate, we are compelled to hold that Debra failed to preserve the issue for our review.

For the foregoing reasons, the order of the Hopkins Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Thomas E. Turner  
Madisonville, Kentucky

BRIEF FOR APPELLEE:

Melanie A. Rolley  
Madisonville, Kentucky

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<sup>9</sup> Cherry, 634 S.W.2d at 425.