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Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000421-MR

JESSE J. SHACKELFORD, JR. APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE ELEANOR GARBER, JUDGE
ACTION NO. 00-FC-004015

JUNE L. SHACKELFORD APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

CLAYTON, JUDGE: Jesse J. Shackelford (hereinafter "Jesse") appeals from the final judgment of the Jefferson Family Court entered on January 26, 2006, which denied his request to modify child support and ordered him to pay his portion of the uninsured medical expenses and child support arrearages.

For the following reasons, we affirm the decision of the Family Court.

FACTUAL BACKGROUND

The parties were divorced by a Decree of Divorce entered on September 15, 2000. They are the parents of two children, Jesse III (d.o.b. 1/21/94) and Logan (d.o.b. 12/27/95). The Property Settlement Agreement ("PSA") between the parties, dated and filed on May 18, 2000, was incorporated into the Decree by reference. The Shackelfords negotiated the PSA with the assistance of a lawyer. The PSA provided for the disposition of their property, child custody, and support for their children.

On April 28, 2005, Appellee, June L. Shackelford (hereinafter "June"), filed a motion to hold Appellant in contempt for failure to pay child support and his portion of the children's medical bills. Following June's motion, Jesse filed a motion, dated July 6, 2005, to modify the amount of his child support obligation, decided between the parties in the 2000 Agreement. He now believes it was unconscionable. On December 1, 2005, the parties had a hearing about these issues. After the Court entered its order on December 29, 2005, Jesse filed a motion to alter, Amend or vacate it. Whereupon, after due consideration, the family court denied his motion on January 26, 2006.

The pertinent issues are the denial of Jesse's request for modification of child support, the requirement that Jesse reimburse June for his share (50%) of uninsured medical expenses incurred for the children between 2001 and July 2005, and that he pay his child support arrearages.

This appeal followed.

STANDARD OF REVIEW

We review questions of law *de novo*. *Revenue Cabinet v. Comcast Cablevision of South*, 147 S.W.3d 743 (Ky.App. 2003). But, findings of fact will not be set aside unless clearly erroneous. Furthermore, due regard shall be given to the family court judge's opportunity to judge the credibility of the witnesses. CR 52.01.

A family court judge has extremely broad discretion in ascertaining the reliability of the evidence presented. Moreover, a reviewing Court is not permitted to substitute its judgment for that of the family court unless its findings are clearly erroneous. *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky.App. 2002). Factual findings are not clearly erroneous if they are supported by substantial evidence. *Black Motor Co. v. Greene*, 385 S.W.2d 954, 956 (Ky. 1964). The "test for substantiality of evidence is whether, when taken alone, or in the light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable men." *Janakakis-Kostun v. Janakakis*, 6 S.W. 3d 843, 852 (Ky.App. 1999).

ANALYSIS

1. Modification of child support.

a. Court retains jurisdiction.

KRS 403.180(1) provides that parties may enter into a written separation agreement with regard to issues concerning maintenance, division of property, and the custody, support and visitation of minor children. Furthermore, the statute provides that the terms of the separation agreement are binding on the court except for the provisions relating to child custody, support and visitation. For the issues of child custody, support, and visitation, trial courts retain jurisdiction and are not bound by the parties' agreement in those areas. KRS 403.180(6).

b. KRS 403.213(2) provides a rebuttable presumption for modification of child support.

Having noted that trial courts retain jurisdiction over child support, we now review the statutory requirements for modification of child support. KRS 403.213(2) states that application of the Kentucky child support guidelines to the circumstances of the party at the time of the filing of a motion for modification of child support which results in equal to or greater than a fifteen percent (15%) change in the amount of support due per month shall be rebuttably presumed to be a material change in circumstances. Furthermore, as stated in *Tilley v. Tilley*, 947 S.W.2d 63 (Ky.App. 1997), "a party who is able to show a 15% discrepancy between the amount of support being paid at the time the motion is filed and the amount due pursuant to the guidelines is entitled to a rebuttable presumption that a material change in circumstances has occurred."

The trial court stated in its original Opinion and Order:

> Based on June's monthly income of $5,833, Jesse's monthly income of $4,166, and considering Jesse's child support for a prior born child, the Kentucky child support guidelines set monthly child support at $575 per month. This is nearly one-half of the amount that Jesse agreed to pay in the PSA.

Therefore, Jesse has demonstrated a rebuttable presumption that a material change in circumstance has occurred. Now, Jesse must show a material change in circumstances that is substantial and continuing. *Snow v. Snow*, 24 S.W.3d 668, 672 (Ky.App. 2000).

c. KRS 403.213(1) requires a material change in circumstances that is substantial and continuing.

Based on the family court's continued jurisdiction over the issue of child support, notwithstanding a settlement agreement, the trial court must address whether or not the parties' child support should be modified "only upon a showing of material change in circumstances that is substantial and continuing." KRS 403.213(1). Given the parties' arguments and the trial court's analysis of conscionability of the Agreement, we shall initially undertake our review by considering the conscionability of the Property Settlement's provision regarding child support.

2. Unconscionability.

The trial court decided in 2000 that Jesse's agreement to pay $475 in child support every two weeks was not unconscionable. Significantly, Jesse, at that time, did not contest the conscionability of the Agreement. Therefore, given the timeline hereto, Jesse did not claim the agreement was unconscionable until approximately five years later after he had accrued significant child support debt.

Kentucky case law, rule, and statutes have established without question that a trial court is in the best position to determine the quality and adequacy of the facts to make findings and conclusions. This is certainly true in determining the facts surrounding the conscionability or the unconscionability of a separation agreement and is best set forth in *Shraberg v. Shraberg*, 939 S.W.2d 330 (Ky. 1997), where this Court ruled that "what is required is a showing of fundamental unfairness as determined 'after considering the economic circumstances of the parties and any other relevant evidence . . . .' (KRS 403.180(2). Undoubtedly the trial court is in the best position to make such an analysis and the cases reflect broad deference to the trial court in this regard." *Id.* at 333.

An agreement is not unconscionable merely because the child support exceeds either the guidelines or the child's reasonable needs. *Pursley v. Pursley*, 144 S.W.3d.820, 824 (Ky. 2004). In such situations, the trial courts review the parties' agreement to pay child support in excess of the guidelines by determining whether the parents had knowledge of the amount of child support established by the guidelines. *Id.* Jesse has acknowledged that, when he signed the PSA in 2000, he was aware that the amount deviated from the child support guidelines. Thus, while the bi-weekly $475 child support obligation was more than the amount required by the statutory guidelines, Jesse agreed to pay this child support amount. In addition to his knowledge of the deviation from the child support guidelines, he had an attorney, and the Agreement was the result of negotiations.

As noted by the trial court "a bad bargain and unconscionability [are] not synonymous." *Shraberg* at 333. Parties may have many valid reasons for agreeing to provide generous child support. Such a decision is likely to be one that meets the best interest of the child(ren.)

Although the parties' finances have not been static since the Decree of Dissolution was entered, this reason alone is not sufficient to conclude that the family court abused its discretion in finding the Agreement was not unconscionable some five years after its original determination regarding the Agreement's unconscionability. Jesse's argument that the increase in his former spouse's income makes the Agreement unconscionable is not persuasive. We note first that both parties have had salary increases since the Agreement. Furthermore, it is reasonable and foreseeable that salaries will fluctuate.

And, Jesse's contention that his child support payments for another child make the original Agreement unconscionable is also without merit. He had this prior child support obligation at the time he entered into the Agreement.

Finally, an Agreement will be set aside only if the court determines "that it is manifestly unfair and unreasonable." *McGowen v. McGowen*, 663 S.W.2d 219 (Ky.App. 1983). We agree with the trial court's determination that an increase in both parties' salaries and a prior commitment to provide child support for another child are not reasons to find the Agreement manifestly unfair or unreasonable. Moreover, we are obligated to defer to a trial court ruling unless it is shown that the trial court's finding is clearly erroneous. Here, the trial court found that the Agreement's child support provisions were not "manifestly unfair and unreasonabl" and thus, "not unconscionable." We agree with the trial court's findings, and therefore, conclude that they are not clearly erroneous.

3. Substantial and continuing change in circumstances.

Now, having determined that the Agreement was and is not unconscionable, we will examine whether or not Jesse has showed a material change in circumstances that is substantial and continuing to the point that a modification of child support is warranted.

Jesse has experienced a 32% increase in salary since the entry of the Decree. An increase in salary does not suggest that a party should have his or her child support amount reduced. Indeed, it suggests a change in circumstance that would make it

easier to pay the agreed upon child support amount. Moreover, June's increase in salary has no impact on Jesse's ability to pay his agreed child support amount. Additionally, Jesse has provided no evidence suggesting that the needs of the children have changed, providing no indication of a substantial and continuing change in circumstances. Finally, his payment of child support for a prior born child existed before he entered into the PSA. Again, this factor does not suggest a substantial and continuing change in circumstances.

Reiterating that the trial court is in the best position to ascertain the quality and adequacy of the facts and has broad discretion in matters of child support, we uphold the trial court's finding that Jesse's circumstances, as contemplated under KRS 403.213, do not meet the threshold for a substantial and continuing change in circumstance requiring a modification in child support. The family court's decision was not unsupported by sound legal principles, and thus, will not be disturbed. *Downing v. Downing*, 45 S.W.3d 449 (Ky.App. 2001).

4. Proof of oral agreement to reduce child support obligation.

Oral agreements to modify child support obligations are enforceable if proven with reasonable certainty and if fair and equitable under the circumstances. *Whicker v. Whicker*, 711 S.W.2d 857 (Ky.App. 1986). The trial court, after hearing the evidence, determined that an oral agreement to modify the child support obligation was not proven with reasonable certainty. Furthermore, we note that in the PSA itself, Paragraph 16 states with regards to modifications of the Agreement: "A modification of [sic] waiver of any of the provisions of this Agreement should be effective only if made in writing."

We again note that the family court judge has broad discretion in ascertaining the reliability of the evidence presented. Moreover, a reviewing Court is not permitted to substitute its judgment for that of the family court unless its findings are clearly erroneous. *Sherfey* at 782. Therefore, we defer to the family court's determination that an oral agreement to modify child support was not proven with reasonable certainty.

5. Reimbursement of medical expenses

Paragraph 3 of the PSA provides that both parties equally pay all medical expenses not covered by health insurance. Jesse asserts that because the Agreement did not provide a procedure or time period for the request or exchange of the children's medical bills, he should not have to pay his portion of the uninsured medical expenses. Jesse maintains that June should have informed him the about the medical bills. However, he could have at any time asked for an accounting.

To repeat, a PSA incorporated into a Decree of Dissolution is an enforceable contract which the family court may not disturb unless the contract is unconscionable. *Pursley* at 826. *See also* KRS 403.180(2). A court may not find an agreement to be unconscionable absent some showing of fraud, undue influence, overreaching or manifest unfairness. *Pursley, supra,* note 3, at 826. Jesse, as the party claiming that a separation agreement is unconscionable, has the burden of proving the agreement is manifestly unfair. *Peterson v. Peterson, 583 S.W.2d 707, 711 (Ky.App. 1979).* Jesse and June agreed to share equally the uninsured medical costs. The lack of a timeline and procedure to exchange bills does not rise to the level of fraud, undue influence, overreaching or manifest unfairness.

Once again, we must give great deference to the trial court. In cases of this nature, the trial court is in the best position to evaluate the circumstances surrounding the Agreement. The trial court found Jesse was obligated to pay his portion of the uninsured medical costs and that the provision was not "manifestly unfair and unreasonable." We hold that the trial court's findings were not clearly erroneous, and therefore, this provision of the Shackelfords' Agreement is enforceable.

CONCLUSION

For the foregoing reasons, the Order of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joy Kidwell Miller
Louisville, Kentucky

BRIEF FOR APPELLEE:

Julia B. Barry
Louisville, Kentucky