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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001290-MR

CECILIA ANN RITCHIE APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NO. 04-CI-00232

SHELBY EUGENE RITCHIE APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND STUMBO, JUDGES.

STUMBO, JUDGE: Cecilia Ann Ritchie (now Williams) appeals from an order of the Perry Circuit Court sustaining the motion of Shelby Eugene Ritchie (hereinafter "Ritchie") to modify a final decree of dissolution. The court found a material change in circumstances sufficient to warrant a modification of the child dependency exemption status. Williams contends that the modification improperly

altered the terms of the parties' separation agreement and therefore was improper. For the reasons stated below, we affirm the order on appeal.

On April 2, 1999, Williams and Ritchie were married in Perry County, Kentucky. The marriage produced one child, namely Rayven James Ritchie. The parties separated on December 31, 2003, and Williams filed a petition for dissolution of marriage on April 15, 2004. At the time the petition was filed, Williams was 35 years old and was employed by the Perry County child support office. Ritchie was 27 years old and employed by Breathitt Mechanical.

The parties entered into a separation agreement which was signed and entered into the record on April 15, 2004. Paragraph 3.3 of that agreement stated that Williams was entitled to claim the dependent child for income tax purposes. It is also notable that Williams received primary custody of the child. Numerous other matters were addressed which are not relevant to the instant appeal. The separation was incorporated by reference into the decree of dissolution, which was rendered on April 22, 2004.

On April 13, 2007, Ritchie filed a motion to modify the decree of dissolution. Specifically, he sought an order allowing him to claim the minor child as a dependant every other year for income tax purposes. As a basis of the motion, Ritchie noted that he was about to be subject to a significant increase in the amount of child support he was required to pay, and that this increase should entitle him to the income tax dependency deduction every other year. Williams responded that she was entitled to the exemption under the general rule that a custodial parent

may exercise the exemption absent a written waiver of that right.

The matter proceeded in Perry Circuit Court, whereupon the court rendered an order on June 5, 2007, sustaining Ritchie's motion to modify the tax exemption benefits. As a basis for granting Ritchie the exemption every other year, the court found a material change in circumstances sufficient to justify the change. This appeal followed.

The sole issue now before us is Williams' contention that the circuit court erred in sustaining Ritchie's motion to grant him the dependency exemption every other year. Williams argues that since the exemption was originally memorialized in the separation agreement - which the court adopted by reference as part of the decree of dissolution - any change to the agreement must be based on a finding of unconscionability. She notes that Ritchie did not raise nor argue unconscionability as a basis for the sought modification, nor did the circuit court rely on unconscionability in support of its ruling. As such, she contends that the order on appeal must be reversed, or in the alternative remanded for a determination of whether the separation agreement has become unconscionable.

Having closely examined the record, the argument and the law, we find no error in the circuit court's determination that Ritchie is entitled to exercise the dependency exemption every other year. Williams correctly states that the terms of a separation agreement are binding on the trial court absent a finding of unconscionability. KRS 403.180(2) states that,

> In a proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement, except those providing for the custody, support, and visitation of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable.

This concept has been acknowledged in the case law. *See generally*, *Rupley v. Rupley*, 776 S.W.2d 849 (Ky. App. 1989); *Peterson v. Peterson*, 583 S.W.2d 707 (Ky. App. 1979). Since even reconciliation and resumption of the marital relation does not void the separation agreement, *Ray v. Ray's Executrix*, 60 S.W.2d 935 (Ky. 1933), we are persuaded that it also survives incorporation into the decree of dissolution.

If the analysis ended here, Williams would likely prevail since the issue of unconscionability was not raised by Ritchie nor expressly recognized by the trial court in its order modifying the status of the dependency exemption. A panel of this Court has previously held, however, that the trial court is not bound by terms of a separation agreement where findings of the court clearly disclose that it considered the agreement unconscionable although it did not specifically so find. *Jackson v. Jackson*, 571 S.W.2d 90 (Ky. App. 1978). That is to say, an *implicit* finding of unconscionability is sufficient to satisfy KRS 403.180(2). "While the use of the specific word 'unconscionable' would be preferable, the wording of the Divorce Commissioner's Findings and Recommendations in this case substantially complies with the requirements of KRS 403.180 as to a finding of

unconscionability." *Id.* The term unconscionable has been defined as "manifestly unfair or inequitable." *Wilhoit v. Wilhoit*, 506 S.W.2d 511 (Ky. 1974).

In the matter at bar, Ritchie was bound by the separation agreement to pay $175 per month in child support.[1] On April 24, 2007, an order of the Perry Circuit Court raised that obligation to $772.77 per month. This modification represented a more than four-fold increase in Ritchie's child support obligation and was the apparent basis of the circuit court's finding of a change in circumstances justifying the dependency exemption modification. Though not expressly stated in terms of unconscionability, we believe that given the notable increase in the child support obligation, the finding of unconscionability was implicit in the circuit court's finding. Since *Jackson* recognizes an implicit finding of unconscionability as satisfying KRS 403.180(2), we find no error on this issue. This conclusion is bolstered by the requirement that the exemption must be allocated to maximize the amount available for the care of the dependent, *Hart v. Hart*, 774 S.W.2d 455 (Ky. App. 1989), as the record indicates that Ritchie earns about 68% of the parties' combined income.

For the foregoing reasons, we affirm the order of the Perry Circuit Court.

ALL CONCUR.

[1] Ritchie's appellate brief incorrectly states that the initial child support obligation was $100 per month.

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