Cite as 2014 Ark. App. 158

ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-13-871

TAMMY McCALL MYERS APPELLANT V. STEVEN McCALL APPELLEE	Opinion Delivered March 12, 2014 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, GREENWOOD DISTRICT [NO. DR-97-442-G] HONORABLE JIM D. SPEARS, JUDGE AFFIRMED

JOHN MAUZY PITTMAN, Judge

This is an appeal from an order requiring modification of child support in which the trial court held that appellee was not required to pay child support after the parties' children began attending college, and ordered each party to pay one-half the cost of a procedure applying dental veneers to their daughter's teeth. The principal question is whether the trial court erred in failing to enforce a prior agreement between the parties requiring appellee father to continue paying child support while the children were in college, and to assume sole responsibility for payment of any future orthodontic procedure necessary to ensure the continuity of the orthodontic treatment the child was receiving. We affirm.

Citing *Van Camp v. Van Camp*, 333 Ark. 320, 969 S.W.2d 184 (1998), appellant argues that the trial court lacked authority to modify the agreement requiring appellee to continue to pay child support after the children reach majority. We do not agree.

> Our cases hold that where a decree for alimony or support is based on an independent contract between parties which is incorporated in the decree and approved by the court as an independent contract, it does not merge into the court's award and is not subject to modification except by consent of the parties. Although a court of equity may decline to enforce payments due under an independent agreement by contempt proceedings where changed circumstances render such payments inequitable, the wife retains her remedy at law on the contract.
>
> There is a second type of agreement in which the parties merely agree upon the amount the court should fix by its decree as alimony or support, without intending to confer on the wife an independent cause of action. This type agreement becomes merged in the decree and loses its contractual nature so that the court may modify the decree.

Law v. Law, 248 Ark. 894, 897–98, 455 S.W.2d 854, 856 (1970) (internal citations omitted).

The agreement in *Van Camp* did contain provisions relating to child support, but was held to be unmodifiable only because the child-support provisions were an integral part of an independent property-settlement agreement negotiated by the parties and incorporated into the divorce decree. *Id.*; *Stills v. Stills*, 2010 Ark. 132, 361 S.W.3d 823. In contrast, the agreement in the present case concerns itself exclusively with issues relating to child support. While the general rule is that the court cannot modify the parties' contract that is incorporated into the decree, our courts have recognized an exception to this rule in child-custody and support matters and have held that provisions in such independent contracts are not binding. *Alfano v. Alfano*, 77 Ark. App. 62, 72 S.W.3d 104 (2002). The trial court always retains jurisdiction over child support as a matter of public policy, and no matter what an independent contract states, either party has the right to request modification of a child-support award. *Id*; *see generally* David Newbern, 2 Arkansas Civil Practice & Procedure § 38:5 (5th ed. 2010). Consequently, we hold that the trial judge did not lack

authority to modify the agreement. Because appellant does not argue that the modifications were not supported by a material change in circumstances, *see Hall v. Hall*, 2013 Ark. 330, 429 S.W.3d 219, that concludes our inquiry.

Nor do we agree that the trial court erred in refusing to require appellee to pay one-half the finance charges incurred by appellant to pay for the veneer treatment. We review traditional equity cases de novo on the record, and we will not reverse a finding of fact by the trial court unless it is clearly erroneous. Ark. R. Civ. P. 52(a); *McWhorter v. McWhorter*, 346 Ark. 475, 58 S.W.3d 840 (2001). In reviewing a trial court's findings, we give due deference to that court's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *McWhorter*, *supra*. When the amount of child support is at issue, we will not reverse the trial court absent an abuse of discretion. *Id*.

We find no such abuse of discretion in this case. There was evidence that the child had serious respiratory disease that required her to take medications that, given her age, interfered with the development of her tooth enamel and caused discoloration. The trial court found that the treatment was desirable and not unnecessary, but required each party to pay one-half of the $10,000 cost of the procedure because less expensive treatment options existed and appellee had not been consulted before the expense was incurred. Appellant argues that a contrary conclusion should be drawn from the evidence regarding whether appellee had been informed prior to the procedure, but this is a question going to weight and credibility in which we defer to the trial judge. We find no clear error, and we affirm.

Affirmed.

WYNNE and BROWN, JJ., agree.

Verkamp & Ladd, P.A., by: *John P. Verkamp*, for appellant.

Kevin L. Hickey, for appellee.