RENDERED: SEPTEMBER 18, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001078-ME

M. LAYNE NETHERTON — APPELLANT

v.

APPEAL FROM FAYETTE FAMILY COURT
HONORABLE KATHY STEIN, JUDGE
ACTION NO. 00-CI-01957

TIMOTHY CORNETTE — APPELLEE

AND NO. 2014-CA-001212-ME

M. LAYNE NETHERTON — APPELLANT

v.

APPEAL FROM FAYETTE FAMILY COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 00-CI-01957

TIMOTHY CORNETTE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON AND KRAMER, JUDGES.

DIXON, JUDGE: Appellant, M. Layne Netherton, appeals *pro se* from orders of the Fayette Family Court that she characterizes as having suspended a timesharing agreement between herself and Appellee, Timothy Cornette, regarding the parties' daughter, Mia.[1] Layne also appeals the family court's award of attorney's fees to Timothy as well as the denial of her request for reimbursement of health insurance premiums paid for Mia.

The parties herein were married in 1996. They separated in January of 2000 and were subsequently divorced in August 2000. The Decree of Dissolution awarded the parties joint custody of Mia, born in August 1996, with Layne being designated as the primary residential parent. Pursuant to an order entered on April 23, 2012, the parties agreed to Mia living primarily with Timothy so that she could change schools, with Mia spending every other weekend and one week night with Layne.

In April 2014, Layne filed a motion requesting that the family court (1) seal the record (due to sensitive health information involving Mia not pertinent to this appeal);[2] (2) prohibit any discussion about the proceedings with Mia; (3) order the parties to attend a cooperative parenting class; (4) modify the timesharing

[1] Mia has since reached the age of majority.

[2] The parties thereafter signed an agreed order to seal the record.

agreement to require Mia to live primarily with Layne; and (5) order Timothy to reimburse Layne for $7,391.10 in health insurance premiums paid on behalf of Mia. Timothy filed a verified response, requesting that Layne's timesharing be suspended and further that the family court interview Mia to ascertain her wishes. In addition, Timothy claimed that the divorce decree did not require him to pay Mia's health insurance premiums and, in fact, Layne owed him for one-half of Mia's expenses not covered by insurance.

After exhaustive pleadings, the family court's interview with Mia, and a hearing held on May 23, 2014, the family court entered Findings of Fact and Conclusions of Law ruling,

> This Court has already issued a ruling that the minor child, Mia, who will be 18 this August, is a mature, responsible, and articulate young lady who is capable of making the decision herself as to whether she prefers to stay at the home of her mother or father pending further testimony on this issue. The Court reaffirms this ruling. This Court bases this decision upon the pleadings, the testimony taken, and the Court's interview with Mia. The Court specifically limits Mia to living with one or both parents and obeying that parent's or parents' house rules until she turns 18.

The family court further denied Layne's motion for court-ordered counseling or a separate hearing on timesharing. Further, the family court granted Timothy's motion for attorney's fees in the amount of $5,009.00, as well as both parties' motions seeking reimbursements for expenditures related to Mia, reserving the resolution of such for another hearing.

The family court held a second hearing on May 28, 2014, for the purpose of addressing the amount of attorney's fees and reimbursement issues. The subsequent order reflected that the reimbursement issue had been resolved with neither party owing the other any funds expended on behalf of Mia. Further, the family court awarded Timothy $5,250.20 in attorney's fees to be paid within 90 days of the order. Layne now appeals to this Court. Additional facts are set forth as necessary.

On appeal, Layne argues that the family court erred by (1) arbitrarily suspending timesharing with a "law abiding, joint custodial and fit parent;" (2) allowing Mia to decide her own timesharing arrangement; (3) speaking to Mia on an unrecorded phone call and acting upon those statements without providing an opportunity for rebuttal; (4) denying her the opportunity to rebut Mia's testimony provided during an *in camera* interview; (5) awarding Timothy $5,250.20 in attorney fees; (6) denying her request for reimbursement of health insurance premiums.

With respect to the first four issues presented, Timothy contends, and we agree, that such are moot. "It is the universal rule that courts will not consume their time in deciding moot cases, and have no jurisdiction to do so." *Louisville Transit Co. v. Department of Motor Transportation*, 286 S.W.2d 536, 538 (Ky. 1956). "A 'moot case' is one which seeks to get a judgment . . . upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy." *Benton v. Clay*, 192 Ky. 497, 233 S.W. 1041, 1042

(1921) (citations omitted). An appellate court is required to dismiss an appeal when a change in circumstances renders the court unable to grant meaningful relief to either party. *Medical Vision Group, P.S.C. v. Philpot*, 261 S.W.3d 485, 491 (Ky. 2008) (*citing Brown v. Baumer*, 301 Ky. 315, 321, 191 S.W.2d 235, 238 (1945)).

Mia turned eighteen years old on August 7, 2014, and began her freshman year at Lindsey Wilson College the following week. Thus, even before the record was certified in this appeal, Mia was no longer a "child" and ceased to be subject to the family court's jurisdiction. *See* KRS 403.800(2). Even if we were to rule in Layne's favor, the ruling would have no practical legal effect upon her controversy with Timothy since the order she seeks to have reconsidered expired when Mia turned eighteen and can no longer be changed. *See* KRS 405.020 (providing in pertinent part that parents retain legal custody of their child until the child turns eighteen years old). As such, any issues or alleged errors by the family court regarding timesharing are rendered moot by Mia reaching the age of majority.

Layne urges that this Court should nevertheless undertake review of the issues herein because this case falls within the public interest exception to the mootness doctrine as set forth in *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014). We disagree.

In *Morgan*, our Supreme Court held:

> Unlike the two-element "capable of repetition" exception, the "public interest" exception commonly has three elements, all of which must be clearly shown:
>
> > The public interest exception allows a court to consider an otherwise moot case when (1) the question presented is of a public nature; (2) there is a need for an authoritative determination for the future guidance of public officers; and (3) there is a likelihood of future recurrence of the question.
>
> *In re Alfred H.H.*, 331 Ill.Dec. 1, 910 N.E.2d at 80. Although our Kentucky cases that were in effect "public interest" cases focused largely on the first and the third of these elements, the second element should not be disregarded. As the Supreme Court of Illinois noted, if all that was required under this exception was that the opinion could be of value to future litigants, the exception "would be so broad as to virtually eliminate the notion of mootness." 331 Ill.Dec. 1, 910 N.E.2d at 81. To invoke this exception, therefore, the party asserting justiciability must show, in addition to the public-question and likelihood-of-recurrence elements, that "there is a need for an authoritative determination for the future guidance of public officers." . . .

Morgan, 441 S.W.3d at 102.

Although the underlying case in *Morgan* was a purely private custody dispute, the Court noted:

> [T]he issue Morgan raises about the proper role of a GAL in such cases has been fully litigated and argued by adverse parties and poses a substantial question of a public nature certain to recur in many other cases. It is also likely, especially in cases involving older children, again to evade review. It is a question, moreover, currently pertinent to a substantial number of family court proceedings and an issue about which our circuit courts addressing custody matters would benefit from guidance.

Id. at 103. Contrary to Layne's argument, we find nothing within the instant matter that involves a question of substantial public interest. Accordingly, all issues concerning timesharing and the proceedings associated with the family court's decision on this matter are not properly before this Court and should be dismissed.

Layne next challenges the family court's award of attorney fees to Timothy arguing that the family court erred in finding that bad faith on her part justified the award. Timothy responds that Layne has failed to preserve this issue for review. Although the time line of the proceedings and orders entered therewith are nonsequential and thus confusing, we must agree that this issue is not preserved.

In its Findings of Fact and Conclusions of Law following the May 23, 2014, hearing, the family court ruled:

> The Court grants Tim's motion for attorney fees in the amount of $5,009. The Court finds that there has been a significant show of bad faith on Layne's part in bringing the motion and in the manner in which she has conducted herself. If Layne disputes the amount of Tim's attorney's fees listed in Tim's counsel's affidavit, these arguments may be heard by the Court on May 28th, 2014 at 12:00 p.m. The timetable for which Layne must pay these fees will be determined upon the same date.

In addition, the family court further ordered the parties to appear on May 28th "for a hearing and ruling on what reimbursement amount the parties are deemed to owe one another" for Mia's extracurricular expenses. Unfortunately, the Findings of Fact and Conclusions of Law were not entered until June 6, 2014. In the interim, the parties appeared at the May 28th hearing, during which Layne's attorney

argued, among other things, that Layne should not have to pay for attorney's fees related to reimbursement issues because they were not brought in bad faith. The family court agreed and required counsel to remove that portion of fees related to the reimbursements. However, counsel was allowed to add fees arising from the May 28th hearing. As such, by order entered on July 29, 2014, Layne was ordered to pay Timothy $5,250.20 in attorney fees.

Prior to entry of the July 29, 2014 order, Layne filed a notice of appeal in this Court on July 7, 2014, from the family court's June 6, 2014, Findings of Fact and Conclusions of Law, naming both Timothy and his attorney as Appellees. Layne did not, however, appeal the family court's subsequent July 29, 2014, order awarding Timothy $5,250.20 in attorney fees. Nevertheless, Layne now argues that her first appeal preserved the issue as the family court's Findings of Fact and Conclusions of Law was a final and appealable judgment and the subsequent July order did nothing more than alter the amount of attorney's fees owed. We disagree.

CR 54.01 defines a final or appealable judgment as "a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02." "[I]f an order entered in a cause does not put an end to the action, but leaves something further to be done before the rights of the parties are determined, it is interlocutory and not final." *Hubbard v. Hubbard*, 303 Ky. 411, 412, 197 S.W.2d 923, 924 (1946). However, CR 54.02 provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims.

For the purpose of making an otherwise interlocutory order final and appealable, the trial court is required to determine 'that there is no just reason for delay,' and the judgment must recite this determination and also recite that the judgment is final CR 54.02(1). *Hale v. Deaton*, 528 S.W.2d 719, 722 (Ky. 1975). The omission of one of these requirements is fatal. *Com., Dept. of Highways v. General Refractories Corporation*, 453 S.W.2d 531 (Ky. 1969).

In *Revenue Cabinet v. Barbour,* 836 S.W.2d 418, 422 (Ky. App. 1992), a panel of this Court noted:

> It has been held that an order allowing an attorneys fee, but not providing for a distribution of funds to the attorney is not a "final order" from which an appeal will lie. *Smith v. Ferguson*, Ky., 295 S.W.2d 792 (1956). Even though the initial order in the case at hand contained CR 54.02 finality language, we believe the attorneys fees issue was nevertheless interlocutory. Where an order is by its very nature interlocutory, even the inclusion of the recitals provided for in CR 54.02 will not make it appealable. *Hook v. Hook*, Ky., 563 S.W.2d 716 (1978).

Similarly, in the unpublished decision in *Hazelwood v. Hazelwood*, No. 2007–CA–001598–ME (May 23, 2008), this Court found that an order granting a modification of child support was not final and appealable where a claim for attorney fees remained unadjudicated. The Panel concluded that the claim for attorney fees was not "collateral," but was part of the underlying claim since the plaintiff requested the fees in her motion for the child support modification, and the claim was made pursuant to statute (KRS 403.220).

The judgment entered by the family court herein did not adjudicate all the rights of the parties. In fact, although it awarded an initial amount of attorney's fees, it specifically set an additional hearing to allow Layne to challenge said amount, to set a payment schedule for such, as well as to determine the amount of reimbursement for expenses owed by each party. Even though the family court's Findings of Fact and Conclusions of Law contained the CR 54.02 finality language, we believe that the issues concerning attorney's fees and reimbursement were explicitly reserved, thus rendering the judgment interlocutory. As a result, Layne was required to appeal the subsequent July 29th judgment awarding Timothy attorney fees to preserve the issue for review. As she did not do so, we conclude that such is waived on appeal.

Next, Layne argues that the family court erred in denying her request for reimbursement of health insurance premiums totaling $7,391.10. Despite the fact that the parties' settlement agreement as well as the divorce decree stated that Layne "will cover the child with her health insurance and the parties shall pay one-

half of any reasonable and necessary health care cost that is not covered by insurance," she now argues that the word "cover" was not intended to impose sole financial responsibility for health insurance premiums on her.

We are of the opinion that this issue is totally lacking in merit. KRS 403.180(5) dictates that the terms of a settlement agreement "are enforceable as contract terms." Further, it is well-settled that in the absence of an ambiguity, a written instrument will be strictly enforced according to its terms. *O'Bryan v. Massey-Ferguson, Inc.*, 413 S.W.2d 891, 893 (Ky. 1966). In responding to Layne's argument, the family court noted during the hearing, "Because when I read the agreement, I did not read it that way. I read that [Layne] was responsible for the premiums and then they would divide the expenses above and beyond that." We agree. If Layne disagreed with the terms of the settlement agreement or divorce decree, the time to challenge such was in 2000, not fourteen years after the fact. As such, the family court did not err in denying Layne's request for reimbursement.

We finally address Timothy's request that he be awarded costs pursuant to CR 73.02(4) because the issues raised by Layne are frivolous and without any reasonable basis or authority. Such an award is only merited if this Court finds that an appeal "is so totally lacking in merit that it appears to have been taken in bad faith." CR 73.02(4). We have emphasized that such sanctions "are appropriate only in egregious circumstances . . . ." *Kenton County Fiscal Court v. Elfers*, 981 S.W.2d 553, 559 (Ky. App. 1998). Certainly, all issues related to

timesharing could be construed as having been brought in bad faith as Layne was aware that Mia was eighteen prior to the record even being certified on appeal. Nevertheless, Layne was permitted to appeal the award of attorney's fees and, but for the procedural posture of such, we would have addressed the issue. Accordingly, we do not believe that the present appeal warrants such a considerable sanction. Therefore, Timothy's request is denied.

For the reasons set forth herein, the orders of the Fayette Family Court are affirmed.

CLAYTON, JUDGE, CONCURS.

KRAMER, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

KRAMER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I agree with the majority opinion in most respects. However, I would grant Timothy's motion pursuant to CR 73.02(4), for the filing of a frivolous appeal. If Layne's appeal was solely based on the trial court's award of attorney's fees, which was filed untimely, I could be persuaded to agree with the majority that this lone issue was perhaps not frivolous. But, when that issue on appeal is put into context with the frivolous nature of the other arguments, I would order that the entire appeal is frivolous and award sanctions.

Layne's timesharing issue, being patently moot, is absolutely frivolous. Further, she does not argue in her opening brief that this issue is of a *substantial public interest*, which was necessary to have this Court review it. Rather, Layne's

argument on this issue, and in fact most of her brief, was a diatribe against the family court. Layne only attempted to rebut Timothy's obviously correct notation that this issue was absolutely moot by resorting to using the exception to the mootness doctrine in her reply brief. Kentucky courts have declined to entertain arguments so introduced in reply briefs. *See Smith v. Commonwealth*, 366 S.W.3d 399, 401 (Ky. 2012) (quoting *Milby v. Mears*, 580 S.W.2d 724, 728 (Ky. App. 1979) ("[T]he reply brief is not a device for raising new issues . . . .")). Accordingly, Layne's "moot yet evading review" argument is not properly before this Court, and even that argument is absolutely frivolous on the facts of this case.

Next, Layne's basis of her appeal of the family court's order denying her request for reimbursement of health insurance premiums is absurd and totally lacking in all merit. Taking this argument in context with the remainder of her other arguments reveals its petty nature.

In my view, this is a textbook example of the type of appeal and briefing that should be sanctioned. My opinion does not change even though Layne is acting pro se. While it is true that "pro se litigants are sometimes held to less stringent standards than lawyers in drafting formal pleadings," pro se litigants are required to adhere to the rules of procedure. *Watkins v. Fannin*, 278 S.W.3d 637, 643 (Ky. App. 2009).

Regarding Layne's representing herself "*pro se*," I will note that although she is described as an accomplished professional in forensic accounting and is likely very articulate and capable, her briefing, citation to the record, adherence to

the *other* rules of civil procedure and appellate practice, as well as citation to case law, reads as though it was drafted by an attorney. If my perception is correct, this is very troublesome. This is a frivolous appeal and briefing; it has the appearance of being drafted by an anonymous attorney refusing to sign his or her name to it, which gives the perception of an obvious attempt by a member of the Bar to avoid sanctions. I would award the full extent of sanctions allowable under CR 73.02(4).

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