

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001453-MR

SANDRA GAYLE COBURN

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 96-CI-00685

ROBERT L. COBURN, II

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, JOHNSON, AND KNOPF, JUDGES.

JOHNSON, JUDGE: Sandra Gayle Coburn appeals from an order of the Boyd Circuit Court entered on May 18, 1998, that confirmed and adopted a report of the Domestic Relations Commissioner (DRC) which, inter alia, found that Robert Coburn was not in arrears in paying temporary maintenance. Having concluded that the trial court did not err in its ruling, we affirm.

The parties were married in 1974 and separated in 1995. On July 17, 1996, Robert filed a petition for dissolution of marriage. On July 31, 1996, Sandra filed a response seeking division of property, custody of the parties' daughter, and

maintenance, both temporary and permanent. The parties then reached an accommodation involving temporary child support, maintenance, and payment of household expenses. According to the arrangement, in addition to some other expenses, Robert paid Sandra \$766 per month for child support and \$1,500 per month in temporary maintenance.

In October 1996, Robert filed a motion for a Putnam v. Fanning,¹ decree. On October 31, 1996, the circuit court entered a decree dissolving the marriage but reserving for further action all issues as to custody, support and maintenance. As part of the local rules, Robert filed an expense schedule on April 24, 1997, in which he listed a \$1,500 monthly expense for maintenance. On April 29, 1997, Sandra filed a motion for temporary maintenance in which she stated that Robert had previously voluntarily and consistently paid \$1,500 per month temporary maintenance, but that Robert had failed to make any maintenance payment in March and April 1997. Sandra asked the trial court to enter an order awarding her temporary maintenance. On May 2, 1997, the trial court entered an order stating, inter alia, "IT IS FURTHER ORDERED that the Petitioner . . . pay the expenses which the parties had agreed he would pay since the separation in January 1995 as temporary measures until further Orders of the Court." The trial court also referred the case to the DRC for a final hearing.

On July 8, 1997, Sandra filed a motion for rule to hold Robert in contempt of court for violating the trial court's May

¹Ky., 495 S.W.2d 175 (1973).

1997, order dealing with temporary maintenance. In support of her motion, Sandra stated in an affidavit that Robert was \$4,000 in arrears on temporary maintenance for May through July 1997. In his response to the motion, Robert alleged that he had paid different amounts of maintenance since the parties' separation and that there was no firm agreement on the exact amount of temporary maintenance he was to pay. The trial court referred the motion to the DRC.

On October 6, 1997, the parties entered into and filed with the trial court a separation agreement that had been prepared by Sandra's attorney. The agreement was comprehensive and dealt with custody, visitation, child support, distribution of property, maintenance, and various miscellaneous items. The agreement contained an "entireties clause" and a clause releasing each of the parties from all claims including all claims for maintenance.

On February 26, 1998, an evidentiary hearing was held before the DRC. Sandra testified that Robert had agreed to start paying her temporary maintenance of \$1,500 per month in October 1996, but that he had been inconsistent in those payments. She admitted that there was no written agreement between the parties as to the amount of temporary maintenance. Robert testified that he did not believe he was obligated to pay any certain amount of maintenance, but he did admit making several payments of \$1,500 per month and stating in his April 1997, expense schedule that he had a monthly maintenance expense of \$1,500. The DRC recommended that Robert not be held in contempt for failing to pay \$1,500 per

month maintenance because there was no order requiring him to pay that amount.

In her exceptions to the DRC's report, Sandra argued that Robert was obligated to pay \$1,500 per month temporary maintenance under the trial court's May 2, 1997, order. In his response, Robert countered that any alleged maintenance arrearage was waived by the parties' separation agreement. On May 18, 1998, the trial court entered an order confirming and adopting the DRC's report. This appeal followed.

Sandra argues on appeal that the trial court erred in confirming the DRC's report. She contends that the DRC erroneously concluded there was no court order requiring Robert to pay temporary maintenance. She points out that the trial court's May 2, 1997, order required Robert to "pay the expenses which the parties had agreed that he would pay since the separation in January 1995 as temporary measures until further Orders of the Court." She further claims that Robert is estopped from denying the existence of an agreement between the parties that he pay \$1,500 per month maintenance because his April 24, 1997, expense schedule, which listed an expense of \$1,500 per month for maintenance, constituted a judicial admission. Combining these two arguments, Sandra maintains that the trial court erred by refusing to award her an amount for arrearage for temporary maintenance.

First, we do not believe that Robert's April 1997, expense schedule represents a judicial admission that he had agreed to pay \$1,500 per month in temporary maintenance. "A

judicial admission is a formal act by a party in the course of a judicial proceeding which has the effect of waiving or dispensing with the necessity of producing evidence by the opponent and bars a party from disputing a proposition in question."² However, in order to be conclusive on an issue, the party's statement "in the light of all the conditions and circumstances proven, must additionally not give rise to the probability of error in the party's own testimony."³ Furthermore, "the determination by a court that a party may not contradict an admission is strong medicine and should be sparingly administered."⁴ Consequently, we are reluctant to classify Robert's expense schedule as a judicial admission. It merely indicates that he claimed to be paying \$1,500 per month maintenance, not that there was a firm agreement between the parties on the issue. Sandra's own testimony indicates that Robert was inconsistent in actually paying the stated amount. The trial court's order is similarly ambiguous because it fails to state a specific amount. Moreover, we note that Sandra did not argue before the trial court that Robert's statement constituted a judicial admission, only that it provided some evidence of an agreed upon amount of maintenance.

²Nolin Production Credit Ass'n v. Canmer Deposit Bank, Ky. App., 726 S.W.2d 693, 701 (1986).

³Id. (emphasis in original) (citations omitted). See also McGuire v. Citizens Fidelity Bank & Trust Co., Ky., 805 S.W.2d 119 (1991) (finding parties' unambiguous and unequivocal statement in a report in probate proceeding binding as a judicial admission).

⁴Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 380 (1992).

Therefore, we cannot say that the trial court erred by failing to award Sandra an arrearage based on the May 2, 1997, order.

Even if we were to accept Sandra's position concerning the May 1997 order, we agree with Robert that the separation agreement constituted a waiver of any claim to an arrearage for temporary maintenance. The pertinent provisions of the agreement provide as follows:

6. **MAINTENANCE**

6.1 The issue of amount and duration of maintenance and the number of months [Robert] shall be responsible for Sandra's health insurance premiums are specifically reserved for determination at a later date.

7. **RELEASE**

7.1 Each party does hereby release and discharge the other from any and all claims, demands, liabilities, damages, actions, choses in action whatsoever, including but not limited to any and all claims for past, present and future maintenance, dower, curtesy, descent and distribution, and any and all other claims arising out of the marriage or otherwise, but excepting from such releases the obligations contained in this agreement.

. . .

10. **MISCELLANEOUS**

. . . .

10.2 Each party acknowledges that this agreement is a full, fair, just, and final settlement of all matters of property between the parties. Each party acknowledges that he or she has had an adequate opportunity to discuss this agreement with his or her attorney and fully understands all of the provisions contained herein.

10.3 This agreement contains the entire agreement between the parties. There are no

warranties, representations, understandings, arrangements, agreements, contracts, or inducements whatsoever except as set forth in this agreement. Each party acknowledges that he or she is not relying on any representation, statement, or inducement which is not set forth in this instrument.

The separation agreement was executed on September 29, 1997, subsequent to the trial court's May 1997 order and prior to the DRC's report. Section 7 clearly states that Sandra released Robert from "all claims, demands, liabilities . . . including but not limited to any and all claims for past . . . maintenance [emphasis added]." Sandra's argument that Subsection 6.1 preserved her right to arrearages for temporary maintenance is unconvincing. By making reference to "duration" of maintenance, we understand Subsection 6.1 to have reserved the issue of the amount and duration of future maintenance, not past maintenance. As a result, we conclude that Sandra waived any claim to an arrearage for temporary maintenance in the separation agreement.

For the above stated reasons, we affirm the order of the Boyd Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

James H. Moore, III
Philip Q. Ratliff
Ashland, KY

BRIEF FOR APPELLEE:

Roger W. Hall
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