

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000566-MR
AND
NO. 1999-CA-002424-MR

EVELYNN SCRIVNER STILZ

APPELLANT

v. APPEALS FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 85-CI-01098

ROBERT C. STILZ, JR.

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: GUIDUGLI, McANULTY, AND TACKETT, JUDGES.

TACKETT, JUDGE: Evelynn Scrivner Stilz appeals, pro se, from two separate post-decree orders of the Fayette Circuit Court, the first denying her request for reimbursement from her ex-spouse, Robert C. Stilz, Jr., for certain medical and dental expenses, and, the second denying her request to reinstate maintenance. These two issues represent respectively the two cases filed on appeal and thus have been consolidated. We affirm.

The parties were married in 1975 and some ten years later in 1985, Evelyn filed a petition to dissolve the marriage. The divorce decree was entered on February 7, 1986, in conjunction with the parties' separation agreement which granted

Evelyn custody of the parties' two children. The agreement contained, among other things, terms regarding maintenance, child support, and payment of medical expenses.

Following the divorce, Evelyn and the children moved to Minnesota. Thereafter, frequent litigation transpired primarily concerning child visitation issues. In 1989 Robert eventually filed a motion for change of custody, which the trial court granted.

In 1990 Evelyn filed a motion relevant to the present litigation requesting that Robert be required to pay various arrearages, including arrearages for medical expenses. The trial court entered an order on the motion which stated that "[w]ith respect to medical expenses, counsel for Respondent is directed to furnish to counsel for Petitioner the necessary insurance forms."

Eight years later in 1998, Evelyn filed another motion titled "Motion for Reimbursement of Medical Expenses." The motion sought reimbursement from Robert in the amount of \$1,117.90, for past medical and dental expenses for the children. These expenses dated back to 1987. Following a hearing, the trial court entered an order requiring Robert to reimburse Evelyn \$208.80 for past medical expenses. Reimbursement was denied for the remaining expenses based on the fact that there had already been a hearing addressing those bills, and because the trial court would not order them to be paid twice. Evelyn thereafter filed an appeal which is the subject matter of case number 1999-CA-000566-MR.

Based upon Robert's interpretation of the separation agreement, in January 1997, he discontinued paying maintenance to Evelyn. Evelyn then filed a motion for review and payment of maintenance, reimbursement of child support, and a claim for damages. The motion, as later amended, requested \$903.30 in child support arrearages; a continuation of maintenance pursuant to the separation agreement; and reimbursement "for any compensatory, punitive, direct, irreparable or prospective damages incurred by [Robert's] gross negligence, non-support and breach of contract."

The trial court ruled to deny this motion noting that a hearing on the motion was scheduled, that Evelyn failed to appear for the hearing, and further that no cause had been given to the court to excuse her failure to appear. The trial court at this time also denied her request to reinstate maintenance because of her delay in seeking maintenance pursuant to the separation agreement, and moreover, on the merits because she was not entitled to a continuation of maintenance. Evelyn thereafter filed a motion for a new trial, which following a hearing the trial court denied. On appeal this question is the subject matter of case number 1999-CA-002424-MR.

First, Evelyn contends the trial court erred in failing to review her maintenance requirements pursuant to the separation agreement and failing to extend her entitlement to maintenance. The relevant portions of the separation agreement are paragraphs 5.1 and 5.3. These paragraphs provide as follows:

5.1 The parties further agree that commencing on the first day of January, 1986 and continuing until the earlier of (a) Wife's

death; (b) Wife's remarriage; (or) January 1, 1997, Husband will pay to Wife as maintenance the sum of Three Thousand Dollars (\$3,000.00) per month, payable one-half on the fifteenth day of each month and one-half on the last day of each month.

. . . .

5.3 Husband agrees that Wife's financial condition and her anticipated financial needs will be reviewed on January 1, 1997. With respect to her then financial condition if it be determined that Wife's financial condition is such that she cannot reasonably provide for herself then such maintenance will continue for such periods and in such amounts as shall provide her with reasonable maintenance.

On January 1, 1997, Robert discontinued maintenance payments pursuant to his interpretation of paragraph 5.1; however, it is uncontested that the provisions of paragraph 5.3 were not complied with in that no formal review of Evelyn's "financial condition and her anticipated financial needs" occurred on January 1, 1997, as alluded to in the agreement.

Evelyn's motion, in effect, sought to enforce belatedly paragraph 5.3 for review and payment of maintenance, which was filed two years after Robert ceased to pay maintenance. The trial court denied Evelyn's motion as both untimely and as unwarranted on the merits, stating that:

[b]ecause the Court has found that there was no reasonable justification for the two (2) year delay in filing her Motion, it does not need to address the merits of her claim, but, after considering Petitioner's intelligence level and vocational opportunities available in Central Kentucky, all as verified by the testimony of Ralph Crystal, Ph.D., a vocational expert, and finding no reason why Petitioner could not have completed her education prior to January 1, 1997, and the Court recognizing that Petitioner had in excess of Three Hundred Thousand Dollars

(\$300,000) in assets available at the time of her divorce, with no debt, the Court finds that there has not been any justification provided to it to support an award of maintenance.

We disagree with the trial court's conclusion that Evelyn's motion was untimely. Her motion sought to enforce a term included in the separation agreement, a written contract. Kentucky Revised Statute (KRS) 413.090(2) provides that actions concerning a written contract must be commenced within fifteen years after the cause of action first accrued. Her cause of action accrued on January 1, 1997, when Robert discontinued maintenance, and her motion to enforce paragraph 5.3 was filed therefore within the limitations period. Nevertheless, the trial court, despite its conclusion that Evelyn's motion was untimely, reviewed the issue on the merits, and concluded that she was not entitled to a continuation of maintenance. We agree.

Paragraph 5.3 contains no standards under which Evelyn's financial condition and needs are to be reviewed. Therefore, in our review of the trial court's decision, we have considered KRS 403.200, the maintenance statute, and have applied the appropriate appellate standards of review.

The determination of whether to award maintenance is highly discretionary with the trial court after its consideration of the dictates of KRS 403.200. Browning v. Browning, Ky. App., 551 S.W.2d 823 (1977). The amount and duration of maintenance is within the sound discretion of the trial court. Weldon v. Weldon, Ky. App., 957 S.W.2d 283, 285-286 (1997); Russell v. Russell, Ky. App., 878 S.W.2d 24, 26 (1994). Furthermore, in matters of such discretion, "unless absolute abuse is shown, the appellate court

must maintain confidence in the trial court and not disturb the findings of the trial judge." Id. (emphasis original); See also Clark v. Clark, Ky. App., 782 S.W.2d 56, 60 (1990); Platt v. Platt, Ky. App., 728 S.W.2d 542 (1987); and Moss v. Moss, Ky. App., 639 S.W.2d 370 (1982). And finally, "In order to reverse the trial court's decision, a reviewing court must find either that the findings of fact are clearly erroneous or that the trial court has abused its discretion." Perrine v. Christine, Ky., 833 S.W.2d 825, 826 (1992).

In support of its conclusion that Evelyn was not entitled to a continuation of maintenance, the trial court specifically cited: (1) Evelyn's intelligence level; (2) her vocational opportunities in Central Kentucky; (3) her opportunity to complete her education; (4) her assets of \$300,000 with no debt following the divorce; and (5) the testimony of a vocational expert who testified that Evelyn was capable of supporting herself in a variety of occupations in the area. These considerations are in accord with the KRS 403.200 factors, and further, we conclude, satisfy the review requirements specified in paragraph 5.3 of the separation agreement. We conclude the trial court's findings of fact were not clearly erroneous, nor did the trial court abuse its discretion in its determination that Evelyn was not entitled to a continuation of maintenance.

Evelyn next contends that the trial court erred by failing to require Robert to reimburse her for child support arrearages, an issue she raised in a prior motion. However, the trial court did not address the child support arrearages in its earlier order noting Evelyn failed to appear for the hearing. In

response, Evelyn's motions styled "Motion for a New Trial" and "Memorandum in Support of Motion for a New Trial of the Issues" did seek a new trial on both the issues of child support arrearages and maintenance, further requesting the court to amend its findings, and make additional findings, as well as to amend the judgement. In the body of the motion and in her "Memorandum in Support of Motion for a New Trial," Evelyn, however, did not mention the issue of the child support arrearages, nor did she raise the issue at the hearing on the motion for a new trial.

In summary, the trial court at no time made findings or ruled on the child support issue. It is clear that Evelyn did not properly bring this failure to the trial court's attention. Kentucky Rules of Civil Procedure (CR) 52.04 requires the litigant to file a subsequent motion for additional findings of fact when the trial court has failed to make findings on essential issues. Moreover, failure to bring the omission to the attention of the trial court by means of a written request will be fatal on appeal. Cherry v. Cherry, Ky., 634 S.W.2d 423 (1982).

This issue is not preserved for review; moreover, Evelyn did not address the issue in detail in her brief. However, we will attempt to address the issue on its merits. From our review of the trial court record, we are not persuaded that Evelyn has met her burden of showing that Robert, in fact, was in arrears on his child support obligation. The derivation of the alleged sum of \$903.30 arrearage is in the form of a hand written calculation on a child support payment printout attached to her motion, and apparently derives from Evelyn's computation of a

cost-of-living adjustment applicable to the period from January 1988 through January 1989. The validity of this calculation is not ascertainable from the record before us. Evelyn failed to attend the scheduled hearing to offer evidence supporting her arrearage calculation, and, hence there is a failure of proof.

Finally, Evelyn contends that the trial court erred by failing to require Robert to reimburse her for the full amount of medical expenses she had requested. Evelyn's second motion requested reimbursement for medical expenses totaling \$1,117.90. Based upon the canceled checks and receipts attached to the motion, the expenses were incurred from 1987 through 1992.

In her motion, Evelyn sought reimbursement pursuant to the separation agreement. The applicable paragraph of that agreement states as follows:

7.2 In addition to the monthly support payments under paragraph 7.1 for the minor children, Husband shall provide (a) hospitalization and medical insurance coverage under the best group policy available to him for each minor child until each minor child reaches 18 years of age, (b) shall pay all reasonable uninsured medical and dental expenses for Anna and Robert until each minor child reaches 18 years of age. Husband's obligation shall extend only insofar as such expenses are reasonably required and are in reasonable amounts having regard to the station of life of the parties and especially the financial circumstances of the Husband. Wife agrees that she will promptly fill out, execute and deliver to Husband all forms and provide all information in connection with any application he may make for reimbursement of medical and dental expenses under any insurance policies which he may have. Husband shall make prompt reimbursement to Wife if she has advanced any sums for such expenses. [emphasis added].

Following a hearing, the trial court entered an order requiring Robert to reimburse Evelyn \$208.80 for past medical expenses. These expenses were allowed because they occurred during a period when a limited power of attorney executed by Robert was in effect authorizing Evelyn to procure medical care for their daughter. With regard to the remaining expenses, the trial court stated that:

[a]ll other medical expenses incurred by Petitioner for the parties children that were provided to the Court at the hearing shall not be reimbursed to her by the Respondent. The Court having found that for the expenses incurred before September, 1990, there had already been a hearing addressing those bills, so this Court will take no further action, and, for those expenses incurred before July 24, 1992, the Court having determined that due to their age, it is inequitable to require Respondent to pay them.

We agree with the conclusions of the trial court. The agreement clearly and specifically required Evelyn to take prompt action regarding reimbursable medical expenses. At the hearing, Evelyn testified that she did not seek recovery earlier because, variously, (1) she thought it would be futile because at the same time the expenses were incurred Robert was seeking financial concessions from her; (2) Robert changed insurance companies; (3) she did not have an attorney; (4) she was suffering from health problems; and (5) the medical bills and canceled checks were in storage.

Despite Evelyn's excuses, she unquestionably breached the term of the contract requiring prompt notification to Robert and thereby lost her entitlement to enforce the reimbursement provisions of the contract. Further, it is undoubtedly much too

late for Robert to seek insurance reimbursement for such past due medical bills as these.

For the foregoing reasons the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Evelynn Scrivner Stilz
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BRIEF FOR APPELLEE:

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