

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001793-MR

LAURIE MCCLUNG

APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD KOPOWSKI, JUDGE
ACTION NO. 93-CI-00266

ALLEN MCCLUNG

APPELLEE

OPINION
AFFIRMING

** ** * * * ** **

BEFORE: BARBER, GUIDUGLI, AND TACKETT, JUDGES.

BARBER, JUDGE: This is an appeal of the Campbell Circuit Court's denial of Appellant, Laurie McClung's ("Laurie"), Motion for Rehearing. We affirm.

On March 4, 1994, Laurie and Allen McClung were granted a dissolution of marriage, and subsequently entered into a Settlement Agreement on June 6, 1996. The trial court entered the Settlement Agreement, which dealt with all financial, child custody and support issues between the parties, as an Agreed Order.

On March 21, 1997, Laurie filed a motion for contempt, asserting that Appellee, Allen McClung ("Allen"), had violated

the terms of the Settlement Agreement by failing to remain current in child support payments, failing to pay his share of a child's medical expenses, and violating express provisions of the Settlement Agreement contained in Paragraph 9. Before the circuit court, Allen argued that paragraph 9 of the Settlement Agreement should be found null and void.

A three day hearing on the parties' motions was held before the Campbell County Domestic Relations Commissioner ("DRC"), resulting in eighteen hours of taped testimony. The testimony was not taped by a court reporter, but by the DRC, himself. By Order dated May 27, 1998, following a hearing on the parties' objections to the DRC's report, the trial court adopted the DRC's decision in its entirety. A timely notice of appeal was filed, with the case captioned as McClung v. McClung, 98-CA-1487-MR.

No designation of the record on appeal was filed by Laurie in the 1998 appeal. In January 2000, Laurie had yet to ensure that the Record on Appeal was certified by the circuit court clerk. She claims that when she attempted to have the testimony given in the hearing transcribed, the audio tapes of the hearing were not capable of transcription, and some of the audio tapes were missing. Laurie did not bring this issue to the attention of this Court, and failed to provide an explanation for her failure to have the record completed or certified.

Allen filed a motion to have the 1998 appeal dismissed due to Laurie's failure to designate or certify the record. Such designation and certification is the responsibility of the

Appellant. CR 75.07(5). Prior to the Court of Appeals dismissal of the case, Laurie filed a motion with the circuit court requesting a second hearing of the parties' motions which were the subject of the 1998 appeal. The grounds for the request to have the matter reheard was the fact that the tapes were not capable of transcription. CR 75.13(1) provides an avenue for parties where the record is not capable of transcription. Laurie did not follow these procedures in the 1998 appeal. Laurie does not cite to any documents indicating that she brought this matter to the attention of the appellate court at any time during the 1998 appeal.

Allen objected to Laurie's motion before the circuit court. He argued, that pursuant to CR 59.02, the circuit court no longer had jurisdiction over the matter, and thus could not order the DRC to conduct another hearing.

On March 14, 2000, this Court dismissed the 1998 appeal for lack of a certified record and Laurie's failure to provide a response to Allen's motion to dismiss the appeal. Laurie then moved the circuit court for a rehearing on this matter, arguing that it would be impossible for her to reconstruct the eighteen hours of testimony, and that it was inequitable to deny her the right to appeal due to the absence of a transcribed record. The circuit court denied the motion for rehearing. We affirm that denial. The time for correcting the problem with the record was during the pendency of the 1998 appeal. Laurie's failure to bring any problems with the record on appeal before this Court at that time precludes litigation of those matters now. Laurie is

time-barred from re-litigating those matters at the present time.

We affirm the ruling of the Campbell Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert N. Trainor
Covington, Kentucky

BRIEF FOR APPELLEE:

Dana E. Deering
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