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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000350-MR
AND
NO. 2019-CA-000357-MR

NANCY FAYE DAVIS — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE BRUCE PETRIE, JUDGE
ACTION NO. 06-CI-00487

JAMES LEWIS DAVIS — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: ACREE, GOODWINE, AND JONES, JUDGES.

GOODWINE, JUDGE: Nancy Faye Davis appeals, and James Lewis Davis cross-appeals, Boyle Family Court orders stemming from their divorce.[1] Both parties

[1] Both parties identify three orders in their notice of appeal or amended notice of appeal: January 31, 2019, November 5, 2018, and November 14, 2016. Record (R.) at 2525-29. The January 31, 2019 order attaches finality language to the November 5, 2018 order. Kentucky

assert the family court erred in interpreting various aspects of the parties' marital separation agreement (MSA). After careful review, we affirm in part, reverse in part, and remand.

BACKGROUND

After thirty years of marriage, James petitioned the Boyle Family Court for a divorce from Nancy. He filed his petition on October 24, 2006. Two years later, the family court bifurcated the divorce and entered a decree of dissolution, followed by the MSA in 2012. Unfortunately, this did not end the contentious litigation. Over the next several years, the parties fought many contentious legal battles, arguing over the division of their real and personal property and needs of their college-aged children: Jordan Beth, John Clay, and Jake.[2] However, these appeals pertain only to two distinct subjects, the children's fund and attorney fees.

In Section 6(b) of the MSA, the parties agreed to each contribute $60,000 to establish a fund for their "children's future undergraduate educational

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Rules of Civil Procedure (CR) 54.02. The November 14, 2016 order does not contain finality language and is not referenced in the January 31, 2019 order. However, the subject matter of the November 14, 2016 order is included in the November 5, 2018 order.

[2] When the parties executed the MSA, Jordan Beth had completed her undergraduate degree and was in graduate school. The parties contemplated that John Clay had two more semesters to finish his undergraduate studies, and Jake had two more years to finish his undergraduate studies. However, both took more time than originally thought. John Clay graduated in May 2014 and Jake in December 2017.

and living expenses." But before the ink could dry on the agreement, the parties were unable to agree on what constituted "educational and living expenses." This resulted in an agreed order being entered on August 12, 2013, noting, "the parties agree that the boys' books, tuition, rent, $500/month allowance and utilities and all children's health insurance as allowed by KRS[3] 403.211[4] are all to be included in the expenses paid from the children's cost fund." R. at 1576-81. However, the parties still disagreed as to "whether the children's unreimbursed medical expenses are considered 'living expenses' for payment from the fund." *Id.* It is noteworthy that the parties also disagreed as to what should be included as "living expenses." *Id.*; R. at 1364-78; R. at 1585-96; R. at 1597-1612; and R. at 1665-69.

On two occasions, James itemized what he believed should be included in the boys' living expenses, which were to be paid from the children's fund. These expenses included: rent, utilities, tuition, books, health insurance, a $500/month allowance for food, household supplies, grooming, toiletries, and transportation. R. at 1597-1612 and 1665-69. We did not find a separate itemization for "college expenses" in the record.

[3] Kentucky Revised Statutes.

[4] Jordan Beth was in graduate school and still considered a dependent within the meaning of KRS 403.211(7)(c)3.

After the family court entered the August 12, 2013 agreed order, the parties agreed via email, without the knowledge of counsel and the family court, to extend payment of Jake's college expenses for at least two more years. Additionally, James questioned Nancy's payments from the children's fund for John Clay's living expenses for his final semester of college that was beyond the two semesters anticipated by the MSA.

Nancy responded by asking the family court to order James to "pay health insurance and [past-due] medical bills of their son Jake, who is 23, and John Clay, who is 25, in addition to Jake's additional two (2) years of college." R. at 2173-78. An accounting of payments from the children's fund showed that as of September 28, 2016, James owed Nancy $41,508 to cover expenses for two more years of college for Jake.

The family court ordered the parties to split the cost of keeping all three children covered under Nancy's insurance until they reached age 26, if needed, and to split the cost of the unreimbursed medical bills. The family court also interpreted the email exchange between the parties to mean

> [James] agreed to reimburse Nancy for one half (1/2) of Jake's college/living expenses incurred from September 24, 2014 through September 23, 2016, regardless of whether or not he had already met his half of the one hundred and twenty thousand-dollar ($120,000.00) cap identified in the November 1, 2012 Marital Separation Agreement.

R. at 2236.

Following the issuance of the order, James filed a motion to alter, amend, or vacate, arguing the family court erred by ordering him to pay unreimbursed medical expenses that were "beyond the age where medical support could be required under KRS §403.211." R. at 2239. James also objected to the family court abandoning the $120,000 cap because of the email exchange extending his college expenses obligation more than two years. Nancy responded, asking the family court to require James pay all, rather than half, of Jake's college/living expenses. Her request also included health insurance and unreimbursed medical expenses until Jake graduated.

Ultimately, the family court ordered James to pay half of John Clay's unreimbursed medical expenses pertaining to his 2013 fall until he turned 26 or was removed from his parents' coverage. It also denied James's motion to alter, amend, or vacate, finding that he was obligated to pay half of Jake's college/living expenses sustained between September 24, 2014, to September 23, 2016. It further noted this payment obligation was not contingent on whether he had already satisfied half of the $120,000 cap identified in the November 1, 2012 MSA.

Also in the parties' MSA, was a section acknowledging and agreeing that Nancy was entitled to $340,000 from James. He agreed that if he did not pay the debt, plus interest, in full by October 31, 2015, an agreed judgment reflecting

the outstanding balance would be entered and Nancy could take any steps necessary to collect from James. As of November 1, 2016, James failed to pay Nancy in full. Therefore, Nancy sought legal counsel to help with collecting the full amount.

James petitioned the family court for help in preparing to auction the parties' jointly owned property. Nancy objected to the auction at that time. Nonetheless, the family court entered an order auctioning the property, and in conjunction, a judgment in favor of Nancy for $391,995.43, plus interest. Following this order, Nancy initiated a foreclosure action to satisfy her lien. After months of litigation, Nancy argued her right to collect her judgment, via the foreclosure action, was superior to James's right to auction the property.

After a hearing, the family court found that Nancy's lien would protect her judgment and ordered the auction to be held, despite the pending foreclosure. It was not until May 24, 2017, that the property was sold at auction. Nancy sought attorney fees for collecting her judgment, which totaled $18,511.47. She petitioned the family court for James to pay the attorney fees under the MSA's Section 10 provision. The family court denied the request. Notably, Nancy and James both filed multiple motions for attorney fees and sanctions. In its discretion, the family court denied all motions for attorney fees and sanctions. Nancy appeals

only the family court's denial of her motion for attorney fees related to the collection of her judgment under the default provisions of the MSA.

Due to the parties' culminated legal battles, they moved for two issues to be "final and appealable." The family court granted the request on January 31, 2019, under CR 54.02.[5] This appeal followed.

STANDARD OF REVIEW

The issues in this case involve the interpretation and meaning of certain terms in the MSA. Questions relating to the construction, operation, and effect of a settlement agreement are generally governed by the rules and provisions applicable to the construction of other contracts. *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 105 (Ky. 2003); KRS 403.180(5). The interpretation of a contract, including determining whether a contract is ambiguous, is a question of law for the courts and is subject to *de novo* review. *First Commonwealth Bank of Prestonsburg v. West*, 55 S.W.3d 829, 835-36 (Ky. App. 2000).

An award of attorney fees is usually governed by KRS 403.220, which "authorizes a trial court to order one party to a divorce action to pay a 'reasonable amount' for the attorney's fees of the other party . . . ." *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 519 (Ky. 2001), *overruled on other grounds by Smith*

[5] A court "may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay." CR 54.02(1).

v. McGill, 556 S.W.3d 552 (Ky. 2018). Generally, a decision of whether to make an award of attorney fees, and, if so, the amount of any such award, is within the discretion of the trial court. *Id.* However, a contractual right to attorney fees is not discretionary. *Corrigan v. Corrigan*, 305 Ky. 695, 205 S.W.2d 495, 498 (1947). A written agreement entered into between the parties, and providing for the recovery of attorney fees, shall be enforced where the husband was represented by counsel and understood his legal rights regarding the contract. *Id.*

ANALYSIS

Given this is an appeal and a cross-appeal, we will take each party's arguments in turn. Nancy contends the family court erred by failing to order James pay: (1) for all of Jake's remaining college expenses; and (2) her attorney fees for the actions taken to collect the $340,000 she was owed under the MSA. On the other hand, James contends the family court erred by: (1) ordering him to pay Jake's college expenses for two more years; (2) abandoning the $120,000 cap; and (3) ordering him to pay medical expenses until the children are 26 years old.

College/Living Expenses and $120,000 Cap

Section 6(b) of the parties' MSA requires both parties to equally split the cost of the children's future undergraduate educational and living expenses with a cap of $120,000. "Two-thirds of this fund shall be used to pay for the remainder of Jake's two years and the remainder for John [Clay]'s two semesters."

Shortly after making this agreement, James also agreed, via email, "to pay Jake's college expenses for at least 2 more years."[6]

The family court interpreted the September 2014 email to mean James agreed to reimburse Nancy for half of Jake's college/living expenses for two calendar years, running from September 24, 2014, through September 23, 2016—regardless of the $120,000 cap. Nancy contends the family court erred by limiting James's payment to only two years and requiring James to pay only half. On the other hand, James contends the family court erred by including living expenses in its order and for exceeding the $120,000 cap.

The general principles of contract law dictate that we first determine whether the provision in question is ambiguous. *See Central Bank & Trust Co. v. Kincaid*, 617 S.W.2d 32 (Ky. 1981). Our Supreme Court has held that a contract is ambiguous "if a reasonable person would find it susceptible to different or inconsistent interpretations." *Hazard Coal Corp. v. Knight*, 325 S.W.3d 290, 298 (Ky. 2010) (internal quotation marks and citation omitted). Furthermore, "[i]n determining whether ambiguity exists, we must look no further than the four corners of the instrument. If we find ambiguity, then extrinsic evidence may be considered in order to determine the intent of the parties. When there is no ambiguity, resort to parol evidence is prohibited." *Partin v. Partin*, No. 2015-CA-

[6] James signed the email written by Nancy in the presence of a notary.

001256-ME, 2016 WL 4255013, at *2 (Ky. App. Aug. 12, 2016); *see Central Bank & Trust Co*., 617 S.W.2d at 33.

In reviewing the language in the email, we hold the provision in question is ambiguous. Specifically, the language "for at least 2 more years" may reasonably be interpreted to mean two years or possibly more than two years. It also begs the question—is the $120,000 cap still in play? Both parties acknowledge the ambiguities, and both parties' interpretations are reasonable. As such, a court "may consider parol and extrinsic evidence involving the circumstances surrounding execution of the contract, the subject matter of the contract, the objects to be accomplished, and the conduct of the parties." *Cantrell Supply Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002). "[O]nce a court determines that a contract is ambiguous, areas of dispute concerning the extrinsic evidence are factual issues and construction of the contract become subject to resolution by the fact-finder." *Id.*; *see Cook United, Inc. v. Waits*, 512 S.W.2d 493, 495 (Ky. 1974); *Reynolds Metals Co. v. Barker*, 256 S.W.2d 17, 19 (Ky. 1953).

Here, the family court decided the email was not incorporated into the MSA and is, therefore, interpreted separately.[7] We agree. The parties failed to

[7] The MSA states, in Paragraph 11, that the MSA is the "entire final agreement between the parties regarding all outstanding issues in this case." In Paragraph 12, it states, "No future

include language referencing, or incorporating, the email to the MSA. Therefore, in interpreting the contract, the court must consider the "plain meaning" of the document. "Absent any ambiguity, 'the intention of parties to a written instrument must be gathered from the four corners of that instrument.'" *Dotson v. Dotson*, 523 S.W.3d 441, 444 (Ky. App. 2017) (quoting *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000)). "When interpreting the terms of a settlement agreement, our primary purpose is to achieve the parties' intentions." *Id*. (citing *Cantrell Supply, Inc.*, 94 S.W.3d at 384).

It is clear to this Court that the parties intended to provide the necessary resources for Jake to complete his college education. The mere use of the word "more" indicates James was obligating himself to something "more" than he originally contracted. Otherwise, why would the email have been necessary? The family court looked to the MSA to glean the intent of the parties with respect to that term and concluded that the parties sought to ensure that Jake had the resources necessary to complete his college education.

In the emailed agreement, James agreed to pay for at least two more years. Using the term "more" obviously implies more than, or in addition to, the two years he was already obligated to pay. Whether he meant a school year or

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modification, alteration, or variation shall be binding or enforceable unless the same shall be in a writing signed by both parties."

calendar year is irrelevant. Every additional calendar year would end in December, as would each of Jake's additional college years. Therefore, either way, two more years would end in December 2016. James agreed to pay for "at least" two more years of Jake's college expenses. Jake graduated in December 2017.

The family court interpreted the email as James's agreement to reimburse Nancy for half of Jake's college expenses incurred from September 24, 2014, through September 23, 2016, regardless of whether James had already met his half of the $120,000 cap identified in the MSA. The family court reasoned that the parties sought to ensure Jake had the resources necessary to complete his college education.

The family court found the most important consideration in construing this agreement was the construction that it had previously placed upon these terms in the parties' MSA. The family court had previously construed that the parties' various agreements concerning their children's post-secondary educational expenses evinced an intent on their part to equally provide sufficient resources necessary to allow each to finish their college education.

Further, the family court found the construction it placed on this agreement and the MSA is that which supports the underlying purposes for which the agreements were reached. As such, it is the construction which is most readily

supported not only by the written language in the September 23, 2014 agreement—but by the language in all their agreements and practices concerning the children throughout this litigation. The family court's interpretation is not unreasonable, based on the facts of this case, and could have extended to Jake's third and final year of college. However, Nancy did not seek reimbursement from James for Jake's final year of college.

We disagree with Nancy's contention that James should have been required to pay for all, not just half, of Jake's college expenses. Yet, we do agree with the family court that James waived the $120,000 cap. Given James's email is a separate agreement and not incorporated by reference into the MSA, we must construe the language with its plain meaning. Nowhere in the writing was it established that James was still desiring the $120,000 cap. In fact, by agreeing to pay more money, logic would tell you the cap would be exceeded. Thus, we affirm that portion of the family court's order requiring James to pay half of Jake's college/living expenses from September 24, 2014, through September 23, 2016.

Attorney Fees

Nancy contends the family court erred in failing to grant her attorney fees for her collection efforts following James's default under the $340,000 judgment. She contends her entitlement to said fees is contractual, not discretionary. We agree. Section 10 of the MSA pertains to default/

indemnification, in which case the defaulting party will hold the other harmless and pay *reasonable* attorney fees in connection to litigation connected with the default, breach, or failure to perform.

In the absence of a contractual or statutory provision, generally a trial court cannot require one party to pay the other's attorney fees. *Bell v. Commonwealth, Cabinet for Health & Family Servs., Dep't for Cmty. Based Servs.*, 423 S.W.3d 742, 750 (Ky. 2014). However, these parties did contract for the award of attorney fees in the case of defaults, breaches, or failures to perform. In addition, both parties filed multiple motions for attorney fees and/or sanctions for a myriad of actions or behaviors with which the other disagreed.

The family court meticulously laid out its reasons for denying each party's request for attorney fees generally, or as sanctions based on its discretion, and we would affirm in that regard as to its denial of attorney fees generally with respect to each party's respective motions for attorney fees for everything except collection of the judgment. For that, we must look at the contract, the MSA. It clearly states the parties are entitled to attorney fees if the other defaults, breaches, or fails to perform.

It is clear James defaulted and Nancy had to seek counsel for collection. Nancy limited her request to $18,511.47 associated solely with James's default under the MSA. Contrary to the family court's conclusion, Nancy was not

seeking a discretionary award of attorney fees under KRS 403.220 and was not "seeking attorney's fees and sanctions based upon [her] perception of the improper conduct of [James,]" related to collection of her judgment. R. at 2540.

Given that language, we must reverse the family court's denial of attorney fees to Nancy for collection of her judgment and remand for the family court to determine if the $18,511.47 requested is, in fact, *reasonable* under the circumstances.

Unreimbursed Medical Bills

James takes issue with the family court ordering him to pay for half of John Clay's unreimbursed medical bills until he reaches 26, or until he is removed from his parents' medical insurance coverage, whichever comes first. He cites KRS 405.020, which we have interpreted to bar courts from "requir[ing] a parent to support a child beyond majority." *Bailey v. Bailey*, 246 S.W.3d 895, 897 (Ky. App. 2007) (quoting *Wilhoit v. Wilhoit*, 521 S.W.2d 512, 513 (Ky. 1975)) (footnote omitted). With that, we agree. A court cannot modify child support payments once a child has reached the age of majority. *Showalter v. Showalter*, 497 S.W.2d 420 (Ky. 1973). However, a family court can order parties to provide for their adult children's health insurance under KRS 403.211(7)(c).

The family court's order states that James shall reimburse Nancy for one half of the payments she made for health insurance coverage and pay half of

the unreimbursed medical bills related to John Clay's accident. Although this is legally acceptable, the family court failed to make factual findings consistent with KRS 403.211(7)(c).

This Court has previously held that a family court erred when it required a father to continue providing health insurance for his emancipated children without entering sufficient findings to support its judgment. *Sammet v. Sammet*, No. 2015-CA-001350-MR, 2017 WL 383448 (Ky. App. Jan. 27, 2017). It is instructive to determine what is needed to comply with KRS 403.211 when parents seek continuing insurance coverage for emancipated minors.[8]

In *Sammet*, we held that although an "original decree provided a basis for continuing coverage if certain conditions were met under KRS 403.211, the family court still must make factual findings that those conditions were satisfied before ordering [a parent] to provide insurance coverage." *Sammet*, 2017 WL 383448, at *5 (citing *Pappe v. Pappe*, No. 2010-CA-002071-MR, 2012 WL 5371891, at *1 (Ky. App. Nov. 2, 2012)). We reversed and remanded the trial court's ruling for appropriate findings, explaining that if the conditions were met, the family court should order the father to provide insurance. *Id.* We instruct the family court, in this case, to do the same. Factual findings must be made showing

[8] We may appropriately consider an unpublished case under CR 76.28(4)(c) because there are no published opinions that address the issue.

John Clay was in school at the time of the accident for James to be obligated to pay the unreimbursed medical expenses of his emancipated child. Therefore, we reverse that portion of the family court's order and remand for further findings consistent with this Opinion.

CONCLUSION

For the foregoing reasons, we affirm in part and reverse in part the Boyle Family Court's orders and remand for rulings consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS APPELLEE:	BRIEF FOR APPELLEE/CROSS-APPELLANT:
Wanda McClure Dry Danville, Kentucky	Ann D'Ambruoso Lexington, Kentucky