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ARKANSAS COURT OF APPEALS

DIVISIONS III & IV

No. CA 10-914

	Opinion Delivered MAY 4, 2011
ANDREA SHA NORMAN APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SIXTEENTH DIVISION [NO. DV2001-5575]
V.	HONORABLE ELLEN B. BRANTLEY, JUDGE
JOHN ERIC ALEXANDER APPELLEE	AFFIRMED IN PART; REVERSED IN PART

JOHN B. ROBBINS, Judge

This appeal challenges portions of the May 24, 2010 order entered by the Pulaski County Circuit Court that denied appellant Andrea Sha Norman the following: (1) an increase in child support based upon appellee John Eric Alexander's monthly gift income, and (2) reimbursement for health-insurance premiums for coverage during the period when appellee failed to provide the coverage required by their property settlement agreement. We affirm as to the child support but reverse as to the health-insurance premiums.

We review domestic-relations proceedings de novo but do not reverse unless the trial court's findings are clearly erroneous. *Hass v. Hass*, 80 Ark. App. 408, 97 S.W.3d 424 (2003). This standard of review applies to child-support awards. *Davie v. Office of Child Support Enforcement*, 349 Ark. 187, 76 S.W.3d 873 (2002). A finding is clearly erroneous when,

although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Nielsen v. Berger-Nielsen*, 347 Ark. 996, 69 S.W.3d 414 (2002). The amount of child support lies within the sound discretion of the trial judge, and that finding will not be reversed in the absence of an abuse of discretion. *Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002). The trial court must determine the payor's income, which is intentionally defined broadly for the benefit of the child. *Paschal v. Paschal*, 82 Ark. App. 455, 117 S.W.3d 650 (2003). Gifts can properly be considered income for child-support purposes. *Ford*, *supra*.

Here, the parties had been divorced since 2002. Appellee was ordered to pay $1200 per month in child support for their three children. Child support was raised over the years, but appellee became unemployed in 2007, and his child support was lowered to $1500. Appellee, who holds a degree from Hendrix and an MBA, was laid off from his job at Acxiom. In August 2009, appellant filed a motion for an increase in child support alleging a material change in appellee's income.

Appellant reviewed appellee's bank statements; appellee provided no tax returns. In reviewing appellee's 2009 gross deposits, appellant believed appellee to have $15,282 in average monthly income. Appellee testified that he and his wife live in a gated community in West Little Rock in a 4380-square-foot house, eat out, buy groceries at high-end markets, and his wife goes to the spa and tanning salon. His stepdaughter and his former father-in-law (appellant's father) live with him. Appellee listed monthly expenses of $9000. His banking

statements showed more than $12,000 per month going out of their account. Appellee testified that his parents give him $8500 to $11,000 per month, although it had dropped in the four months just prior to the hearing to about $7500 a month. Appellee admitted that he does not work and had not been offered a job since being laid off in 2007. Appellee's parents had for years paid for the children's private-school education.

Appellee's father testified that appellee was his only son, that he had helped him over the years, and that he had been supporting him. He testified that he did not know how long he could continue paying appellee's expenses because his savings and dividends were running out. He did not want to sell his stocks because he wanted to be able to leave his grandchildren something. But, he intended to "try to take care of my son until I go broke."

The amount of child support is within a trial court's discretion, which will not be overturned absent an abuse of that discretion. *Ford*, *supra*. Administrative Order No. 10 II defines income to include any form of payment, periodic or otherwise, due to an individual, regardless of the source. "Relevant factors to be considered by the court in determining appropriate amounts of child support shall include . . . other income or assets available to support the child from whatever source[.]" Ark. Sup. Ct. Admin. Order No. 10 (v)(12).

The trial judge stated from the bench that she needed to look at the monthly gift income, but she did not know how long those gifts would continue. She said that if she believed his parents would "continue to give $15,000 a month, then I'd set a certain amount. . . . I don't know how much longer that they can pay. I cannot find that they're going to

provide. They are under the impression that he's looking for a job. I'm not under that impression." The trial court entered an order finding that appellee "is well-educated and intelligent, but he has not made a strong effort to find a job." The order recited that appellee would be imputed $8000 monthly income. The trial court has discretion to determine the actual disposable income of the payor. We cannot say on de novo review that the trial court clearly erred or abused its discretion in failing to set child support on the precarious and indefinite additional future gifts by appellee's father.

We next consider appellant's argument that the trial court erred by not ordering appellee to reimburse her for three years of premiums for health-insurance coverage for the children. The settlement agreement approved by the trial court in their divorce decree required appellee to provide health-insurance coverage "equal to the coverage now in effect," which was a low-deductible United Healthcare policy. His employer changed the health insurance that it provided to its employees in January 2005. Appellant made her objection known to appellee but he did not comply with their agreement. Appellant acquired coverage equal to the original policy for the children beginning in 2005. Appellee provided no health-insurance coverage at all for the children after December 2007.

The trial judge ordered appellant to be reimbursed for the premiums when insurance was totally lacking, beginning January 2008 forward. The trial court found that for the period between January 2005 and December 2007, appellee had provided coverage "although not comparable to the coverage in effect at the time of the divorce." The trial court added that

"if [appellee] had petitioned the Court for relief from the decree [during the lesser-coverage period], the Court would have granted it." It is this period that is at issue. We hold that the trial court clearly erred.

The parties' agreement was incorporated, but does not purport to have merged, into the decree. *See Meadors v. Meadors*, 58 Ark. App. 96, 946 S.W.2d 724 (1997). It was an independent, binding contract. *Wall v. Wall*, 2011 Ark. App. 143. Questions relating to the construction, operation, and effect of such agreements are governed, in general, by the rules and provisions applicable in the case of other contracts generally. *See Surratt v. Surratt*, 85 Ark. App. 267, 148 S.W.3d 761 (2004). Even if this provision could be construed in the nature of child support, subject to modification by the trial court under appropriate circumstances, appellee never moved to be relieved from this unambiguous provision. We reverse the trial court's order to the extent of the reimbursement of those health-insurance premiums.

Affirmed in part; reversed in part.

VAUGHT, C.J., and GRUBER and BROWN, JJ., agree.

HART and HOOFMAN, JJ., agree in part and dissent in part.

CLIFF HOOFMAN, Judge, agrees in part and dissents in part. I agree with the majority opinion that this case should be affirmed on the issue of child support. However, I must respectfully dissent from the reversal of the trial court's decision not to reimburse Norman for insurance premiums paid by her while Alexander also maintained coverage of the children

through his employer. The majority's decision on this issue relies upon an argument not made below or ruled upon by the trial court and, in addition, not even made by Norman on appeal. Instead, Norman argues in her brief that the trial court's decision amounted to an illegal, retroactive modification of child support under Ark. Code Ann. § 9-14-234(b) (Repl. 2009). Not only is this statute not relevant to the requirement in the decree that Alexander maintain health insurance on the children, as the statute only applies to support paid "through the registry of the court," Norman also failed to present this argument to the trial court. It is well settled that we do not consider arguments raised for the first time on appeal, as it is incumbent upon the parties to first give the trial court an opportunity to consider and rule on them. *Lamontagne v. Ark. Dep't of Human Servs.*, 2010 Ark. 190, ___ S.W.3d ___. Thus, I would affirm on this basis.

The majority's decision to find facts and reverse on a ground never argued or raised by the parties is contrary to precedent. As our supreme court stated in *Hanlin v. State*, 356 Ark. 516, 529, 157 S.W.3d 181, 189 (2004), "this court has been resolute in stating that we will not make a party's argument for that party or raise an issue, *sua sponte*, unless it involves the trial court's jurisdiction." In effect, for this court to raise a new ground for reversal on its own motion deprives Alexander of his right to be heard and to respond to this argument.

Furthermore, because this particular argument that the health-insurance provision was a nonmodifiable, contractual obligation was not raised, developed, or ruled upon at the trial court level, there was no proof presented as to whether the settlement agreement was in fact

intended to be an independent, binding contract between the parties. *See Kennedy v. Kennedy*, 53 Ark. App. 22, 918 S.W.2d 197 (1996) (the burden of proof on this issue is with the party relying on the terms of such agreement). In addition, the two different insurance policies from Alexander's employer were never introduced into evidence, and thus, there is a lack of evidence as to whether the subsequent policy was in fact not "equal" to the previous policy as Norman alleged. The only undisputed evidence presented on this issue was that the second policy was a high-deductible policy. While Norman testified that the children's physicians were not covered under the new plan, Alexander testified that it had the same coverage as the previous policy once the deductible was met. Alexander also offered to pay one-half of the deductible to assist Norman, but she declined, instead procuring her own, additional policy on the children.

Even assuming that this settlement agreement is a binding contract between the parties and that there was in fact a breach of this agreement, the measure of damages to Norman would not be the entire cost of insurance premiums on a whole new policy, while Alexander also maintained his employer-provided coverage. Rather, the proper amount of damages would be the *additional* cost to Norman to maintain the same level of health coverage as the previous policy; however, there was a lack of proof presented to the trial court on this issue as well. Therefore, I cannot agree that the trial court's decision on this issue was clearly erroneous, and I would affirm.

HART, J., joins.