

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002383-MR

SARAH C. HUNTER AND
CHRISTINA R. L. NORRIS

APPELLANTS

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE PATRICIA WALKER-FITZGERALD, JUDGE
ACTION NO. 98-FC-00691

FREDERICK C. REIGLE

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: EMBERTON, CHIEF JUDGE, SCHRODER, TACKETT, JUDGES.

TACKETT, JUDGE: Sarah C. Hunter appeals from an order of the Jefferson Family Court alleging that the family court erred (1) by failing to impose sanctions on her ex-spouse, Frederick C. Reigle, despite holding him in contempt of court; (2) by failing to award attorney fees; and (3) by referring Reigle's motion to reduce child support to the domestic relations commissioner. Having reviewed the arguments of the appellant and finding no error, we affirm.

The parties were married on June 20, 1981. They had one child during the marriage, Megan, born December 16, 1987. On

May 13, 1992, a final judgment of divorce was entered by the Superior Court of Morris County New Jersey, Chancery Division - Family Part. The Judgement incorporated a twenty-seven paragraph Matrimonial Settlement Agreement dated April 17, 1992, which, among other things, awarded the parties joint custody of Megan; established alimony, child support, and visitation; and settled distribution of property issues. At the time of the final judgment, Hunter and Megan were living in Kentucky, while Reigle remained in New Jersey.

A long period of unusually acrimonious litigation began in March 1994 when Reigle filed a motion concerning visitation issues in Jefferson Circuit Court. The issues litigated have, either directly or indirectly, concerned Megan. Much of the early background of the case is irrelevant to the present appeal, and we limit our review of the procedural history of the case to the litigation leading up to the current appeal. Earlier litigation will be referred to as necessary in our discussion of the issues raised by Hunter in this appeal.

As a result of allegations of phone harassment, on January 15, 1997, the circuit court entered an order restricting telephone contact between the parties. On January 29, 1998, Reigle filed a motion seeking an order permitting him to have visitation with Megan on Presidents Day 1998. Shortly thereafter, Hunter filed a motion seeking to hold Reigle in contempt of court for violating previous court orders restricting telephone communication with Hunter, and requesting attorney fees for the cost of bringing the motion.

On April 2, 1998, Reigle filed a motion seeking to prohibit Hunter from initiating professional services concerning Megan without input and consultation with him. The motion was based upon the allegation that Hunter had engaged a therapist to examine Megan without first consulting him. In May 1997, Hunter filed a motion seeking attorney fees for the cost of litigating Reigle's request for Presidents Day visitation on the basis that Reigle's motion for the visitation was frivolous and in bad faith.

On February 4, 1998, an order was entered transferring the case from Jefferson Circuit Court to Jefferson Family Court. In June 1998, Hunter filed a motion for a medical child support order seeking reimbursement for certain medical expenses not covered by insurance; the motion also sought attorney fees for the cost of bringing the motions. On June 16, 1998, an order was entered concerning medical child support issues.

On July 13, 1998, as a prerequisite to any additional court proceedings, the family court entered an order requiring the parties to attend mediation in an attempt to resolve some or all of the outstanding issues. On August 27, 1998, Hunter filed a motion to require Reigle to have his Labor Day visitation with Megan in Louisville in light of Megan's attention deficit disorder and scholastic needs. The motion also sought attorney fees for the cost of bringing the motion.

On October 8, 1999, Hunter again filed a motion seeking a modification of visitation and a motion requesting that Megan be allowed to continue treatment with a therapist originally

retained by Hunter. Hunter's concern again was related to scholastic issues. On May 11, 2000, Hunter filed a motion seeking to enforce the parties' agreement concerning Megan's therapist. The order also sought attorney fees for the cost of bringing the motion. On May 25, 2000, Hunter filed a motion to establish summer vacation and to permit Megan to attend a summer camp.

On July 6, 2000, Hunter filed a motion for reimbursement of travel expenses and camp fees. On July 18, 2000, the family court entered an order referring the motion to the domestic relations commissioner. On July 20, 2000, Reigle filed a motion seeking to modify his child support obligation to conform with the Kentucky Child Support guidelines. On July 26, 2000, the family court entered an order referring the matter to the domestic relations commissioner.

Hearings on the above motions on were held beginning November 10, 1998, and continuing on March 10, 1999, and January 7 and 11, 2000. In October and November 2000, counsel for Hunter filed additional affidavits in support of attorney fees.

On February 12, 2001, the family court entered an order addressing the outstanding issues. Among other things, the order held Reigle in contempt of court for violating the circuit court's January 15, 1997 order regarding telephone contact between the parties; denied Hunter's various motions for attorney fees; and renewed the referral of Reigle's motion to modify child custody to the domestic relations commissioner. On February 22, 2001, Hunter filed a motion to alter, amend, or vacate pursuant

to CR 59. On October 2, 2001, the family court entered an order making certain modifications to the February 22, 2001 order regarding matters not relevant to this appeal. This appeal followed.

As a preliminary matter, Reigle contends that Hunter's brief should be stricken for her failure to comply with CR 76.12 (4) (c). While Hunter's brief, for the most part, failed to provide appropriate citations to the record, she did file an extensive volume of exhibits from the trial record, and we will therefore address the appeal on the merits. Nonetheless, we remind counsel that all briefs submitted to this Court should conform, in both content and form, to CR 76.12.

First, Hunter contends that the trial court erred by finding Reigle to be in contempt of its order of January 15, 1997 restricting telephone communications between the parties without imposing sanctions against Reigle. The family court severely reprimanded Reigle and specifically held that he had violated the no telephone contact order.

Contempt is "the willful disobedience toward, or open disrespect for, the rules or orders of a court. Contempts are either civil or criminal. Commonwealth v. Burge, Ky., 947 S.W.2d 805, 808 (1996); Gordon v. Commonwealth, 141 Ky. 461, 133 S.W. 206, 208 (1911). The purpose of civil contempt is to coerce the contemnor into conforming his behavior in accordance with the court's commandment. Shillitani v. United States, 384 U.S. 364, 368, 86 S.Ct. 1531, 16 L.Ed.2d 622, 626 (1966); Blakeman v. Schneider, Ky., 864 S.W.2d 903, 906 (1993). Alternatively, there

is criminal contempt which is levied for the purpose of punishment. The act of disobedience consists of doing something which the court has prohibited. Blakeman, at 906.

The family court's opinion and order does not specify whether its intent was to hold Reigle in civil or criminal contempt; however, since Reigle was held in contempt for an act of disobedience consisting of his past disregard of the court's orders, we construe the family court's order as having held Reigle in criminal contempt rather than civil contempt.

It is within a court's discretion whether to use its contempt power, Smith v. City of Loyall, Ky. App., 702 S.W.2d 838, 839 (1986). In the exercise of its contempt powers, the court is vested with discretionary power on the matter of imposing sanctions. Id. The court's discretionary power necessarily includes the power to refrain from imposing sanctions and fines in the face of compliance. Id. Inasmuch as the discretion in the matter rests with the court imposing sanctions, we will disturb its ruling only if there is an abuse of discretion. "Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision. ... The exercise of discretion must be legally sound." Sherfey v. Sherfey, Ky. App., 74 S.W.3d 777, 783 (2002) (quoting Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994)).

In view of Reigle's flagrant violation of the telephone contact order and the court's conclusion that his conduct "cannot be excused," it is paradoxical that the court did not impose

sanctions. However, Hunter brought the motion to hold Reigle in contempt in February 1998, and the family court entered the contempt order in February 2001. The incidents precipitating the contempt finding had occurred more than three years earlier, and Hunter filed no additional contempt motions relating to telephone contact subsequent to February 1998. As Reigle appears to have complied with the telephone contact order for the three years prior to the contempt order, the trial court did not abuse its discretion by imposing no sanctions against Reigle.

Next, Hunter contends that she was entitled to an award of attorney fees on various grounds. Hunter identified five theories under which she was entitled to attorney fees:

(1) because the parties' marital settlement agreement requires the losing party to pay the attorney fees of the prevailing party; (2) because Reigle's obstructionist tactics directly increased Hunter's attorney fees; (3) because Reigle rejected Hunter's July 1999 offer of judgment regarding visitation, but did not obtain a judgment at trial more favorable than her offer; (4) because Reigle made no request for attorney fees yet the family court weighed Hunter's motions for attorney fees against her uncooperative parenting and conduct; and (5) because a significant disparity of income exists between the parties.

Hunter claims that she is entitled to attorney fees for the cost of litigating her entitlement to reimbursement for fees related to Megan's attendance at a summer camp in the summer of 2000, and the cost of returning Megan to Louisville at the conclusion of her June 2000 summer visitation with Reigle. In

support of her claim, Hunter relies upon paragraph twenty-six of the parties' marital settlement agreement, which provides as follows:

In the event either party has to enforce the terms of this Agreement, the defaulting party shall be responsible for the counsel fees and costs of the nondefaulting party.

Other provisions of the agreement required Reigle to pay 40 percent of the cost of Megan's summer camp expenses and all of the costs of travel related to visitation. Hunter's motion of July 6, 2000, sought recovery of both Reigle's share of the cost of summer camp and the cost of Megan's return trip to Louisville from New Jersey relating to a visitation with Reigle.

In its order of February 12, 2001, the family court awarded Hunter the cost of a return trip from New Jersey from Louisville; however, it denied her request for fees relating to summer camp because "[a]s has been her pattern with other decisions, [Hunter] made the determination to send Megan to camp without consulting the respondent." The family court further noted that "[t]he idea that one parent should send Megan to an extended out-of-state program at a significant cost to the other, and even more, to contemplate a reduction of the respondent's time with him, without consulting or even notifying the respondent, is completely inconsistent with the terms of the parties' agreement to share joint custody." The family court further held that Hunter "should shoulder the burden of the substantial cost of the camp incurred unilaterally."

The family court's ruling on Hunter's July 6, 2000 motion does not support the appellant's claim that she was the

"nondefaulting party" in the litigation. To the contrary, the ruling demonstrates that Hunter, also, violated the terms of the parties' settlement agreement by failing to consult with Reigle regarding Megan's attendance at summer camp; that Reigle was justified in refusing to reimburse Hunter for the camp fees; and that Hunter precipitated unnecessary attorney fees for both parties by attempting to recoup summer camp expenses to which she was not entitled and which she incurred in violation of the parties settlement agreement. In view of Hunter's unclean hands in the matters addressed in her July 6, 2000 motion, the family court did not abuse its discretion by declining to award Hunter attorney fees under paragraph twenty-six of the settlement agreement for the cost of bringing the motion.

Hunter also claims that she is entitled to attorney fees on the basis that Reigle's unwarranted litigation tactics directly increased her attorney fees. Under this theory, Hunter contends that she is entitled to fees relating to Reigle's motion seeking visitation with Megan on Presidents Day 1998 and as a result of his failure to cooperate on the entry of the medical child support order. Hunter further claims that the family court applied the wrong standard when it stated that "obstruction and/or prolonging of the litigation may not be a basis for an award of attorney fees until an imbalance of resources is found unless the obstruction is related to discovery, in which case attorney's fees may be awarded under CR 37." Hunter believes this is an incorrect statement of the law and alleges that Gentry v. Gentry, Ky., 798 S.W.2d 928 (1990), authorizes the imposition

of attorney fees for obstructionist tactics and refusal to cooperate regardless of any disparity of resources.

In support of its above statement, the family court cited Lampton v. Lampton, Ky. App., 721 S.W.2d 736, 739 (1986). In Lampton, the misconduct at issue was discovery violations. While the family court correctly stated the holding in Lampton, we do not believe Lampton intended to hold that attorney fees may not be awarded under any circumstances in a domestic relations case in instances where a party has filed harassing or vexatious pleadings, unrelated to discovery, and while at the same time the parties have similar resources. In such cases, CR 11 provides a basis for the trial court to impose sanctions against the violator, including the imposition of reasonable attorney fees. Moreover, in Gentry there was a disparity of resources, and we disagree with Hunter's interpretation of that case.

Inasmuch as the family court was not considering a request for attorney fees under CR 11, we conclude that it applied a correct statement of the law. It is well settled that an allocation of attorneys fees in a divorce action is entirely within the court's discretion. Browning v. Browning, Ky. App., 551 S.W.2d 823 (1977). The only requirement is that there be a disparity in the financial resources of the parties. KRS 403.220; Gentry v. Gentry, supra.; Glidewell v. Glidewell, Ky. App., 859 S.W.2d 675, 679-680 (1993). Here, as discussed later, Hunter failed to show that there was a disparity of financial resources and, further, the family court determined that "neither party has fully complied with the orders of this court and both

have contributed to the length and expense of this litigation.” The family court also professed its agreement with the holding of the predecessor circuit court regarding attorney fees. The circuit court gave fair warning it seems when it stated in its order of April 4, 1996:

This never ending battle between these parties continues. If the parties insist on coming before this Court on matters that should be resolved between them, they will be responsible for their own attorney fees.

The family court did not abuse its discretion in denying Hunter’s motion for attorney fees for expenses incurred as a result of Reigle’s motion seeking visitation with Megan on Presidents Day 1998, and as a result of his failure to cooperate on the entry of the medical child support order.

With regard to Hunter’s May 25, 2000 motion to establish summer vacation visitation schedule, Hunter contends that she is entitled to an award of attorney fees pursuant to CR 68. CR 68 provides that if a party defending against a claim makes an offer of settlement to the claimant, and the claimant rejects the offer, and the award to the claimant is subsequently not more favorable than the offer, then the offeree must pay the costs of the litigation incurred after the making of the offer. CR 68; Smith v. Ky. State Fair Board, Ky. App. 816 S.W.2d 911 (1991). Hunter contends that since the visitation schedule ultimately set by the Court was not more favorable than the proposed schedule served upon Reigle in July of 1999, CR 68 entitles her to an award of attorney fees.

In the usual case, CR 68 would apply to offers which could be quantified, and hence an objective comparison could be made between the offer and the award. Whether the family court's ultimate disposition of summer visitation was more or less favorable than her offer requires subjective analysis. Hunter claims her offer was more favorable, Reigle claims "the trial court's judgment regarding Rick's visitation with Megan was far more favorable than the offer."

The family court's February 12, 2001, order did not address the issue of whether Hunter's offer was more favorable, and it not the function of an appellate court to resolve a disputed fact such as this. The order did, however, state:

The petitioner [Hunter] has proposed that the summer be divided essentially into thirds, giving each parent equal time and giving Megan an extended opportunity to attend camp. . . . To divide the summer as the petitioner proposes is merely to invite further litigation regarding the child's summer and once again to place this unfortunate child in the midst of a battle between her parents. . . Accordingly, the summer shall be divided between the parents and each may, during the time Megan is with him/her, permit the child to participate in such summer programs as he/she deems appropriate.

It therefore appears that a significant aspect of Hunter's proposal was decided against her. Based upon the record before us, Hunter is not entitled to attorney fees for the summer 2000 visitation litigation under CR 68.

Hunter also claims that the family court abused its discretion by not awarding attorney fees under KRS 403.220 in that the family court improperly offset Hunter's request for fees against her co-parenting failures even though Reigle had filed no

related motions or requests for fees. KRS 403.220 provides as follows:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

The family court has broad discretion in awarding fees under KRS 403.220. The amount of an award of attorney's fees is committed to the sound discretion of the trial court with good reason. That court is in the best position to observe conduct and tactics which waste the court's and attorneys' time and must be given wide latitude to sanction or discourage such conduct. Gentry v. Gentry, 798 S.W.2d at 938. Under the facts of this case, the family court's consideration of Hunter's litigation history was a proper consideration in exercising its broad discretion, and its denial of the fees under KRS 403.220 was not an abuse of discretion.

Hunter also contends that she is entitled to an award of attorney fees because there is a substantial disparity in the income of the parties. However, the standard under KRS 403.220 is not disparity of income, it is disparity of financial resources. In this regard, the family court stated, "[i]n this action, the court has been advised of the petitioner's income, but of none of her assets. While it is clear that there is a substantial disparity in income, the court is not advised as to

resources of either party." In light of this deficiency in the record, the court did not abuse its discretion in denying attorney fees with regard to a disparity of financial resources.

Finally, Hunter contends that the family court erred by referring Reigle's motion to modify child support to the domestic relations commissioner. Hunter contends that the motion is in violation of the parties' settlement agreement. Hunter notes that under the terms of the agreement, child support could not be modified unless her salary exceeded \$50,000. The February 12, 2001 order specifically provided that the case was remanded to the domestic relations commissioner "subject to this qualifying factor."

KRS 22A.020(1) vests this Court with jurisdiction over final judgments, orders and decrees. Kentucky Rules of Civil Procedure (CR) 54.01 defines a final or appealable judgment as one "adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under CR 54.02." Accordingly, the family court's order of February 12, 2001, granted final judgment on the issues of sanctions and attorney fees and contained the requisite CR 54.02 finality language deeming it a final and appealable order.

However, with respect to the child support issue, the February 12, 2001 order did not adjudicate the rights of the parties; rather, the order referred the case to the domestic relations commissioner for a consideration of Reigle's motion in light of the parties settlement agreement. Under these

circumstances, the child support issue is interlocutory and, therefore, not properly before this Court.

For the foregoing reasons the judgment of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Christina R. L. Norris
Louisville, Kentucky

BRIEF FOR APPELLEE:

Mark Mulloy
Mulloy & Mulloy
Louisville, Kentucky