

RENDERED DECEMBER 18, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000116-MR

REGINA GAIL STUMBO

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT
HONORABLE KRISTI HOGG GOSSETT, JUDGE
ACTION NO. 05-CI-00198

TIMOTHY C. STUMBO

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * **

BEFORE: CAPERTON, THOMPSON, AND WINE, JUDGES.

WINE, JUDGE: Regina Gail Stumbo (“Regina”) appeals from the order of the Carter Family Court denying her an award of attorney fees. Regina presents one issue on appeal: whether the court, in its determination not to award attorney fees, erred in failing to give consideration to the parties’ financial situations pursuant to Kentucky Revised Statute (“KRS”) 403.220. After reviewing the arguments of the

parties, the record, and the applicable law, we agree with Regina and, accordingly, reverse the Carter Family Court and remand for additional findings.

Timothy C. Stumbo (“Timothy”) brought a post-dissolution motion for the court to enter an order requiring Regina to take the parties’ two minor children exclusively to medical professionals listed on the “preferred provider list” of the insurance company and for Regina to be responsible for any extraordinary medical expenses.

The court held an evidentiary hearing on December 13, 2007, and issued its findings of facts, conclusions of law and order on December 15, 2007. In its order, the court recited the evidence presented regarding the parties’ current financial situations, then summarily denied Regina’s motion for attorney fees. Subsequently, Regina moved the court to make additional findings of fact pursuant to Kentucky Rules of Civil Procedure (“CR”) 52.02. That motion was denied. It is from these orders that Regina now appeals.¹

On appeal Regina argues that the trial court did not take into consideration the parties’ current financial resources as the order does not contain any analysis prior to the court overruling the motion. Regina requests this Court to impose a good faith effort requirement on trial courts to show that they considered the parties’ current financial resources prior to denying a motion for attorney fees.

¹ Although Regina moved the trial court on at least two prior occasions to award her attorney fees for motions she filed, the court either denied or failed to address the requests. Because these were interlocutory orders, Regina made no effort to perfect an appeal until the final orders of December 15, 2007 and January 10, 2008.

Timothy argues that the trial court did not commit reversible error by overruling Regina's motion for attorney fees, as it was within the court's sound discretion to overrule Regina's motion.

At the outset we note that decisions concerning the award of attorney fees are within the discretion of the trial court. As such, this Court will not overturn said decisions absent an abuse of discretion. The test for abuse of discretion is "whether a trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). *See also Miller v. McGinty*, 234 S.W.3d 371, 372 (Ky. App. 2007).

We recognize in deciding whether to award attorney fees pursuant to KRS 403.220 that the trial court "need only 'consider' the parties' financial situation." *Hollingsworth v. Hollingsworth*, 798 S.W.2d 145, 148 (Ky. App. 1990). Consideration of the parties' financial situations does not require specific findings by the trial court, but may be evidenced by the trial court being apprised of the parties' financial situations contained within the record. *Miller* at 374.

KRS 403.220 authorizes a court to award reasonable attorney fees in a dissolution proceeding where a financial disparity exists between the parties. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 519 (Ky. 2001).

Timothy earned more than \$100,000 annually, assumed the bulk of the outstanding financial obligations and is responsible for the health care costs of the parties' two children. Regina is only described as a full time student

responsible for raising the children and apparently dependent on child support as her only source of income. Clearly there is a disparity between the incomes of the parties. While a trial court could, within its discretion, award no attorney fees when one party enjoys a six figure income and the other nothing, such a decision would hardly be fair or reasonable and thus arbitrary.

It is well-established that a final judgment shall not be set aside because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless the failure is brought to the attention of the trial court by a written motion pursuant to CR 52.02; CR 52.04. In the absence of such a motion, this Court must presume that the evidence presented at trial supports the trial court's conclusions. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). Conversely, however, CR 52.02 does not require a trial court to make additional findings in response to a motion. The Rule simply states that the court may amend its findings or make additional findings in response to a motion. By its own terms, the Rule permits the trial court to determine the sufficiency of its factual findings. Where a party has preserved an issue through a proper motion, as did Regina, the question on appeal is whether the omitted finding involves a matter which was essential to the trial court's judgment. As this involves a question of law, we need not defer to the trial court's conclusion that its findings were sufficient. Furthermore, since the issue is preserved for review, this Court is not required to presume that the evidence supports the trial court's conclusions. With this standard in mind, we find Regina was entitled to specific factual findings on

several issues she raised relating to the denial to award her any attorney fees. The trial court could not determine if there was a disparity in the incomes, nor can this Court decide if the denial of attorney fees was arbitrary, without a finding as to Regina's income.

In the case *sub judice*, the record is not clear that the trial court took into consideration Regina's current financial resources. Based on the record and the applicable law, we find the trial court abused its discretion by denying Regina's motion for attorney fees. Accordingly, we vacate the Carter Family Court judgment and remand this matter to the trial court for additional findings as to Regina's income.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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