

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL KENT WAGNER,

Plaintiff-Appellant,

v

JENNIFER ANN WAGNER,

Defendant-Appellee.

UNPUBLISHED

March 31, 2009

No. 283928

Livingston Circuit Court

LC No. 05-037062-DM

Before: Cavanagh, P.J., and Fort Hood and Davis, JJ.

PER CURIAM.

In this child-custody action, plaintiff appeals as of right from the order of the family division of the circuit court requiring him to reimburse certain attorney fees and costs of defendant, his former wife. We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts

The parties were married in 1994 and divorced in 2005. The judgment of divorce provided for joint legal and physical custody of their three minor children, but by July 2006 neither party lived in the children's former school district. Each party enrolled the children in schools near their respective homes. Unable to resolve that disagreement, and also disagreeing over how best to treat the older child's attention deficit hyperactivity disorder, the parties each sought a change of custody. The custody battle resulted in an order awarding defendant sole legal and physical custody of the children. This Court affirmed that order.¹

The original custody order dates from August 30, 2007, and referred the matter to the friend of court (FOC) to address parenting time and child support. A hearing took place the following September, and on October 26, 2007, the trial court entered an order adopting the referee's recommendations concerning parenting time, including that plaintiff must administer

¹ *Wagner v Wagner*, unpublished per curiam opinion of the Court of Appeals, issued October 30, 2008 (Docket No. 282724).

medications as prescribed, refrain from speaking poorly of defendant to the children, and participate in therapy to better his parenting skills. The order additionally called for a review hearing before the FOC on December 7, 2007.

A memorandum from defendant's attorney to the trial court dated December 6, 2007, complained of plaintiff's failure to abide by the conditions on his parenting time, and requested that those parenting privileges be suspended. Counsel additionally requested that plaintiff "be ordered to pay \$2,500 of [defendant's] attorney fees, as she is unable to pay and [plaintiff] should be required to do so for refusing to comply with the previous Orders of this Court despite having the ability to do so."

At the December 7, 2007, hearing, plaintiff admitted not administering medication to the children as prescribed, suggesting that it was not always made available, or that instructions were lacking or vague. Plaintiff additionally stated that rather than seek out a licensed professional for the court-ordered therapy, he had gone to his pastor for that purpose. There was no discussion of shifting attorney fees at that hearing.

A fax from defendant's attorney to the hearing referee, dated December 7, 2007, but mechanically date-stamped for one week later, requested a ruling on the request for \$2,500 in attorney fees. Counsel additionally submitted an affidavit listing counsel's fees as \$3,640, paralegal fees adding up to \$361, and costs of \$81.15, for a total of \$4,163.15. The hearing referee responded with a recommendation that plaintiff be required to pay the \$2,500 requested, plus the \$81.15 in costs, stating that plaintiff was employed but defendant was not, and asserting that defendant "should not have needed to expend the amounts for legal representation had [plaintiff] complied with court orders." The trial court adopted that recommendation, and then denied a motion for reconsideration. This appeal followed.

Plaintiff's sole issue on appeal is whether the trial court erred in ordering him to pay attorney fees where no hearing addressed the matter, including defendant's attorney's efforts or plaintiff's ability to pay, especially where that order followed from a recommendation from the FOC that itself followed from a fax outside of court proceedings.

II. Fees and Costs

We review a trial court's award of attorney fees and costs for an abuse of discretion. See *In re Condemnation of Private Property for Highway Purposes*, 221 Mich App 136, 139-140; 561 NW2d 459 (1997); *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 518; 556 NW2d 528 (1996), *aff'd* 458 Mich 582 (1998).

"Awards of costs and attorney fees are recoverable only where specifically authorized by a statute, a court rule, or a recognized exception." *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997). MCR 3.206(C) authorizes awards of fees and expenses in domestic relations actions where (a) the party seeking the award is "unable to bear the expense of the action," but "the other party is able to pay," or (b) "the attorney fees and expenses were incurred because the other party refused to comply with a previous court order"

In this case, defendant asserted both that plaintiff had a superior ability to pay her legal fees, and that plaintiff was culpable in the matter because his failure to abide by certain court-ordered conditions of parenting time caused her to incur additional legal expenses.

A. Reasonableness

Plaintiff asserts that there was little, if any, evidentiary basis, for attributing any of defendant's legal expenses specifically to any misconduct on plaintiff's part.

“Where the opposing party challenges the reasonableness of the fee requested, the trial court should inquire into the services actually rendered prior to approving the bills of costs. . . . Although a full-blown trial is not necessary, an evidentiary hearing regarding the reasonableness of the fee request is.” *B & B Investment Group v Gitler*, 229 Mich App 1, 15-16; 581 NW2d 17 (1998), quoting *Wilson v General Motors Corp*, 183 Mich App 21, 42-43; 454 NW2d 405 (1990). Where a party seeking attorney fees submits no evidence regarding what fees were actually incurred because of the other party's misconduct, and the trial court makes no finding in that regard or concerning the reasonableness of the fees, an award of fees is an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 166; 693 NW2d 825 (2005).

In this case, defendant's attorney did not broach the subject of attorney fees at the December 7, 2007, hearing, but sought to revive the issue through an informal fax. The hearing referee simply adopted counsel's position, without affording plaintiff any opportunity to object, and the trial court in turn simply adopted the resulting recommendation. The fax and accompanying affidavit were never admitted into evidence, and plaintiff was never called upon to raise objections. Further, those documents are not sufficiently detailed to indicate precisely what attorney work came about in direct response to any misconduct on plaintiff's part. Moreover, we note that no proceeding took place specifically to address the question of any of plaintiff's failures to abide by his parenting-time conditions; such issues were instead litigated in the course of proceedings already scheduled in the normal course of the litigation.

The lack of any input from plaintiff on the matter, or any inquiry into defendant's attorney's reasonable and customary billing rates, or how much time, effort, or expense was devoted specifically to responding to any misconduct on plaintiffs' part, by way of arguments or evidence in open court, was error. *Reed, supra*. The lack of any judicial findings of fact in these regards was also erroneous. *Id.*

For these reasons, the trial court erred in adopting the FOC's recommendation in connection with attorney fees and costs.

B. Ability to pay

“Attorney fees in a divorce action are awarded only as necessary to enable a party to prosecute or defend a suit.” *Gates v Gates*, 256 Mich App 420, 438; 664 NW2d 231 (2003). In this case, although there was evidence in the record to show, for purposes of calculating child-support obligations, that plaintiff was employed and that defendant was not, the question of the extent to which either party was obliged to invade assets to satisfy attorney fees was not raised and resolved on the record. Plaintiff insists that defendant's mother in fact has fully covered defendant's attorney's fees in this action, citing testimony in which the mother agreed that she

had telephoned plaintiff and said that if he won custody she would take him through the appeal process, and that she was “financially . . . more powerful than he.” Conversely, plaintiff asserts that he owes his own attorneys more than he can reasonably expect to pay in the foreseeable future.

Because the present abilities of the parties to afford their respective attorneys’ fees was not fully litigated below, the trial court erred in adopting the hearing referee’s recommendation in that regard.

For these reasons, we vacate the award of attorney fees and costs, and remand this case to the trial court with instructions to decide the question anew after the necessary evidentiary development.

Reversed and remanded. We do not retain jurisdiction.

/s/ Michael J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Alton T. Davis