

RENDERED: August 22, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-3163-MR

ROBERT LYLE ESLINGER

APPELLANT

v. APPEAL FROM MEADE CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
ACTION NO. 91-CI-0161

CYNTHIA ANN ESLINGER (NOW RICKLEFS)

APPELLEE

OPINION AFFIRMING

* * * * *

BEFORE: DYCHE, GUIDUGLI, and MILLER, Judges.

MILLER, JUDGE. Robert Lyle Eslinger, acting pro se, appeals an October 24, 1996 order of the Meade Circuit Court rejecting the recommendations of the Domestic Relations Commissioner (Commissioner) and modifying the custody arrangement by transferring primary residence of the parties' three children to appellee, Cynthia Eslinger Ricklefs. We affirm.

The parties were married in 1982 and separated in 1990. During the marriage, they had three children: John, Travis, and Tessa, born January 1983, August 1984, and February 1987, respectively. A decree of dissolution was entered in February 1992, but the issue of child custody was reserved for later adjudica-

tion. On April 9, 1993, the circuit court granted the parties' joint custody with primary residence of the children being with Robert. On December 14, 1995, Cynthia moved for modification of custody and requested sole custody of the children. On April 2, 1996, Robert filed a motion seeking an order from the court to require Cynthia to pay his attorney fees prior to the child custody hearing. After a hearing on this motion, the Commissioner denied Robert's motion for advance attorney fees based on a lack of legal authority. The Commissioner conducted evidentiary hearings on May 10, 1996 and June 6, 1996 on the issue of custody and child support. On June 21, 1996, the Commissioner entered a report recommending that Cynthia's motion for change of custody be denied, but that Robert be ordered to undertake parental counseling. Both parties filed exceptions to the report. On October 24, 1996, the circuit court entered an order and opinion rejecting the Commissioner's recommendations by sustaining Cynthia's exceptions to the report on the issue of custody. The circuit court ordered that the parties retain joint custody with the primary residence of the children being with Cynthia. The court also set out visitation rights for Robert consistent with the standard visitation guidelines. This appeal follows.

Robert has raised three challenges to the procedure utilized in determining the custody issue. First, he maintains the Commissioner erred by failing to order Cynthia to pay his

attorney fees in advance. Second, he argues the Commissioner erred by refusing to allow him to submit on avowal a one-page document consisting of a "Staff Note" prepared by Dr. Craig Cabezas, Ph.D. And, third, Robert contends the circuit court erred by considering Cynthia's exceptions to the Commissioner's report because they were allegedly filed too late. Finding no error, we affirm the circuit court's order.

The Commissioner denied Robert's prehearing request for attorney fees stating he knew of no authority that required an opposing party in a domestic relations case to provide, in advance, the fees necessary to retain counsel. Robert cites Kentucky Revised Statute (KRS) 403.220 and Molloy v. Molloy, Ky. App., 460 S.W.2d 15 (1970), but neither of these sources supports his position. KRS 403.220 gives the circuit court discretion to award attorney fees for "legal services rendered and costs incurred prior to commencement of the proceeding or after entry of judgment." See also Glidewell v. Glidewell, Ky. App., 859 S.W.2d 675 (1993). The language of the statute indicates that the legal services must have already been rendered before a court may order payment by the other party. In Molloy v. Molloy, supra, the court remanded the case for further consideration on the issue of the denial of attorney fees by the Commissioner, who believed he had no authority to grant attorney fees. However, in Molloy, the court noted that the case law was in a state of confusion concerning the award of attorney fees and a subsequent

case decided after judgment, and prior to appeal, allowed the award of attorney fees under the circumstances in Molloy. In the case sub judice, Robert has presented no statutory or case law authorizing an award of attorney fees in advance or prior to the rendering of legal services. Moreover, Robert did not raise this issue before the trial judge or in his exceptions to the Commissioner's report.

Robert's second argument, that the Commissioner erred by failing to permit submission of a document on avowal, does not compel reversal. Dr. Cabezas is a psychologist who was acting as a family counselor for Robert and his children in November 1995. In conjunction with counseling, Dr. Cabezas prepared a document designated as "staff notes" and dated November 28, 1995.¹ The document contains opinions by Dr. Cabezas about Robert's parenting skills. It states in part: "[Bob] continues to be structured and firm with his consequences. Based on his presentation, it appears as though his consequences are appropriate [Bob] continues to do a good job of consequenting his children. He tries to be consistent and firm." During the custody hearing, Robert attempted to introduce this document into evidence, but Cynthia's attorney objected based on hearsay and a lack of foundation. Robert did not produce Dr. Cabezas or any legitimate records custodian to authenticate the

¹Robert has included this document in his appendix to his brief.

document. Robert also failed to provide a sufficient foundation for admissibility under any exception to the hearsay rule. See, e.g., Kentucky Rule of Evidence (KRE) 803(6) and City of Louisville v. Willoughby, Ky., 455 S.W.2d 558 (1970) (allowing copy of hospital record to be filed on avowal through testimony of custodian). The Commissioner sustained the objection and also denied Robert's request to file the document as part of the record through an avowal.

Robert argues he should have been permitted to submit the document by avowal. Ky. R. Civ. P. (CR) 43.10, which deals with avowals, states:

In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, upon request of the examining attorney, the witness may make a specific offer of his answer to the question. The court shall require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

See also KRE 103.

Robert failed utterly to follow the rules of evidence in presenting Dr. Cabezas's notes at the custody hearing. Robert's failure to provide either a proper foundation or authentication of the document support the Commissioner's

decision to exclude the document from evidence. The purpose of an avowal or offer of proof is to provide a record for an appellate court to evaluate the trial court's evidentiary ruling. See Perkins v. Commonwealth, Ky. App., 834 S.W.2d 182 (1992). In an action tried without a jury, the trial court has some discretion on whether to allow an avowal. Id. We cannot say the Commissioner erred by not allowing Robert to file the document as an avowal because it appears the document was not admissible on any ground.

Robert cites United Fuel Gas Co. v. Mauk, Ky., 272 S.W.2d 810 (1954), and Eilers v. Eilers, Ky., 412 S.W.2d 871 (1967), as supporting his position on the avowal, but these cases are distinguishable. In Mauk, the court held that the appellant's offer of proof contained in an avowal was sufficient to permit appellate review of the issue concerning fair market value for condemned land despite the appellant's failure to satisfy the best evidence rule. In that case, the court indicated the significance of the proof was obvious and the avowals were sufficient to permit review. Mauk did not concern the propriety or availability of an offer of proof; rather, it involved the sufficiency and necessity of the avowals that were made.

In Eilers v. Eilers, supra, the court held that the trial court erred by refusing to allow appellant to submit by way of avowal letters written by a witness to the trial judge

concerning the child custody matter at issue in the case. The appellate court specifically found the letters were not inadmissible "on any ground" under CR 43.10. Unlike the case sub judice, the party in Eilers tendered the documents through the witness who had written the letters, so the evidentiary barriers present in our case were not present in Eilers.

In addition, Robert has not demonstrated that the refusal to allow submission of Dr. Cazebas's notes on avowal precluded review of the Commissioner's evidentiary ruling on the admissibility of the document. Robert has not maintained or shown that the Commissioner's evidentiary ruling was incorrect or affected a substantial right. See KRE 103(a) and R. Lawson, The Kentucky Evidence Law Handbook, § 1.10 VI (Third Edition 1993) (discussing harmless error standard for excluded evidence).

Finally, Robert contends that the circuit court erred by considering Cynthia's exceptions to the Commissioner's report because they were filed untimely. The Commissioner's report was filed on June 21, 1996. On July 1, 1996, Cynthia filed a motion for an extension of time to serve her exceptions to the Commissioner's report. On July 9, 1996, Cynthia filed her exceptions to the report. On July 25, 1996, the circuit court issued an order allowing Robert ten days to file his response to Cynthia's exceptions, and allowing Cynthia five days for a reply, after which time the case stood submitted for decision. On July 27, 1996, Robert filed his response to Cynthia's exceptions. On

October 24, 1996, the circuit court issued an order rejecting the custody recommendation of the Commissioner and accepting the exceptions raised by Cynthia.

Robert argues that Cynthia's exceptions were untimely based on the local Domestic Relations Rule (DrR) 3(F), which states as follows:

In pendente lite matters, the recommended order and case file shall be delivered to the Judge of the Court. Unless otherwise ordered, the recommended order shall be immediately signed by the Judge and entered by the Clerk on or before the close of the third business day after it has been so delivered. Any party may file a motion for reconsideration of the Court's order within ten (10) days after the entry of that order.

Robert maintains that because the circuit court did not sign a separate order explicitly granting an extension of time and Cynthia's exceptions were not filed until July 9, 1996, the circuit court should not have considered the exceptions. We disagree. The language of DrR 3(F) indicates the ten-day time frame referenced in that rule applies to motions to reconsider the circuit court's order accepting or rejecting the Commissioner's report. It does not apply to the filing of exceptions to the Commissioner's report. In fact, Cynthia filed her motion for extension of time on the tenth day following the Commissioner's report.

The more applicable rule is CR 53.06, which states that any party may serve written objections to a Commissioner's report within ten days after being served with notice of the filing of

the report. It also states that application to the court for action on the report and the objections shall be by motion with proper notice. This rule does not create a jurisdictional time limitation for filing of objections, but rather allows the circuit court to adopt the report without considering objections filed after the ten-day period. Cf. United States v. Central Bank & Trust Co., Ky., 511 S.W.2d 212 (1974) (holding that party who failed to file objections to Commissioner's report in compliance with rule providing objections should be filed within ten days from submission of report could not object on appeal to circuit court's action confirming the report). In the present case, the circuit court exercised its discretion to consider Cynthia's objections and allowed Robert an adequate period to file a response. Robert filed a response and did not raise the untimeliness issue before the circuit court. Robert has shown no prejudice by the circuit court's action.

For the foregoing reasons, the order of the Meade Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT, PRO SE:

Robert L. Eslinger
Vine Grove, Kentucky

BRIEF FOR APPELLEE:

Vincent P. Yustas
Brandenburg, Kentucky