

RENDERED: April 27, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002762-MR

CARA SWORD WHEELER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 96-CI-04099

GORDON LEE WHEELER AND
MARTHA ROSENBERG

APPELLEES

OPINION
REVERSING
** ** * * * * *

BEFORE: BARBER, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Cara Sword Wheeler has appealed from an order of the Fayette Circuit Court entered on November 3, 1998, that required her to pay an attorney's fee to her former husband's attorney. Having concluded that the award of an attorney's fee was an abuse of discretion, we reverse.

Cara and Gordon Lee Wheeler were married on August 14, 1993, and the marriage was dissolved by decree on October 7, 1998. The parties have a daughter, who was born April 26, 1993,

and a son, who was born on July 20, 1995. Cara filed a petition for dissolution of marriage on December 2, 1996, and the case commenced a long and tortuous journey that has not reflected well upon our civil justice system.

We have reviewed the videotape of the numerous hearings before the trial court, which basically consisted of arguments by counsel; but the deficient condition of the written record has made our review of this matter difficult. The written record offers very little insight into the events which led up to many of the trial court's orders.

At a hearing held on August 28, 1998, Cara's attorney argued a motion to allow her to take the deposition of Gordon's mother in order to ascertain the financial resources provided to him through a trust or other sources. In responding to Cara's counsel's argument, Gordon's counsel, for the first time on the record, stated that she did not understand why they were proceeding as if they were going to trial when they had "an enforceable agreement." The trial court responded by stating, "[i]t looks enforceable to me. I've looked at what was in the record. There's letters from both sides."¹ Cara's counsel then advised the trial court, "I'm saying the client has authorized us to proceed no further with it." The trial judge responded,

¹Gordon's response to Cara's motion to take additional proof had included evidence of settlement negotiations that included copies of Gordon's attorney's letter dated August 12, 1998, to Cara's attorney and Cara's attorney's response of that same date. The letters indicated that they had been transmitted by facsimile.

"[s]orry she's stuck with it, overrule the motion." The trial court then entered an order on September 9, 1998, which not only denied Cara's "motion to allow the deposition and testimony of Sallie Wheeler[,]" but also "sustained" Gordon's "request to enforce the settlement agreement between the parties."

On September 4, 1998, the trial court conducted a hearing concerning Gordon's "motion to award tax dependency exemptions." The attorneys argued their respective positions, but the trial court received no evidence. This hearing demonstrated a gap that existed in the parties' purported agreement. The property settlement agreement that Gordon proposed allotted one child to each parent as a tax dependent, but significantly the letters exchanged by their attorneys made no reference to this issue. The trial court granted Gordon's motion and ruled that each party could claim one child each as a tax dependent.

Following the bench ruling on the tax dependency question, Gordon's counsel, Martha Rosenberg, raised with the trial court her concerns that she had not received the signed property settlement agreement from Cara's attorney, Melissa Cain. Ms. Cain responded that she had met with her client that morning and that Cara "had a couple of fine points that needed to be smoothed out" and she "will be getting those to Ms. Rosenberg today." Ms. Rosenberg again expressed her concern to the trial court, and the trial judge stated, "[i]t needs to be entered as it is. I don't know what the fine points are, but if you all

don't agree on them, I've already ruled that it's to be entered as it is."

At a hearing on September 18, 1998, the saga continued with a new twist. Cara's counsel had filed a motion to withdraw, Gordon's counsel had filed a motion to compel Cara to sign the property settlement agreement, and Cara, pro se, had filed a "motion to suspend action and amend or vacate prior orders." In response to Gordon's counsel's expressed concern that the case not be delayed any further, the trial judge indicated that Gordon need not be concerned because "[w]hen I sustain a motion to withdraw, it does not delay anything. I simply allow the lawyer to get out. It's a civil proceeding, there's no requirement that an attorney be in. If an attorney comes in, they come in under what we are operating on right now. There's no changes."

The trial court then proceeded to address the motion to compel. First, Gordon's counsel argued in favor of the motion to compel and expressed her opposition to Cara's motion to suspend. Before allowing Cara, who was pro se, to respond, the trial judge began the following colloquy:

Judge Overstreet: I've already heard, I feel like, some of this Ms. Wheeler based on previous motions that have been filed. This case needs to get over with. I'm going to sustain the motion to withdraw, sustain the motion to compel and overrule that motion to suspend. Obviously, you can continue. If you want to hire more lawyers you

can. That's up to you.
But, I'm going to simply
overrule your motion at
this time because the
court has previously
ordered that you need to
sign these documents and I
want the documents signed
right now.

Ms. Rosenberg: (Turned to Cara and attempted
to hand her the proposed
agreement).

Cara Wheeler: I can't sign that document
your Honor because I did not
agree to the terms contained
in it.

Judge Overstreet: Let's get it entered
without her signature.
The only other alternative
would be to hold her in
contempt, which I could
do, but the important
thing is to get that thing
entered.

Ms. Rosenberg: Judge, I think it may be
somewhat necessary to hold a
short hearing as to what the
agreements are. We can do
that right now if the court's
ready to go.

Judge Overstreet: How long is short?

Cara Wheeler: Your Honor, I really need to
be taking my daughter to
kindergarten. . .

Bobby Wombles: Your Honor, if I might
interject. Since she now no
longer has counsel, I will
shortly file an appearance for
her, but I need a couple of
weeks to look at that. I
suggest that any hearing be
held in two weeks.

[Discussion ensued concerning the almost two-year length of the proceedings].

Judge Overstreet: Well, we'll continue it to October 2nd. We'll have a hearing that day. It'll be a five-minute hearing. That's all it's going to be. So don't be coming in here with a bunch of witnesses, because I don't have time.

The trial court entered an order on September 23, 1998, which followed its pronouncement from the bench at the hearing on September 18, that the law firm of Andrews and Associates be allowed to withdraw as Cara's attorneys, and which also stated that "the Firm of Andrews and Associates is adjudged to have a lien upon any funds the Petitioner may receive pursuant to KRS 376.460."

At the hearing on October 2, 1998, Cara's former attorneys, David M. Andrews and his associate, Melissa G. Cain, were subpoenaed by Gordon to testify concerning the proposed agreement. It was established through Ms. Cain's testimony that prior to August 12, 1998, the parties' counsel exchanged telephone calls in an effort to settle the case. While the parties' attorneys exchanged faxes on August 12, concerning an agreement on the issues of custody, child support and division of property, the testimony of Ms. Cain demonstrated that differences still remained between the parties concerning the details of a \$250,000 life insurance policy on Gordon with the children as beneficiaries and the exchange of tax information. Ms. Cain

confirmed that she had communicated to Cara that the agreement consisted of 11 sentences and that Cara had objected to various terms and conditions in the ten-page proposed agreement prepared by Ms. Rosenberg. While the testimony by attorney Cain at the October 2nd hearing was the first and only testimony ever provided concerning the proposed agreement, the matter was treated by the trial court as if it had already been heard and as if it were before the court on a motion to reconsider.² The trial judge announced from the bench, "I'll overrule the motion to set aside the actions of the court." This ruling from the bench was followed by the entry of a decree of dissolution dated October 2nd and entered on October 7, 1998.

Finally, we arrive at the issue of the trial court's award of attorney's fees. At the October 2nd hearing, Ms. Rosenberg, Gordon's attorney, raised the issue of her attorney's

²Cara was not present at the October 2nd hearing. Gordon's counsel made note of her absence in light of the fact that the September 18th hearing had been continued due to Cara's need to take her daughter to kindergarten. Cara's new counsel, Mr. Wombles, explained that his client was not there because they believed the only purpose for the hearing was to enter a decree. This is a curious comment since Mr. Wombles was present at the September 18th hearing and had asked for a continuance of two weeks. Mr. Wombles also filed a motion on September 28th entitled "motion to set aside order entered on September 18th and motion to reconsider orders previously entered." There was no order entered on September 18th, although there was one entered on September 30th which ordered "[t]he Respondent's motion to compel execution of the Property Settlement Agreement is hereby SUSTAINED and the Petitioner is hereby directed to immediately execute the Property Settlement Agreement tendered to her by Respondent's counsel." Again, this is noteworthy because evidence concerning the proposed agreement was not even heard by the trial court until October 2nd.

fees. The trial judge asked attorney Rosenberg if she had an affidavit and she responded that she had a copy of the billing statement. Cara's counsel objected because he had not received a copy of Ms. Rosenberg's billing statement and the matter was continued for one week.

On October 6, 1998, Ms. Rosenberg filed an affidavit which incorporated a two-page summary of her work on the case. The summary included 66 different entries, which totaled 25.65 hours at \$150.00 per hour for a total of \$3,847.50. Before the hearing, Cara's counsel filed a motion to take Ms. Rosenberg's deposition. At the hearing on October 9th, an associate of Ms. Rosenberg's appeared on her behalf and indicated that Ms. Rosenberg was requesting an attorney's fee of \$3,500.00, and that she opposed being deposed. The trial court denied the motion to take Ms. Rosenberg's deposition, but continued the hearing for one week so Ms. Rosenberg could be present.

On October 16th, Ms. Rosenberg appeared at the hearing. She had filed a second affidavit which provided more details concerning the work she had performed.³ Cara's counsel continued to object to the award of an attorney's fee. His grounds included the fact that the agreement "forced upon Ms. Wheeler" included a provision that "each party shall be responsible for payment of his or her own attorneys fees," and that many of the

³The first affidavit included 41 entries entitled "phone," while the second affidavit supplemented those entries with reference to an individual, e.g. "phone with client" or "phone with M. Cain."

charges listed on the billing statement were not related to Ms. Rosenberg's efforts to enforce the agreement. Without hearing any testimony from Ms. Rosenberg and without allowing Cara's counsel to question her, the trial court ruled that her attorney's fee request would be approved with the exception of four entries on August 10th and 11th for a total of 1.4 hours. An order was entered on November 3, 1998, ordering that "Respondent's motion for attorney fees is hereby granted in an amount calculated for work performed on behalf of Respondent from August 12, 1998 through October 2, 1998 as reflected in the billing statement submitted by Respondent's attorney in the amount of \$3,637.50. This appeal followed.⁴

In this appeal, our review is limited to determining whether the trial court abused its discretion in awarding the attorney's fees to Ms. Rosenberg. This issue has become somewhat confused because Cara has continued to argue as a ground for relief from the order awarding attorney's fees that the trial court abused its discretion when it "erred in enforcing the agreement prepared by Ms. Rosenberg." In his brief, Gordon states "that Appellant has waived any challenge to the trial court's entry of the Decree of Dissolution by virtue of the

⁴This appeal originally included Cara's former attorneys Andrews and Associates, David M. Andrews and Melissa Cain, as appellees. The attorneys had filed a lien for the \$6,746.95 in attorneys' fees that they claimed were still owed them against the \$30,000.00 in settlement proceeds due Cara. By agreement, these appellees were dismissed as parties by this Court on May 18, 1999.

Notice of Abandonment of Certain issues filed on or about February 23, 1999." Unfortunately, this Court's records do not reflect the filing of such a document. However, a copy is attached to Gordon's brief; and in her reply brief, Cara acknowledges filing it.⁵ Cara states that she "only wants this Court to understand that the forcing of the 'agreement' on her was an abuse of discretion by the lower court, and as such, she had a right to object. If she had a right to object, then the awarding of the attorney fees for not signing the agreement was an abuse of discretion."⁶

⁵The "Notice of Abandonment of Certain Issues" states:

Comes now the Appellant, Cara Sword Wheeler, by and through her undersigned counsel, and notifies all parties to the Appeal that the Appellant is abandoning certain issues presently being appealed as follows:

1. That the Appellant abandons any issue concerning the granting of a divorce between the parties.
2. That the Appellant abandons any issues concerning a division of the marital and non-marital property of the parties.
3. That all other issues shall be pursued, and in particular, the issue of the granting of attorney fees and or the reasonableness of said attorney fees, and all matters related to attorney fees.

⁶Cara claims she "had a twofold purpose for abandoning these two narrow issues. First of all, the lower court placed her in an untenable position by keeping her funds from her unless she
(continued...)

Since the trial court's award of attorney's fees was based on its determination that the parties had reached an enforceable agreement on August 12, 1998, and that Cara was unreasonable in refusing to sign the agreement, we believe it is necessary to compare the attorneys' correspondence with the agreement approved by the trial court. In Ms. Rosenberg's letter to Ms. Cain, she stated, in pertinent part, as follows:

This letter is to confirm the oral offer of settlement made to you on the morning of August 10, 1998 by my client to Cara. As you may recall Cappy is offering to settle this matter with a lump sum payment to Cara in the amount of \$30,000.00 with Cara assuming any outstanding debt that she claims to be owed on medical bills or other items that she presented in her deposition of August 4, 1998. Cara would receive the vehicle in her possession, free and clear as well as any personal property in her possession. Custody and visitation will remain as previously agreed and child support shall be based on the parties['] actual income and daycare costs and therefore it is anticipated to remain similar to what it is currently. It appears from the deposition that Cara's income is actually higher than previously calculated and daycare will be less beginning with the school year. Cappy will not agree to pay for private school or education for Cara. As I am sure you are aware, the Court does not have the power to order either considering the income of the parties and the short duration of the marriage. Cappy is offering the \$30,000.00 with the belief that same can be utilized for the children's education since the parties did not acquire marital property worth anywhere close to this

⁶(...continued)

consented to drop the appeal regarding a reversal of the entire divorce. Secondly, she did not want to unduly delay the entry of the divorce, itself, so the parties could get on with their lives."

amount. Each party will be responsible for his/her individually incurred attorney fees.

Ms. Cain responded to Ms. Rosenberg as follows:⁷

Per our telephone conversation of earlier today, this is to confirm that we would agree to settle this matter on the following terms:

- a.) Cappy pays Cara a lump sum of \$30,000 (Thirty Thousand Dollars);
- b.) Cappy pays child support to Cara in the monthly amount of \$809.00;
- c.) Cappy maintains an insurance policy on himself, naming the children as beneficiaries, and in the amount of \$250,000, until the youngest child (Dolphy) reaches the age of 21 years;
- d.) Cara is to retain the Van, free and clear of any debts regarding same, and all other personal property in her possession;
- e.) Cappy retains all personal property in his possession;
- f.) The Parties exchange tax returns yearly, within two weeks of filing same;

Ms. Cain sent Cara the following memorandum:

Martha Rosenberg conferred w/ Cappy and they accepted our terms for settlement. Specifically, the terms for settlement are as follows:

1. Cappy pays you \$30,000[.]
2. Cappy pays you child support @ \$809/month[.]

⁷Page 2 of this letter is not in the record.

3. Cappy keeps life insurance on self for childrens' benefit until Dolphy reaches age 21[.]
4. You keep health insurance on kids-- You pay first \$100 of unreimbursed medical expenses and the remainder is split between you and Cappy proportionately. (The clause where you pay the first \$100 of unreimbursed medicals is, as I thought, in accord with the statute.)
5. You keep van, with no responsibility for debt associated with same (except, of course, tax/license, etc.)[.]
6. You keep all personal property in your possession; Cappy keeps all personal property in his possession.
7. You and Cappy exchange tax returns every year, within two weeks of filing same with government.
8. Custody/visitation per our earlier agreed order[.]
9. You pay off marital debts we set forth at your deposition (I will call some of the creditors to see if they will negotiate payment-- accept less than full amount)[.]
10. Each pays his or her own attorney fees[.]
11. If either party defaults, the breaching party pays the non-breaching party's attorney fees/costs.

I will be talking with you tomorrow!!!

The provisions of the proposed property settlement agreement that have been identified by the parties as objectionable to Cara include the provisions underlined below:

3. CUSTODY. Wife shall be awarded sole care, custody and control of the minor children born of the marriage, namely, Cara Lee Wheeler, born April 26, 1993, and Gordon Adolphus Wheeler, born July 20, 1995, subject to reasonable visitation with Husband as more specifically set forth in paragraph 4 of this agreement.

Husband and Wife shall consult in an effort to mutually agree in decisions regarding the children's general health, welfare and education, as far as possible, so that they may adopt a mutually harmonious policy in regard to the children's upbringing. It is agreed that Husband and Wife shall consult with one another and consider the opinion of the other parent prior to making major decisions concerning said children, however, in the event the parties are unable to agree on an issue concerning the children, the Wife shall be the final decision maker [emphasis added].

Neither Husband nor Wife shall attempt or condone any attempt to estrange the children from the other party or injure or impair the mutual love and affection between parent and child. At all times Husband and Wife shall both encourage and foster sincere respect for the other parent [emphasis added].

Each party shall keep the other party advised as to any serious illness or major developments with said children. Each of the parties agree to keep the other currently advised as to his or her residential address, business address, telephone numbers and whereabouts while on vacation or out of two with the children [emphasis added].

Each party shall be entitled to reasonable telephone conversations at reasonable times when each child is subject

to the control of the other party [emphasis added].

Each party shall be entitled to full access to the children's medical, dental, psychological and school records [emphasis added].

. . .

6. CHILD SUPPORT. . . .

Husband shall be obligated to provide child support on behalf of the minor children until such time as the children reach the age of eighteen (18) years or graduate from high school, whichever occurs last, but in no event shall continue beyond the year in which the child reaches his or her nineteenth (19th) birthday [emphasis added].

. . .

Each party hereby agrees to exchange W-2 and 1099 income information each year, with said statements to be provided within two weeks of receiving their W-2 and 1099 statements, as well as exchanging the cost of work related daycare and medical and dental insurance costs for the purpose of re-evaluating child support [emphasis added].

7. TAX DEPENDENCY EXEMPTIONS. Wife shall be entitled to claim Cara Lee as her dependent on her state and federal income tax returns each and every year beginning in the tax year 1998 and Husband shall be entitled to claim Adolphus as his dependent on his state and federal income tax returns each and every year beginning with the tax year 1998. Both parties agree to execute all forms necessary claiming the appropriate child as a dependent on his or her tax returns [emphasis added].

. . .

11. LIFE INSURANCE. It is agreed by and between the parties that Husband shall obtain a term life insurance policy on his life, with a death benefit in the amount of \$250,000.00. Said policy shall name Cara Lee and Adolphus as equal beneficiaries or a

trustee on their behalf shall be designated as a trustee beneficiary to provide for the children's health, education and welfare in the event of the early demise of Husband. It is agreed by and between the parties that Husband shall maintain said term life policy on his life until such time as the youngest child reaches the age of twenty-one (21) years [emphasis added].

. . .

20. INCORPORATION AGREEMENT. Both parties agree that this document, in the event a Decree of legal separation or of dissolution is granted by the Fayette Circuit Court, shall be incorporated by reference into said Decree and there shall be no modification or alteration of its terms except for terms concerning child custody, support and visitation or by written document signed by both parties [emphasis added].

Cara objected to the provisions in the proposed agreement which related to consultation with one another concerning the children; telephone conversations with the children; child support terminating in no event "beyond the year in which the child reaches his or her nineteenth (19th) birthday"; tax dependency exemptions; a trustee on the children's behalf to administer the \$250,000.00 in life insurance proceeds; and the exchange of W-2's and 1099's instead of tax returns. Gordon has emphasized the insignificance of Cara's objections concerning the agreement's language that the "Husband and Wife shall both encourage and foster sincere respect and affection in both parents" and that the agreement "shall be incorporated by reference into said Decree."

Having thoroughly reviewed the procedural history of this case and the factual basis for the trial court's award of an attorney's fee, we will now summarize the law. Kentucky Revised Statutes 403.220, in relevant part, provides:

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 [emphasis original].

KRS 403.220 makes it clear that the decision to award attorney's fees and costs in dissolution actions is entirely within the trial court's discretion. As this Court said in Glidewell v. Glidewell,⁸ "[i]t is well settled that an allocation of attorneys fees in a divorce action is entirely within the trial court's 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."⁹

We hold that the trial court abused its discretion in awarding the attorney's fee because the record clearly shows that the trial court made its determination that the parties had reached an enforceable agreement based solely on correspondence

⁸Ky.App., 859 S.W.2d 675, 679 (1993).

⁹Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994).

between the attorneys and before receiving any evidence from the attorneys or the parties. The trial court first indicated its determination to enforce the agreement at the hearing on August 28, 1998, which concerned whether there was a need for additional discovery. Then, on September 4, at the hearing on the dispute over tax dependency exemptions, the trial court reiterated that it had "already ruled that it's to be entered as it is." The abuse of discretion exacerbated at the September 18th hearing, when the trial court told Cara, whose counsel had just been allowed to withdraw, that she could "hold her in contempt" and told her, "I want the documents signed right now." These unwarranted comments were followed by Ms. Rosenberg's reminder that "it may be somewhat necessary to hold a short hearing as to what the agreements are." It is apparent to this Court from our review of the record that Cara expressed some genuine concerns about the language in the proposed agreement and that some of the terms included in the proposed agreement were not included in the attorneys' correspondence.

Based on the record before us, we hold that the trial court abused its discretion by awarding an attorney's fee in this matter and the judgment of the Fayette Circuit Court is reversed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Bobby G. Wombles
Lexington, KY

BRIEF FOR APPELLEE:

Martha A. Rosenberg
Lexington, KY

