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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001622-MR

LINDA LOU VATTER;
DAVID B. MOUR;
BOROWITZ & GOLDSMITH, PLC — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDA M. HELLMANN, JUDGE
ACTION NO. 93-FC-001372

DAVID VATTER — APPELLEE

OPINION
VACATING AND REMANDING
** ** ** ** **

BEFORE: KNOPF, MILLER, AND TACKETT, JUDGES.

MILLER, JUDGE: Linda Lou Vatter brings this appeal from a June 27, 2001 order of the Jefferson Circuit Court. We vacate and remand.

The record indicates that Linda and David Vatter were married on December 13, 1980 and divorced on December 2, 1994. Under a settlement agreement, they enjoyed joint custody of their minor child with Linda being primary residential custodian. David agreed to pay $185.00 per month in child support, and a clothing allowance for the child of $450.00 per year.

In August of 1999, Linda filed a motion to increase child support. It was referred to a Domestic Relations Commissioner for hearing. In October of 2000, David filed a motion to modify child support. Therein, he sought to reduce his monthly support payment and eliminate the clothing allowance. The family court ultimately increased child support to $341.62 per month, and concluded that the clothing allowance should not be eliminated. David pursued a direct appeal to this court in Appeal No. 2001-CA-000595-MR. After a settlement conference, the parties reached a settlement of the appeal, which was memorialized by an agreed order entered June 20, 2001. In these proceedings, Linda was assisted by David B. Moore and the law firm of Borowitz and Goldsmith, PLC.

In March of 2001, Linda filed a motion for attorney fees and costs under Kentucky Revised Statutes 403.220. Therein, Linda sought attorney's fees and costs in the amount of $9,068.90. The matter again was referred to a Domestic Relations Commissioner. In her report and recommendation, the Commissioner awarded Linda only $750.00 in attorney's fees and costs. Exceptions were filed to the report. On June 26, 2001, the family court entered an order "confirming" the commissioner's report. This appeal follows.

Linda Vatter, Borowitz & Goldsmith, PLC, and David B. Mour, Esquire (collectively referred to as appellants) contend the family court failed to exercise its discretion as provided under Ky. R. Civ. P. (CR) 53.06(2). Specifically, appellants assert that the family court "labored under the misconception

that it lacked authority to take any action, and as a result, failed to exercise its discretion with respect to its review of the action recommended by the Domestic Relations Commissioner." Appellants think the family court's review of the Commissioner's recommendations is both limited and deferential. In support thereof, appellants cite to the following utterances of the court:

> Mr. Mour, if I were in your position to receive $750.00 from the other side in a court order based upon the fact that you had expended over $9,000.00 in this matter, I understand your argument about reasonable. My job as a judge reviewing recommendations of a Commissioner is, number 1, I do not disturb those recommendations. I do not rule over those recommendations unless I feel the Commissioner, number one, side-stepped it and didn't consider it, and in this case I feel the Commissioner did consider it, did know the total sum, did know why in part why it was high because of the self-employment. She did use the word reasonable in awarding the $750.00 knowing that $750.00 is not anywhere near the $9,000.00. Ms., Commissioner Guenther did consider and did state the disparity in incomes of 71% versus 29% and so, I find that **I have no other choice than to affirm and to sign the Commissioner's recommendations**.

(Appellants' Brief at 8).

Upon review of the above, we, too, believe that the family court may have been mistaken concerning its "review" of the Commissioner's action. The law is clear that the court has "complete discretion" in its use of a commissioner's report. CR 53.06. See Eiland v. Ferrell, Ky., 937 S.W.2d 713 (1997); Haley v. Haley, Ky. App., 573 S.W.2d 354 (1978). It may adopt, modify or reject the report in whole or part. The Court is not compelled to give findings of the commissioner deference, and may

even "receive further evidence" upon an issue. CR 53.06(2). A commissioner is merely an agent of the court, and a report and recommendations has no legal effect until acted upon by the court.

Upon remand, we direct the family court to reconsider the amount of attorney's fees and costs. In so doing, the family court shall have complete discretion to adopt, modify, or reject the commissioner's report in whole or in part.

For the foregoing reasons, the order of the Jefferson Circuit Court is vacated and this cause is remanded for proceedings consistent with this opinion.

TACKETT, JUDGE, CONCURS.

KNOPF, JUDGE, DISSENTS.

KNOPF, JUDGE, DISSENTING: Respectfully I must dissent from the majority opinion. First, I disagree with the majority that the trial court mis-perceived the scope of its review of the commissioner's report. The statements by the trial court are somewhat confusing and could lead one to that conclusion. However, the trial court expressly recognized that it had the authority to overrule the commissioner's recommendations. The court merely added that it was not inclined to do so unless there was some showing that the commissioner failed to consider a significant factual or legal matter. Although this deference to the commissioner's findings is somewhat greater than CR 53.06 requires, I am not convinced that it goes beyond what the rule allows. Indeed, a trial court has the broadest possible discretion with respect to the use it makes of commissioner's

reports.[1] That discretion necessarily includes the authority to adopt the commissioner's report in the absence of any convincing evidence that the commissioner mis-perceived a controlling issue of fact or law.

Moreover, the trial court adopted the commissioner's findings as its own, and consequently, our review is limited to the sufficiency of those findings.[2] I have concerns about some of the contradictory findings which the commissioner made. The commissioner's report seems to suggest that some of the delay and expense in bringing Ms. Vatter's motion to a hearing was caused by changes in trial counsel on both sides. However, the commissioner also found that much of the attorney fees were incurred due to the unusual problems of discovering Mr. Vatter's self-employment income. Furthermore, the commissioner also found that Mr. Vatter earns 71% of the parties combined parental income, whereas Ms. Vatter earns only 29%. Curiously deficient from the commissioner's report is any express finding that the attorney fees incurred by Ms. Vatter were unreasonable. Likewise, the commissioner gave no reason for requiring Ms. Vatter to assume responsibility for the bulk of these fees. These findings would suggest that an award of most of the requested attorney fees might be appropriate.[3]

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[1] Eiland v. Ferrell, Ky., 937 S.W.2d 713, 716 (1997).

[2] CR 52.01.

[3] Gentry v. Gentry, Ky., 798 S.W.2d 928 (1990).

Nevertheless, trial courts are accorded wide discretion in awarding attorney fees.[4] Ms. Vatter requested a stunning sum of $8,715.00 in attorney fees and $353.90 in costs for a total of $9,068.90. Ms. Vatter alleged that she incurred these costs in support of her motion to modify child support for one twelve-year-old child. The recommendation to award only $750.00 implies that the commissioner found the higher amount to be clearly excessive under the circumstances.

This conclusion appears reasonable given the evidence. Although there is a disparity of income between the parties, Mr. Vatter earns $2,526.67 per month, and Ms. Vatter is voluntarily underemployed with an imputed monthly income of $1,040.00. Furthermore, child support was increased from $185.00 per month (plus an annual clothing allowance of $450.00) to $341.62 per month. These amounts demonstrate that neither party has such substantial resources as to warrant the fees incurred in support of this motion.

Furthermore, in the absence of a bad-faith concealment of income, there needs to be a rational basis for the amount of attorney fees expended on discovery in support of a motion to increase child support. There is no such allegation in this case. Consequently, I agree with the trial court that the amount sought by Ms. Vatter and her attorney was not justified under the facts of this case. While the commissioner's findings are sketchy on this point, there is no indication that Ms. Vatter

[4] *See* KRS 403.220. *See also* Neidlinger v. Neidlinger, Ky., 52 S.W.3d 513, 519 (2001); Glidewell v. Glidewell, Ky. App., 859 S.W.2d 675 (1993).

asked the court for more specific findings. Thus, she has waived any insufficiency in the court's findings.[5] Consequently, I see no reason to remand this action back to the trial court for additional proceedings, incurring yet more attorney fees. Therefore, I would affirm the trial court's award of attorney fees in its entirety and put this matter to rest.

BRIEFS FOR APPELLANTS:

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BRIEF FOR APPELLEE:

Richard E. Cooper
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[5] CR 52.04