

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2007-CA-001150-MR

PHILLIP SLONE

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT  
HONORABLE STEPHEN N. FRAZIER, JUDGE  
ACTION NO. 03-CI-01112

TOBY SPRADLIN SLONE

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: ACREE AND VANMETER, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

VANMETER, JUDGE: Phillip Slone appeals from an order entered by the Floyd Circuit Court, Family Division, which denied his motion seeking recusal of the special judge appointed below, and granted appellee Toby Spradlin Slone's motion

---

<sup>1</sup> Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

to have Phillip pay a portion of their minor son's extracurricular expenses. For the reasons stated hereafter, we affirm.

The parties married in 1984 and divorced in 2004. Numerous postdissolution proceedings followed over the next several years. Pertinent to this appeal is the fact that in January 2007, the parties' case was assigned to a special judge, Stephen N. Frazier, "pursuant to the Order of the Supreme Court of Kentucky dated December 19, 2006[,]'" as one of the parties had been represented at some point by the new family court judge, Johnny Ray Harris.

The record shows that in January 2007, Judge Frazier conducted a hearing and entered orders relating to Phillip's financial obligations to Toby. Meanwhile, Phillip moved for the termination of his maintenance obligation because Toby was "now gainfully employed and [sic] the Office of Floyd Family Court Judge Johnny R. Harris." In February Phillip renewed his motion to terminate maintenance, and he sought the right to claim the income tax exemption for the parties' son. In March Judge Frazier awarded Toby the income tax exemption and, pursuant to this court's direction in an earlier appeal, vacated Phillip's maintenance obligation pending further proceedings. In April Toby requested the court to compel Phillip both to show cause why he should not be held in contempt for failing to make a court-ordered payment or provide a current medical insurance card for their son, and to order Phillip to assist in paying for their son's "extracurricular activity and basketball camps."

In May Phillip, for the first time, requested the trial judge's recusal and a transfer of the matter to another family court for the following reasons:

- 1) That [Toby] is currently employed by the Floyd Family Court.
- 2) That in order to avoid the appearance of any impropriety, the best interest would be served to have the issues in this matter resolved by either the Pike Family Court or the Johnson Family Court.

No affidavit accompanied the motion, which Toby opposed. In denying the motion, Judge Frazier stated in part that although Toby

is employed by the Floyd Family Court, she is not employed by Hon. Stephen N. Frazier. In fact, her employment with the Floyd Family Court was the justification for the recusal of Hon. Johnny Ray Harris and the appointment of Judge Frazier as Special Judge.

The court granted Toby's pending motion to have Phillip share the cost of their son's extracurricular activities, and ordered him to provide the requested medical insurance card for their son. This appeal followed.<sup>2</sup>

First, Phillip asserts that Judge Frazier abused his discretion by failing to recuse from the matter below. We disagree.

As stated in *Bussell v. Commonwealth*, 882 S.W.2d 111, 113 (Ky. 1994),

[a] motion for recusal should be made immediately upon discovery of the facts upon which the disqualification rests. *Bailey v. Bailey*, Ky., 474 S.W.2d 389 (1972); *Kohler v. Commonwealth*, Ky., 492 S.W.2d 198 (1973). Otherwise it will be waived.

---

<sup>2</sup> No appellee brief was filed in this appeal.

*See also, e.g., Crane v. Commonwealth*, 833 S.W.2d 813, 818 (Ky. 1992); *Johnson v. Commonwealth*, 231 S.W.3d 800, 809 (Ky.App. 2007); *Johnson v. Commonwealth*, 180 S.W.3d 494, 503 (Ky.App. 2005).

Here, the record plainly shows that Phillip knew of Toby's employment by a Floyd Family Court judge as early as January 19, 2007, when he sought the termination of his maintenance obligation because of her new employment. He obviously knew that his motions were filed in that court and then were heard by a special judge. Further, during the three and one-half months which passed before he finally moved for the judge's recusal, Phillip filed or responded to several motions. Under these circumstances any objection was waived. *Bussell*, 882 S.W.2d at 113. In any event, the motion to disqualify was deficient as it was not supported by an affidavit. *Crane*, 833 S.W.2d at 818.

Phillip also contends that the trial court abused its discretion by ordering him to pay a portion of the son's extracurricular expenses, as the evidence was insufficient to show that the claimed expenses were actually incurred, and there was no finding that the expenses were "extraordinary." We disagree.

Toby requested the court to order Phillip to contribute toward their son's expenses for basketball camps and related events, as well as expenses relating to his prom. Phillip failed to timely respond to either the motion or Toby's documentation of costs, and the court ordered him to pay one-half of such "extracurricular" expenses,<sup>3</sup> noting that the son "is a talented basketball player with

<sup>3</sup> Phillip was ordered to pay \$2,247.50, which included \$1,847.50 for the "extracurricular" expenses plus \$400 which was outstanding from a previous order.

the potential to obtain a college scholarship if his talents are pursued[.]”<sup>4</sup> No postjudgment motions were filed before Phillip appealed on May 31, 2007.<sup>5</sup>

On appeal, Phillip asserts that the trial court abused its discretion by ordering him to pay a portion of the son’s extracurricular expenses. However, nothing in the record shows that Phillip timely responded, much less objected, to Toby’s request for such expenses. Further, as Phillip failed to timely seek additional findings as to the “extraordinary” nature of the expenses for purposes of KRS 403.211(3) and (4), he was precluded from obtaining relief on appeal by CR<sup>6</sup> 52.04, which provides:

A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

Since Phillip failed to timely respond to Toby’s motion, or to bring the order’s alleged deficiency to the court’s attention within ten days of its entry as required by CR 52.02, he is not entitled to relief on appeal.

---

<sup>4</sup> According to a newspaper article filed in the record, the parties’ son was ranked as one of Kentucky’s top twenty-five high school basketball players as he entered his junior year and the 2006-2007 season.

<sup>5</sup> Phillip’s Designation of Record, filed in this appeal in October 2007, referenced his “motion for relief from order entered on May 24, 2007.” However, the only such motion in the trial court record is a motion filed on August 2, 2007, seeking CR 60.02 relief from the May 24 order. The motion alleged that the evidence submitted in support of Toby’s motion was inadequate and/or inaccurate, and requested the trial court to vacate its order. The court treated the motion as one to alter, amend or vacate the order, and denied it as untimely. As neither the motion nor the order preceded the May 31 filing of Phillip’s appeal, neither is properly before this court for review.

<sup>6</sup> Kentucky Rules of Civil Procedure.

The order of the Floyd Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

John T. Chafin  
Prestonsburg, Kentucky