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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001168-MR

BARRY LYNN WRIGHT APPELLANT

v.

APPEAL FROM FAYETTE FAMILY COURT
HONORABLE JOHN SCHRADER, JUDGE
ACTION NO. 09-CI-03451

JENNIFER RYAN WRIGHT APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, JONES AND NICKELL, JUDGES.

NICKELL, JUDGE: Barry Lynn Wright has appealed from the June 23, 2014, order of the Fayette Circuit Court, Family Division, awarding attorney fees to his ex-wife, Jennifer Ryan Wright, following litigation concerning a child support modification. After a careful review of the record, the briefs and the law, we reverse and remand.

Barry and Jennifer were divorced in 2010. One minor child was produced by their union. At the time of the divorce, the parties were granted joint custody of their daughter with "equal timesharing" between them, Barry was to pay Jennifer $162.00 per month in child support, and the parties were to split miscellaneous costs in proportion to their incomes. Based on the trial court's calculations, Barry would be responsible for 58% of the extra expenses and Jennifer would be responsible for the remaining 42%.

Due to corporate changes, Barry lost his job with IBM in September of 2012 and began receiving unemployment benefits. While he had previously been earning approximately $6,000.00 per month working at IBM, Barry's income was now reduced to approximately $1,800.00 per month. On March 5, 2013, Barry moved for a modification of his child support obligation based on his reduced income. Jennifer opposed the motion. After nearly fourteen months of discovery, the motion was finally heard on May 2, 2014.

At the hearing, testimony and documentary evidence showed Barry obtained temporary employment in June of 2013, and found a permanent job at the University of Kentucky in November of that year earning $4,999.00 per month. Throughout the litigation, Jennifer maintained employment, with her salary rising from $4,358.00 per month at the time of the divorce to $5,008.00 per month at the time of the final hearing. Barry remained current on his child support obligations. At the conclusion of the hearing, the trial court concluded Barry was not entitled to a retroactive modification of his support obligation. Because the parties' incomes

were nearly identical and they shared equal parenting time with the minor child, the trial court ruled neither party would pay child support, and all future miscellaneous expenses would be divided on a 50/50 basis. No challenge is raised against any of these decisions.

During the hearing, Jennifer orally moved for an award of attorney's fees. She contended Barry was being represented at no cost by a family member while she had to incur significant expense to pay her own counsel.[1] Jennifer argued these expenses constituted a financial disparity between them, thereby justifying an award pursuant to KRS[2] 403.220. She requested Barry be responsible for half of the fees she was obligated to pay her attorney. Barry argued no financial disparity existed as the pair had nearly equal incomes, but if any disparity did exist, the scales should tip in his favor as he had been unemployed for a significant time and had made nearly $18,000.00 less than Jennifer since the filing of his motion to modify child support. Barry then made his own request for an award of attorney's fees. The trial court ordered supplemental briefing on the issue and scheduled a further hearing.

On June 23, 2014, the trial court entered its order finding in favor of Jennifer. In support of its conclusion, the trial court stated it had

> reviewed the memorandum (sic) of the parties and reviewed the case law regarding an award of attorney

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[1] Subsequent evidence would show Jennifer was billed $11,564.01 for legal services related to the child support modification motion.

[2] Kentucky Revised Statutes.

> fees in *pro bono* cases as alleged by [Barry's] counsel, as well as considered the testimony of the parties at the March 31, 2014 hearing. This Court believes that in this particular case there is a disparity in the financial resources of the parties simply because one party has incurred a significant amount of attorney fees and the other has not. The Court has also considered all of the financial evidence that has been supplied an (sic) believes an award of attorney fees is appropriate.

The court then went on to briefly comment on the factors set forth in *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004), in an effort to determine the appropriate amount of fees to be awarded. Upon concluding each party could have been more forthcoming and complete in their responses throughout the litigation, the trial court discounted the requested amount by 25% and ordered Barry to pay $4,370.25 toward Jennifer's legal expenses. This appeal followed.

Kentucky courts typically and routinely apply the so-called American Rule regarding attorney's fees. That rule requires parties to pay their own fees and costs and does not allow, as in the English courts, for the shifting of the prevailing party's fees to the loser. *Bell v. Commonwealth*, 423 S.W.3d 742 (Ky. 2014); *AIK Selective Self–Insurance Fund v. Minton*, 192 S.W.3d 415 (Ky. 2006). There are, however, exceptions to the rule and this case involves one of them, KRS 403.220.

In pertinent part, KRS 403.220 reads as follows:

> 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.

In *Sexton v. Sexton*, 125 S.W.3d 258 (Ky. 2004), the Supreme Court of Kentucky discussed the statutory language of KRS 403.220.

> Under this statute, a trial court may order one party to a divorce action to pay a "reasonable amount" for the attorney's fees of the other party, but only if there exists a disparity in the relative financial resources of the parties in favor of the payor. But even if a disparity exists, whether to make such an assignment and, if so, the amount to be assigned is within the discretion of the trial judge. There is nothing mandatory about it. Thus, a trial court's ruling on attorney fees is subject to review only for an abuse of discretion.

Id. at 272 (internal citations and quotations omitted). Trial courts have broad discretion in awarding attorney's fees to either party in a dissolution proceeding. *Tucker v. Hill*, 763 S.W.2d 144 (Ky. App. 1988). It is well-established that trial courts must consider the financial resources of both parties and may award attorney's fees only where an imbalance of such resources exists. KRS 403.220; *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990); *Glidewell v. Glidewell*, 859 S.W.2d 675 (Ky. App. 1993); *Lampton v. Lampton*, 721 S.W.2d 736, 739 (Ky. App. 1986). If the record on appeal supports the trial court's determination of an imbalance in the parties' financial resources, an award of attorney's fees will not be disturbed on appeal. *Wilhoit v. Wilhoit*, 521 S.W.2d 512 (Ky. 1975).

In the case *sub judice*, the record does not support the trial court's determination that a financial imbalance existed sufficient to award attorney's fees. It was undisputed that each party earned nearly identical salaries at the time the

trial court made its ruling. Although each side accused the other of being voluntarily underemployed, no such finding was made or warranted under the facts as presented. The trial court explicitly based its decision solely on the fact one party "incurred a significant amount of legal fees and the other did not." However, the trial court had previously ruled no future child support was warranted due to the equality of financial positions between the parties. These rulings are internally inconsistent. By definition, there either is, or is not, a financial disparity, regardless of the purpose for which the determination is being made.

We have been directed to no precedent supporting the trial court's position that payment of a higher amount of legal fees by one party is sufficient to find a financial disparity which would permit that party to receive reimbursement by the opposing party who had the lower obligation for professional services. We are convinced none exists. Were we to accept the trial court's unsupported logic, we would be heading down a slippery slope which could undermine the entire purpose of the statute and potentially harm the judicial system as a whole.[3] This we cannot countenance. Since the record reveals—and the trial court found—the

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[3] For instance, if a party chooses to represent himself *pro se* while the other obtains paid professional legal services, under the trial court's ruling, the *pro se* litigant would be required to contribute to the other's legal bills, even if the relative financial positions are otherwise equal. The same might be said for a litigant who procures the services of a reasonably-priced, but still competent, lawyer and the other party hires a higher-priced attorney. The party who is thus "outspent" stands a very good chance of being ordered to pay a portion of the ex-spouse's potentially exorbitant legal bill. Common sense dictates the Legislature did not mean, by passage of KRS 403.220, to punish a litigant who receives free—or at least cheaper—legal services. The intent of the statute is clearly to prevent the party in a relatively better financial position from gaining an unfair advantage for no reason other than having deeper pockets.

resources of the parties in this case were practically equal, the award of attorney's fees under the statute constituted an abuse of discretion under the circumstances.

For the foregoing reasons, we are constrained to reverse and remand for entry of an appropriate order consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Daniel E. Hitchcock
Lexington, Kentucky

BRIEF FOR APPELLEE:

Martha A. Rosenberg
Lexington, Kentucky