

RENDERED: AUGUST 2, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000877-ME

ROBERT MANGINE

APPELLANT

APPEAL FROM KENTON CIRCUIT COURT
FAMILY COURT DIVISION

v. HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 15-CI-01279

KRISTEN MANGINE; AND
HON. ALMA PUISSEGUR

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Robert Mangine brings this appeal from an April 17, 2018, Findings of Fact, Conclusions of Law/Orders (April 17, 2018, order) of the Kenton Circuit Court, Family Court Division, awarding Kristen attorney's fees and costs of \$4,439.25. We affirm.

Robert and Kristen Mangine were married on December 29, 2006.

Two children were born of the parties' marriage; the first in 2010 and the second in

2013. Kristen was employed in a management position with Procter & Gamble, and Robert was employed as a certified public accountant (CPA). Kristen filed a Petition for a Decree of Dissolution of Marriage on July 9, 2015. A Decree of Dissolution was entered June 9, 2016. The Decree dissolved the marriage but reserved many issues for subsequent adjudication, including child custody and time-sharing of the children.

On September 6, 2016, a Supplemental Decree was entered. Pursuant to the Supplemental Decree, the children would reside primarily with Kristen, and Robert would have time-sharing essentially every other weekend and one weeknight per week, so long as his work schedule did not preclude same. Relevant to this appeal, the Supplemental Decree provided the following regarding the income tax exemptions for the parties' two children:

As to tax exemptions the parties have asked this Court to enter orders about them. However, pursuant to *Adams-Smyrichinsky v. Smyrichinsky*, 467 S.W.3d 767 (Ky. 2015) this Court is no longer authorized to divide exemptions and instead the Court is required simply to adhere to the I.R.S. regulation regarding tax exemptions. Ultimately it will be up to the I.R.S. as to tax exemptions but it should be noted that as seen by the parenting schedule provided in this matter, the children will spend more days in a year with the wife than they will with the husband.

September 6, 2016, Supplemental Decree at 1.

In February of 2017, Kristen's accountant attempted to electronically file her 2016 income tax return. The IRS rejected the return as Robert had already filed his return for 2016 and claimed the exemption for one of the children. On March 22, 2017, Kristen filed an emergency motion requesting the family court to order Robert to produce his 2016 federal and state tax returns including all schedules and attachments, to file amended tax returns for 2016 without claiming the exemption for one child, and for attorney's fees related to the tax issue. In her motion, Kristen asserted that Robert violated the September 6, 2016, Supplemental Decree, by claiming one of the children on his 2016 tax returns.

By order entered March 30, 2017, the family court ordered Robert to produce his 2016 tax returns including all schedules and attachments, to amend his 2016 tax returns to remove the child tax exemption, and to provide a copy of the amended tax returns to Kristen within three days of filing. The family court denied Kristen an award of attorney's fees.

In early 2018, Kristen discovered that Robert again had claimed the exemption for one of the parties' children on his 2017 tax returns. By motion filed February 20, 2018, Kristen again sought an order directing Robert to produce his 2017 tax returns including all schedules and attachments, to amend his 2017 tax returns to remove the child exemption, and to provide a copy of the amended tax returns to Kristen. Kristen also sought an award of attorney's fees.

By order entered April 17, 2018, the family court concluded that Robert had violated previous orders as to the tax exemptions and held that Kristen was entitled to an award of attorney's fees. More specifically, the family court held:

This is the second time [Robert] has violated the court order regarding tax exemptions. In 2017 (for the 2016 tax year) [Robert] was ordered to file an amended return as under the "counting the days" IRS regulation he could not take the exemptions. Again, in 2018 (for the 2017 tax year) [Robert] improperly claimed the exemptions. [Robert] relied on *Shvetsov v. Commissioner of Internal Revenue*, US Tax Court Summary Opinion 2017-89 in support of his position that he was entitled to take the child's tax exemption. The court has reviewed this opinion and notes that the holding is actually contrary to [Robert]'s position. As a result of [Robert] taking this erroneous position, [Kristen]'s counsel represented her client by meticulously outlining all of [Robert]'s prior conduct on this subject; performing legal research; consulting with a CPA; filing an emergency motion supported by a thorough memorandum; issuing subpoenas; and searching the IRS website and publications. The legal fees and costs incurred were \$4,439.25, based upon 24.91 hours at a rate of \$175.00 per hour and costs of \$80.00. The court finds that all of the time and costs reflected in EX 31 were reasonable and necessary for her to address this issue that should not have been before the court for a second time. The court finds that [Kristen] is entitled to an award of attorney's fees and costs incurred as reflected in EX 31.

April 17, 2018, Findings and Fact, and Conclusions of Law/Orders at 4. The family court ordered Robert to pay Kristen's attorney, Alma Puissegur, fees and

costs of \$4,439.25 within 90 days of entry of the April 17, 2018, order. This appeal follows.

Robert contends the family court erred by awarding \$4,439.25 in attorney's fees and costs to Kristen. More specifically, Robert asserts the award of attorney's fees was improper under KRS 403.220 and constituted an improper sanction for contempt.

An award of attorney's fees in a dissolution of marriage action is governed by KRS 403.220, which 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. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

The proper interpretation of Kentucky Revised Statutes (KRS) 403.220 was recently addressed by the Kentucky Supreme Court in *Smith v. McGill*, 556 S.W.3d 552 (Ky. 2018). In *Smith*, the Court reversed more than forty years of precedent interpreting KRS 403.220 that mandated a financial disparity must exist between the parties in a dissolution action before an award of attorney's fees could be made. In *Smith*, the Supreme Court held:

[T]oday we overrule this line of cases insofar as they require a financial disparity in order for attorney’s fees to be awarded and return to the plain language of the statute. That language requires only that the trial court consider the financial resources of the parties before awarding attorney’s fees – not that a financial disparity exist.

....

The statutory language here is plain: after a trial court considers the parties’ financial resources, it may order one party to pay a reasonable amount of the other party’s attorney’s fees. The statute does not require that a financial disparity must exist in order for the trial court to do so; rather, that language is a creature of case law born out of this Court’s decisions – and today, we slay this forty-year-old dragon hatched from precedent.

While financial disparity is no longer a threshold requirement which must be met in order for a trial court to award attorney’s fees, we note that the financial disparity is still a viable factor for trial courts to consider in following the statute and looking at the parties’ total financial picture. . . .

We agree with the portion of *Gentry* [*v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990)] which holds, “[t]he amount of an award of attorney’s fees is committed to the sound discretion of the trial court with good reason. That court is in the best position to observe conduct and tactics which waste the court’s and attorneys’ time and must be given wide latitude to sanction or discourage such conduct.”

Smith, 556 S.W.3d at 555-56. Thus, pursuant to *Smith*, an award of attorney’s fees is no longer contingent upon a finding of financial disparity; rather, an award of attorney’s fees is within the sound discretion of the family court. *Id.* As part of

that discretion, the family court is permitted to consider any financial disparity that may exist and is permitted to consider any conduct or tactics by either party “which waste the court’s and attorneys’ time[.]” *Id.* at 556.

In the case *sub judice*, the family court clearly considered Robert’s conduct and tactics in claiming the tax exemptions for the children even after being ordered by the court not to do so. Robert’s actions required Kristen’s attorney to engage in extensive research on the issue, consult with a CPA, file an emergency motion supported by a memorandum, and issue subpoenas. Therefore, we believe the family court was clearly acting within its “wide latitude to sanction or discourage such conduct” when it awarded attorney’s fees to Kristen based upon Robert’s conduct and tactics. *See id.* at 556.

Robert alternatively argues that the amount of the award of attorney’s fees to Kristen was excessive or unreasonable. The reasonableness of an award of attorney’s fees in an action for dissolution of marriage is only reviewed for an abuse of discretion. *Smith*, 556 S.W.3d at 556. And, the test for an abuse of discretion is whether the trial judge’s decision was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Coleman v. Campbell Cty. Library Bd. of Trustees*, 547 S.W.3d 526, 534 (Ky. App. 2018). If no abuse of discretion occurred, the award of attorney’s fees will not be disturbed. *Smith*, 556 S.W.3d at 556.

In the case *sub judice*, Robert engaged in a course of conduct that resulted in unnecessary attorney's fees and costs being incurred by Kristen. As outlined in the April 17, 2018, order, Robert disregarded the family court's orders as to both his 2016 and 2017 tax returns. This resulted in Kristen's counsel having to expend unnecessary time meticulously outlining Robert's prior conduct as to the tax returns, performing legal research, consulting with a CPA, filing an emergency motion and memorandum, issuing subpoenas, and searching the IRS website. In its April 17, 2018, order, the family court allowed 24.91 hours at a rate of \$175 per hour and costs of \$80 for a total of \$4,439.25. Considering the whole, we are unable to conclude that the award of attorney's fees and costs in the amount of \$4,439.25 was unreasonable or constituted an abuse of the family court's discretion.

For the foregoing reasons, the Findings of Fact, Conclusions of Law/Orders of Kenton Circuit Court, Family Court Division, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEES.

Laura A. Oldfield
Erlanger, Kentucky