

RENDERED: JUNE 15, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2009-CA-001856-MR

RICHARD M. MITCHELL, JR.

APPELLANT

ON REMAND FROM THE SUPREME COURT OF KENTUCKY

APPEAL FROM FAYETTE CIRCUIT COURT  
FAMILY DIVISION

v. HONORABLE TIMOTHY NEIL PHILPOT, JUDGE  
ACTION NO. 90-CI-01139

KATHLEEN WOODWARD MITCHELL AND  
MILLER, GRIFFIN & MARKS, P.S.C.

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON, LAMBERT AND NICKELL, JUDGES.

LAMBERT, JUDGE: Richard M. Mitchell, Jr. appeals from a September 16, 2009, order entered by the Fayette Circuit Court, Family Division, which granted Kathleen Woodward Mitchell's motion for attorney fees, expert fees, and costs incurred as a result of a motion to modify maintenance filed by Richard. In an

opinion rendered October 8, 2010, this Court agreed with Richard that the trial court was without jurisdiction to enter the above order and reversed the order on appeal. The Supreme Court of Kentucky reversed this decision in an opinion rendered February 23, 2012, and remanded the matter to this Court for consideration of the merits of the appeal. *See Mitchell v. Mitchell*, 360 S.W.3d 220 (Ky. 2012). We have now reviewed the merits of Richard's appeal, and after careful review of the applicable rules and case law, we affirm.

In October 2008, Richard filed a motion to modify the spousal maintenance he had been paying to his former spouse, Kathleen. Richard and Kathleen had been divorced since 1990, following twenty-four years of marriage. During the divorce proceedings, the parties had entered into a settlement agreement whereby Richard agreed to pay Kathleen \$3000.00 per month in maintenance until she remarried, she died, or Richard died, whichever occurred first.<sup>1</sup> By June 2009, Richard had paid Kathleen \$681,000.00 in maintenance. The settlement agreement also stated that if Kathleen became more employable due to education she received with Richard's financial assistance, this could be considered a ground for modification. With his financial assistance, Kathleen received a bachelor's degree in social work from the University of Kentucky in 1995.

On June 9, 2009, Kathleen filed a motion, pursuant to Kentucky Revised Statutes (KRS) 403.220, for attorney fees, expert fees, and costs incurred "incidental to the defense of [Richard's] Motion to modify maintenance." The

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<sup>1</sup> At the time of Richard's motion to modify, none of these three conditions had occurred.

family court heard testimony regarding Kathleen's motion for fees on June 22, 2009, along with testimony concerning Richard's motion to modify maintenance. Specifically, Kathleen testified on direct examination as to the amount of billed and unbilled fees she had accumulated over the preceding year, and documentary evidence of these fees was filed at the conclusion of the hearing.

On June 30, 2009, the family court entered a lengthy order entitled "Findings of Fact & Conclusions of Law and Order," which addressed Richard's motion to modify maintenance. The court ultimately found that Richard failed to establish sufficient grounds to support modification and therefore denied his motion. At the conclusion of the order, the family court indicated that the ruling was final and appealable. No appeal was taken from this order. However, the order never referred to or addressed Kathleen's motion for fees, which had been argued in conjunction with the motion to modify. Both parties concede that Kathleen's motion for fees and costs was not addressed in the June 30, 2009, order.

On July 1, 2009, Kathleen's attorney sent the following e-mail to the judge's law clerk:

Hi Matt, We got the opinion today. Thanks for getting that to us so quickly! I noticed that the Judge did not rule on attorney's fees and was just wondering if he needs that briefed or how he wants us to proceed in that part of the matter. Hope you are having a great day! Thanks,  
Anna

On July 8, 2009, the law clerk replied by e-mail as follows: "I am on this, give me a day or two."

More than a month later, on August 13, 2009, the judge's secretary called Richard's attorney and informed her about the *ex parte* communication between Kathleen's attorney and the law clerk. The secretary also faxed Richard's attorney the e-mail messages detailed above as well as a copy of the notes written by chambers staff on the face of Kathleen's motion for fees. She stated that Kathleen's attorney had been instructed by the judge to file an attorney fee affidavit and that Richard's attorney would have a week to respond to the affidavit. The secretary further informed Richard's attorney that the judge would hear arguments regarding Kathleen's motion for fees and costs on September 4, 2009.

Thereafter, Richard filed an objection to the family court's consideration of Kathleen's motion for fees and costs. He argued that the family court was without jurisdiction to award fees and costs at this juncture and that an award of fees and costs was unwarranted. The family court heard arguments from counsel as scheduled on September 4, 2009, and on September 16, 2009, the court granted Kathleen's motion and awarded her \$19,161.80 in attorney fees related to the defense of Richard's motion to modify maintenance. The family court found Richard's objection on "technical jurisdictional grounds" to be without merit. In so holding, the family court stated, "Quite simply, the June 9 motion was not ruled on until this date." This appeal by Richard follows.

On appeal, Richard presents three separate arguments supporting his argument that the family court's order granting Kathleen's motion for fees was in error. These are: 1) that the family court lacked jurisdiction to rule on Kathleen's

motion for fees and costs; 2) that *ex parte* communication between Kathleen's attorney and the family court's staff prejudiced Richard; and 3) that the award of fees and costs was unwarranted.

For his first argument, Richard contends that the family court erred as a matter of law in determining that it had jurisdiction to make an award of attorney fees and costs pursuant to KRS 403.220 more than ten days after entry of the order ruling on Richard's motion to modify maintenance. The Supreme Court conclusively decided this issue in *Mitchell v. Mitchell*, *supra*, in which it concluded that Kathleen's motion for fees and costs constituted a separate claim from Richard's motion for purposes of CR 54.02 and that the family court, therefore, retained jurisdiction. Following a lengthy analysis of the law set forth in this Court's earlier opinion as well as the parties' arguments, which we shall not set forth in this opinion, the Supreme Court held:

In this case, Kathleen's motion for fees was made prior to the family court's order denying Richard's motion for modification. It was "counterclaimed" only after the request for modification was filed. Further, there were different facts supporting each motion. The basis for Richard's motion for modification of maintenance was Kathleen's attainment of a bachelor's degree. The basis for Kathleen's request for attorney fees was the financial disparity of the parties in having to defend against Richard's motion. Both motions could have been enforced separately, since Kathleen could have been awarded fees under KRS 403.220 even if Richard's motion was granted. As a result, Kathleen's motion for attorney fees was not part of Richard's motion for modification, but was a separate claim or right created by statute.

*Mitchell*, 360 S.W.3d at 224.

Richard next argues, without requesting specific relief, that the occurrence of *ex parte* communications between the family judge's staff and Kathleen's counsel "called into question" the trial court's ability to adjudicate the matter. Our review of the *ex parte* communication in this case reveals that the communication between Kathleen's counsel and the judge's staff was not in violation of Supreme Court Rule (SCR) 3.130(3.5) (lawyer shall not communicate *ex parte* with judge as to merits of case except as permitted by law).

Rather, as permitted by SCR 4.300, Canon 3B(7)(a) of the Judicial Code of Conduct,

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. With regard to a pending or impending proceeding, a judge shall not initiate, permit, or consider *ex parte* communications with attorneys and shall not initiate, encourage or consider *ex parte* communications with parties, except that:

(a) Where circumstances require, *ex parte* communications for scheduling, initial fixing of bail, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond.

The family judge fully complied with Canon 3B(7)(a) in handling the circumstances which transpired in this case. Upon being contacted by Kathleen's counsel as to how the judge wished to proceed on the attorney fee claim, the judge's chambers contacted Richard's attorney and disclosed the substance of the *ex parte* communication. Richard suggests that notes made on Kathleen's motion for attorney fees is evidence of some kind of collusion between the judge's chambers and Kathleen's counsel. The record does not indicate any evidence of such collusion, and Richard's arguments to the contrary are without merit.

For his final argument, Richard maintains the family court erred in making an award of fees under KRS 403.220. An award of fees under this statute will not be set aside unless there is an abuse of discretion. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 519 (Ky. 2001).

Richard claims the family court abused its discretion in awarding attorney fees to his ex-wife because she "has the resources to pay her own fees, most of which were engendered by her own 'unnecessary' motion practice." The family court found otherwise. Specifically, the court determined that Richard's financial resources far exceeded Kathleen's. The court further found Richard's motion for modification to be "entirely unnecessary." In view of these circumstances, the family court concluded that an award of attorney fees to Kathleen was warranted. Our review of this record reveals substantial evidence to support the family court's

findings. Accordingly, we discern no abuse of discretion in the family court's award of KRS 403.220 fees to Kathleen.

For the foregoing reasons, we affirm the September 16, 2009, order of the Fayette Circuit Court, Family Division, granting Kathleen's motion for attorney fees, expert fees, and costs incurred as a result of a motion to modify maintenance filed by Richard.

ALL CONCUR.

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