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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002079-MR

SUSANNE SLABAUGH HENCYE — APPELLANT

APPEAL FROM JEFFERSON FAMILY COURT
v. HONORABLE DOLLY W. BERRY, JUDGE
ACTION NO. 09-CI-500297

BROOK WHITE AND
ALLEN MCKEE DODD — APPELLEES

AND NO. 2014-CA-000086-MR

BROOK WHITE — CROSS-APPELLANT

CROSS-APPEAL FROM JEFFERSON FAMILY COURT
v. HONORABLE DOLLY W. BERRY, JUDGE
ACTION NO. 09-CI-500297

SUSANNE SLABAUGH HENCYE — CROSS-APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: DIXON, D. LAMBERT, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Susanne Slabaugh Hencye appeals from an order of the Jefferson Family Court directing her to pay $8,000 of her ex-husband's attorney fees incurred as a result of alleged discovery violations after she requested appointment of a parenting coordinator. On cross-appeal, Susanne's ex-husband, Brook White, contends the court abused its discretion by awarding only $8,000 of his requested $24,847.91 in attorney fees.

The parties divorced in 2009 and entered into an agreed custody arrangement. The judicial tranquility began to unravel when Susanne notified the family court in March 2011 that a DVO was entered against Brook and requested the appointment of a guardian *ad litem* (GAL) and a parenting coordinator. At that time, Susanne feared if a parenting coordinator was not appointed, Brook would continue his stalking behavior. She attributed his behavior to jealousy over her relationship with another man.

Unfortunately, the DVO proceedings are not part of the record in this case. Without access to that record, the evidence presented in that proceeding was not available for the family court to review concerning Brook's alleged threatening and violent behavior. In *Holt v. Holt*, 458 S.W.3d 806 (Ky.App. 2015), this Court held family courts have jurisdiction over domestic violence proceedings. In light of our

adoption of a family court system, Susanne's motion should have been heard by the same family court with jurisdiction over any custody or visitation matters. Venue of the DVO action should have been transferred. It was not and, therefore, the record must be reviewed as it exists.

After Susanne's motion was filed, an agreed order appointing parenting coordinator Dr. Sally Brenzel was entered. However, soon after the agreed order, Brook filed a motion to restrict Susanne's boyfriend's involvement with the children, including transporting them to appointments such as "haircuts and the like" stating: "This is [Brook's] role with the children, not her boyfriend's." That motion was passed to Dr. Brenzel.

In May 2011, Susanne filed a motion requesting Brook's visitation be suspended. Ellen Friedman was appointed GAL but parenting time was not suspended.

On July 7, 2011, Susanne requested the court to suspend Brook's make-up parenting time until recommended by GAL Friedman. Susanne explained that Brook requested make-up parenting time in the DVO proceeding when the emergency protective order was in effect. Attached to the motion was a letter to the court from Dr. Bass, the children's therapist, describing Brook as having difficulty controlling his impulses and stating that the children reported hearing Brook ask inappropriate questions to Susanne regarding her boyfriend and threatening to harm her boyfriend. Consequently, Dr. Bass opined Brook placed the children in unhealthy and emotionally compromising situations and

recommended he receive a proper psychological evaluation. Despite Dr. Bass's recommendation, the family court denied the motion to suspend make-up parenting time.

On July 14, 2011, Brook began his quest to have Susanne finance his attorney fees. He requested the court to order an advance of attorney fees and costs in the amount of $14,615.31 incurred responding to Susanne's requests for appointment of a GAL, parenting coordinator and suspension of parenting time. He alleged that as an artist, he earns $2,900 per month while Susanne, a teacher, enjoys a nice home and receives litigation financing from her parents. Astonishingly, Brook requested an advance of attorney fees for a hypothetical custody dispute and anticipated incurring $10,000 in fees.

In response, Susanne pointed out that she only sought to resolve parenting issues caused by Brook's commission of domestic violence against her. The incidents precipitating the DVO included Brook driving the wrong way down a highway with the children in the car while chasing Susanne. Brook's act of domestic violence caused her to seek protection for the children by filing a motion for a parenting coordinator. Susanne argued that the limited financial assistance her parents provided was not an appropriate basis for an award of attorney fees. Finally, she emphasized the extraordinarily high amount requested.

Brook's response was that Susanne lied about his behavior to prevent him from having time with the children. He also pointed out Susanne and her boyfriend took various trips and Susanne has an extensive wardrobe, including

shoes that cost more than $1,000 but had never been worn. Apparently, by his references to Susanne's shopping habits and other activities, he sought to establish a disparity of income between the parties.

On September 12, 2011, the family court issued an order stating that the parties' financial resources did not justify an award of attorney fees. However, this would not end what is now the issue in this case—the award of attorney fees.

Susanne and Shawn Hencye married during the December 2011 holidays: Brook then began filing a series of contempt motions. On December 27, 2011, Brook filed a motion for contempt alleging Susanne was not cooperating in parenting coordinator sessions. He made various allegations that Susanne and Shawn had been harassing him. Brook again requested attorney fees. The parties entered into an agreed order to attend a parenting coordinator session on January 10, 2012.

On January 11, 2012, Brook renewed his motion for contempt and attorney fees. He also requested a restraining order against Shawn.

On January 17, 2012, Susanne responded stating she felt unsafe around Brook and his erratic and harassing behavior escalated since her marriage to Shawn. She denied being in violation of the parenting coordinator order and advised the family court that the parties and counsel scheduled a meeting for January 24, 2012, with Dr. Brenzel. In her motion, Susanne made the poignant statement "the Parties need to either utilize the Parenting Coordinator or utilize the Court[.]"

On January 24, 2012, an order was entered enjoining Brook and Shawn from being within 500 feet of each other. An order was also entered scheduling an April 2, 2012 hearing for Susanne to show cause why she should not be held in contempt for failure to comply with Dr. Brenzel's recommendations.

In February 2012, Susanne's counsel withdrew because she was a potential witness in the scheduled contempt proceeding. That same month, obviously frustrated, Dr. Brenzel resigned as parenting coordinator stating she was unable to "adequately address protection issues" and was "unwillingly to expose [herself] to that risk."

Dr. Zamanian was appointed to conduct a custodial evaluation. In a bizarre twist, Dr. Zamanian was Brook's therapist and removed. Dr. Rhonda Mancini was appointed on April 10, 2012, and Susanne, Brook and the children were ordered to submit to custodial evaluations and examinations.

On May 21, 2012, Susanne and Brook entered into a temporary "agreed order for parenting coordinator." The parties agreed to engage in co-parenting counseling with Matt Veroff and for parenting time arrangements during June and July. They also agreed to halt all motion practice and remand all pending motions unless there was a verified allegation of serious endangerment.

William Hoge was appointed as parenting coordinator on June 20, 2012. He made recommendations on July 25, 2012, which were adopted by the family court.

At this point, a custodial evaluation had not been performed. On December 10, 2012, a third custodial evaluator, Dr. James Shields, was appointed to conduct

a custodial evaluation of the parties. A motion to suspend the evaluation was filed by parenting coordinator Hoge pending an assessment of "Child A" by Dr. Ginger Combo.

On January 2, 2013, Brook filed his first discovery motion requesting Susanne execute a Health Insurance Portability and Accountability Act (HIPAA) release. E-mails in the record establish Susanne's counsel stated that he would provide a HIPAA release for Susanne to sign that would be sent to Brook's counsel on January 2, 2013. He also stated he would send a release to counsel for Brook to sign. After not receiving Susanne's release earlier in the day, on January 2, 2013, Brook filed a contempt motion. Susanne's release was sent the following day. The Court entered an order stating that Susanne executed her HIPPA release and requiring Brook to execute his HIPPA release within seven days of January 7, 2013.

On January 29, 2013, Susanne filed a motion to stay discovery pending the outcome of the custodial evaluation, stating that Brook had made various discovery requests and attempted to schedule depositions. She emphasized that no active motion to modify custody was before the court. The following day, Brook filed a motion to compel Susanne and Shawn to submit to depositions.

On February 4, 2013, the family court issued an order stating the "parties shall stay discovery until all testing/etc./by the Custodial Evaluator is completed." The court further ordered all parties and significant others to participate in the custodial evaluation, if requested by Dr. Shields.

Brook was not deterred by the family court's no discovery order and on March 13, 2013, issued a subpoena duces tecum to Susanne and Shawn to appear at an April 18, 2013 deposition and produce a broad array of bank and credit card records and medical records, including Shawn's medical records since birth.

Susanne requested a protective order. After numerous motions and responses, the family court ignored its own order. On March 25, 2013, Susanne's counsel was ordered to draft an agreed order requiring Shawn, who was not a party, to produce all but a few financial records requested and all medical records since birth.

On April 10, 2013, Brook filed a motion for attorney fees in defending the motion for protective order and an order compelling Shawn to execute a HIPPA release. On April 15, 2013, the family court ordered Susanne and Shawn to produce all documents except Shawn's pay stubs and individual tax returns requested by April 16, 2013. In an order dated the same day, *Susanne* was ordered to produce *Shawn's* HIPPA release within twenty-four hours. The issue of attorney fees was stayed pending a hearing.

On April 24, 2013, Brook filed a motion to hold Shawn in contempt alleging a HIPPA release was not sent to Brook's counsel until April 23, 2013, and was missing the signature page. Brook alleged that because of Shawn's refusal to provide a HIPAA release and documents requested, he was "unable to move this case forward[.]" He requested additional fees for filing the motion.

At motion hour on April 29, 2013, Susanne's counsel pointed out that Susanne could not legally produce Shawn's medical records. The family court responded: "He's [Shawn's] in contempt. He was ordered to produce this stuff. He hasn't done it, so she's going to end up paying some attorney fees." The family court admonished Susanne's counsel, instructing counsel to direct Susanne to immediately direct Shawn to gather the requested documents.

On May 8, 2013, Brook filed another motion for contempt alleging Shawn's April 16, 2013 deposition was rescheduled because Shawn had not scheduled a meeting with Dr. Shields. A contempt hearing was scheduled for August 19, 2013. Although not a party, Shawn retained an attorney to protect his interests, including any privacy rights.

In the meantime, amidst the discovery-related motions, the parties filed several motions and memorandums regarding the children, including their continued attendance at the private school where Susanne taught. Susanne alleged Brook was violating the parenting coordinator order by his frequent presence at the school and harassment of her and other school personnel. She argued a public school would be better suited for the children. Brook contended the children should remain at the school. Additionally, there was an issue regarding the purchase of a BB gun by Shawn for one of the children. The parenting coordinator and GAL worked to resolve these non-discovery-related issues.

Brook continued his discovery requests by serving a subpoena duces tecum on Twin Glass Studio LLC, owned by Susanne and Shawn, requesting three

years' tax returns, bank statements and credit card statements used by Susanne or Shawn. On June 10, 2013, the family court ordered the records to be produced by June 25, 2013. After Brook filed a motion for contempt stating the records were not produced, the family court ordered Susanne and Shawn to appear to show cause at the August 19, 2013 scheduled hearing.

At the hearing, Brook offered his attorney's affidavit and itemized billing statement as evidence that he incurred $24,847.91 in fees relating to the discovery issue. The family court wisely found the fees excessive. Nevertheless, the family court awarded Brook attorney fees in the amount of $8,000 citing Kentucky Revised Statutes (KRS) 403.220. Susanne filed a motion to alter, amend, or vacate the court's order. In its order denying the motion, the family court stated the attorney fees were appropriate pursuant to Kentucky Rules of Civil Procedure (CR) 37. This appeal and cross-appeal followed.

Our Family Court Rules of Practice and Procedure (FCRPP), including its provision that a party may ask for a parenting coordinator and custody evaluation, were needed and intended to simplify and expedite matters involving children. Unfortunately, in this case, the purpose of the FCRPP and the intent of its drafters have been frustrated by prolonged and costly discovery by Brook. Despite Susanne's attempt to utilize the resources of the family court to resolve the parties' domestic issues for the benefit of the children, that has not occurred. By its certification that the order awarding attorney fees is "a final and appealable order with no just cause for delay," the family court has stated there are no issues

pending before it, including any action to determine the children's best interest. The sole issue then is whether the circumstances warranted the award of attorney fees to Brook. We conclude they do not.

The family court justified its award of attorney fees to Brook under KRS 403.220 and CR 37. Both are exceptions to the American Rule that requires parties to pay their own fees and costs. *Rumpel v. Rumpel*, 438 S.W.3d 354, 360 (Ky. 2014). As exceptions, the statute and rule must be narrowly construed. *Id*. at 361.

KRS 403.220 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 family court concluded there was no disparity in income between the parties when it denied the first of many in a series of Brook's requests that Susanne pay his attorney fees. There is no suggestion that the income of the parties has changed, yet, the family court awarded Brook attorney fees. At a minimum, it was required to find a disparity in income.

Moreover, while under the statute a disparity in income is a threshold to an award of attorney fees, it is not the only factor. In applying the statute, the court

must also consider other relevant factors including "obstructive tactics and conduct, which multiplied the record and the proceedings are proper considerations justifying both the fact and the amount of the award." *Rumpel,* 438 S.W.3d at 363 (quoting *Sexton v. Sexton,* 125 S.W.3d 258, 272–73 (Ky. 2004). The voluminous record developed is attributable to Brook filing a barrage of motions unrelated to the best interest of the children and related only to his quest to have Susanne pay his attorney fees.

This Court cannot ignore that Susanne's initial motion was necessary because of Brook's threatening and violent behavior. Because of Brook's behavior, she had a reasonable concern about not only her safety when interacting with Brook, but also for her children. Susanne cannot be responsible for Brook's attorney fees merely because she has a higher income when she sought the services of the judicial system to resolve the tensions in parenting their children.

Additionally, Brook is not entitled to attorney fees to compel discovery that was not permitted to be conducted.[1] In *Combs v. Daugherty*, 170 S.W.3d 424, 426 (Ky.App. 2005), this Court held that a party may not "engage in unlimited discovery regarding child support in a divorce proceeding after a decree has been entered, without first filing a motion to modify the child support award." We recognized that CR 26.02(1) allows discovery "regarding any matter, not

[1] In her brief, Susanne states that the family court acknowledged the error during a January 13, 2014 hearing when it stated: "We don't even have anything pending on this other than just the attorney fees so, I mean, there is no custodial change action. There is no—there's nothing.… If I could go back and do it all over again, I would do this case differently."

privileged, which is relevant to the subject matter involved in the pending action" and "a court [has] continuing jurisdiction over child support matters." *Id.* at 425-26. However, we held that absent a motion to modify support pursuant to KRS 403.213(1), there was not a pending action. We stated: "In order to seek a modification of child support, the burden was on Jennifer to make some showing of a material change of circumstance *before* requiring Brandon to produce personal financial documents and *before* moving the circuit court to compel him to do so." *Id* at 426. A child support matter is not pending merely because a party anticipates filing a motion. *Id*.

Like child support modifications, the grounds for modifying visitation or parenting time are set forth by statute and the matter becomes pending only after a party requests modification. KRS 403.320. Although the family court has continuing jurisdiction over custody and visitation, that jurisdiction can only be exercised when the statutory requirements are met. *See Gullion v. Gullion*, 163 S.W.3d 888, 892 (Ky. 2005).

There was no pending motion to modify custody or parenting time when Brook commenced and continued his discovery requests. The parties and their children were simply to undergo mental assessments: The door was not opened for discovery to be conducted by the parties. If any information was needed, the evaluator, and only the evaluator, could have requested such information and, if refused, sought court assistance. Because the family court improperly exercised its

jurisdiction in permitting and compelling discovery, it had no authority to exercise its jurisdiction to award attorney fees under KRS 403.220.

For similar reasons, CR 37 does not support an award of attorney fees. An award of attorney fees is not proper if the failure to comply with a discovery order "would be unjust or the failure to comply is substantially justified." *E.I.C., Inc. v. Bank of Virginia*, 582 S.W.2d 72, 75 (Ky.App. 1979).

To be discoverable, the information sought must be relevant to a pending action. CR 26.02(1). As stated earlier, there was no pending action. Financial and medical records had no relevance to any claim or defense because there was no claim or defense to be asserted. The alleged inordinate amount of time spent compelling discovery was incurred for compelling information that was not discoverable and for the sole purpose of harassing Susanne and Shawn. Susanne's and Shawn's refusal to comply was absolutely justified.

Finally, even if attorney fees may be awarded under the circumstances, Susanne cannot be required to pay attorney fees for Shawn's noncompliance. "Contempt can be civil or criminal in nature. Civil contempt is the failure ... to do something under order of court, generally for the benefit of a party litigant." *Kentucky River Cmty. Care, Inc. v. Stallard*, 294 S.W.3d 29, 31 (Ky.App. 2008) (quoting *Commonwealth v. Burge,* 947 S.W.2d 805, 808 (Ky. 1996)).

Here, the family court's award of attorney fees made no distinction between Susanne's noncompliance with the discovery orders, which were admittedly few, and those by her husband, Shawn. The over 130.5 hours Brook's attorney alleges

were spent compelling discovery were, for the most part, incurred to compel Shawn's compliance, not Susanne's. Only Shawn could execute Shawn's HIPAA release. The family court cannot order Susanne to pay any amounts incurred by reason of Shawn's alleged noncompliance with its orders.

We cannot conclude without stating this entire dispute over attorney fees incurred for compelling discovery could have been avoided if the family court had merely enforced its February 4, 2013 order staying discovery until the custodial evaluation was concluded. Although the family court's order properly precluded discovery where no motion to modify custody was pending, it ignored its own order and permitted Brook to request broad, burdensome, and irrelevant discovery and ordered Susanne and Shawn to comply. While Brook was filing his various discovery-related motions, a custodial evaluation was not conducted and the children remained in a potentially harmful parenting situation. Unfortunately, as the record exists, they still remain in that situation.

Brook's cross-appeal arguing that the family court abused its discretion by awarding only $8,000 of his requested $24,847.91 attorney fees is moot.

For the reasons stated, the order of the Jefferson Family Court awarding Brook $8,000 in attorney fees is reversed.

D. LAMBERT, JUDGE, CONCURS.

DIXON, JUDGE, DISSENTS.

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