

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000732-MR

SHAWN SINGH SABHARWAL

APPELLANT

v. APPEAL FROM FAYETTE FAMILY COURT
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 01-CI-03607

TAMMY GWYN HOSKINS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, KELLER¹ AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Shawn Singh Sabharwal appeals an order awarding attorney fees to Tammy Gwyn Hoskins incurred in litigation concerning the parties' parental timesharing arrangement. Shawn contends that the award of

¹ Judge Michelle M. Keller concurred in this opinion prior to her appointment to the Kentucky Supreme Court. Release of this opinion was delayed by administrative handling.

attorney fees was barred by the doctrine of res judicata and that the amount awarded was excessive. We disagree with both contentions and affirm.

In 2007, an agreed order was entered in the parties' dissolution of marriage action that provided for supervised visitation by Shawn with the parties' minor children. In 2009, the court granted Tammy's motion to suspend timesharing pending the appointment of a new visitation supervisor. While that motion was pending, Shawn decided not to contest the motion and an order was entered suspending his timesharing but permitting him to attend public events with the children.

On December 6, 2010, Shawn filed a motion requesting the court to appoint a new supervisor for timesharing. After attempts at mediation failed and Shawn completed a court ordered psychological evaluation, a hearing was scheduled for September 16, 2011. During the hearing, Tammy made a motion for an award of attorney fees. Additional hearings were held on October 3, 2011, and October 18, 2011. On October 24, 2011, the court issued an order permitting timesharing with supervised visitation. The order stated that it was final and appealable and that the sole issue resolved was the timesharing arrangement.

On November 14, 2011, Tammy filed a motion for attorney fees and was later instructed by the court to file an accompanying affidavit. On December 7, 2011, Tammy filed a motion for attorney fees and an affidavit requesting \$23,000 for attorney fees. Shawn objected to the award arguing that after the

expiration of ten days after the entry of the timesharing order, the family court lost jurisdiction to enter an attorney fee award. The family court rejected Shawn's argument and, in doing so, pointed out that its order addressed only the timesharing issue and that Tammy could not have determined the amount of fees incurred until after the October 24, 2011, order was issued.

KRS 403.220 expressly grants the court continuing jurisdiction to award attorney fees before and after judgment. It states in its entirety:

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.

Shawn argues that regardless of the statutory language, the family court's order adjudicated all the parties' rights and, pursuant to CR 52.02, the court lost jurisdiction over Tammy's motion for attorney fees ten days after the order was entered.

Shawn intertwines the doctrine of res judicata with his argument. In *Moorhead v. Dodd*, 265 S.W.3d 201, 203-204 (Ky. 2008), the doctrine was explained:

Res judicata consists of two concepts, claim preclusion and issue preclusion (also called collateral estoppel). Claim preclusion bars subsequent litigation between the same parties or their privies, on a previously adjudicated

cause of action. *Buis v. Elliott*, 142 S.W.3d 137, 139–40 (Ky. 2004). Issue preclusion, on the other hand, precludes the relitigation of an issue that was actually litigated and decided in a prior proceeding. *Id.* at 140. Finally, the rule against splitting causes of action precludes successive actions arising from one transaction. (citations omitted).

The application of the doctrine is “a question of law to be reviewed de novo.” *Id.* at 203.

In *Mitchell v. Mitchell*, 360 S.W.3d 220 (Ky. 2012), our Supreme Court rejected an argument similar to that made by Shawn and held that the family court retained jurisdiction to award attorney fees more than ten days after the entry of an order denying a motion to modify maintenance. Although a motion for attorney fees, expert fees, and costs incurred as a result of defending the motion to modify maintenance remained pending, the order was designated as final and appealable and there was no mention of the motion for fees and costs. More than ten days after the entry of the order, the family court explained that it had neglected to address the motion for fees and costs and granted the motion.

The court concluded that the motion for fees and costs was a separate claim for purposes of CR 54.02 and, therefore, the family court retained jurisdiction to grant or deny the motion. It clearly set forth its reasoning:

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.

Id. at 224. The reasoning in *Mitchell* is equally applicable to this case. Tammy's request for attorney fees prior to the entry of the order regarding timesharing was a "separate claim or right created by statute." *Id.* For that reason, res judicata does not preclude her claim and the family court retained jurisdiction to award attorney fees.

Shawn's final argument is the amount of the award, \$17,250, was excessive. The amount of an award of attorney fees is within the sound discretion of the family court. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 518 (Ky. 2001). A family court is not required to make specific findings in assessing attorney fees but must only find that a financial disparity in the financial resources of the parties exists. "Under the statute, no more is required." *Gentry v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990).

The family court noted that Shawn did not provide evidence regarding his financial resources and Shawn has not cited to this Court anywhere in the record where he disclosed his occupation, income or assets. After hearing extensive testimony concerning Shawn's lifestyle and Tammy's income and assets, the family court found that there was a huge disparity in the parties' financial

resources. As the family court stated, it knew the parties, their capabilities, and their culpability. Consequently, we have no basis to disturb the family court's discretion in awarding attorney fees.

Based on the foregoing, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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