

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002729-MR

STEVEN KIMBALL

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE WILLIAM J. WEHR, JUDGE
ACTION NO. 00-CI-01071

MARJORIE KIMBALL,
BEVERLY STORM, AND
ARNZEN & WENTZ

APPELLEES

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: BARBER, DYCHE AND TACKETT, JUDGES.

TACKETT, JUDGE: Steven Kimball (Steven) appeals from an order of the Campbell Circuit Court, which confirmed and adopted a Domestic Relations Commissioner's findings of fact, conclusions of law and recommendations concerning Steven's child support and maintenance obligations to Marjorie Kimball (Marjorie). The trial court also adopted the commissioner's recommendation that Steven pay a portion of Marjorie's attorney's fees. For the

reasons set forth herein, we vacate and remand for further proceedings.

Steven and Marjorie were married on August 20, 1982. During their marriage, Steven was employed as an architect, design engineer, and chief executive officer of KZF, Inc. in Cincinnati, Ohio. Marjorie has not been employed since 1986 since the parties decided at that time that she would stay home with the couple's three children. Since filing for divorce on July 23, 2000, Marjorie has made no attempt to obtain employment despite holding a bachelor's degree in interior design that she earned from the University of Kentucky in 1976.

During the litigation of this matter, the parties reached an agreement concerning several matters, including Steven's nonmarital property, the custody, medical coverage and educational expenses of the children, as well as the division of marital assets and debts. The parties, however, could not reach an agreement concerning the issues of child support, maintenance and payment of attorney's fees. The commissioner held an evidentiary hearing concerning these issues on August 9, 2001.

After reviewing the evidence submitted at the evidentiary hearing, the commissioner found Marjorie to be voluntarily unemployed and imputed a potential average gross monthly income of \$1,213.33 to her. Steven, based upon his salary, yearly bonuses, income from investments and stock dividends, was found to have an average gross monthly income of

\$27,771.00. Since the parties' income exceeded the highest income provided in the child support guidelines, the commissioner examined the budget each party prepared concerning the normal expenses incurred by the children. With this information, the commissioner determined that the children's normal expenses were in the amount of \$2,814.00 per month. After subtracting all expenses for the oldest child¹, as well as the medical and educational expenses that Steven had already agreed to pay, the commissioner recommended that Steven should pay \$2,700.00 per month to Marjorie for child support.

Concerning Marjorie's request for maintenance, the commissioner found Marjorie to have expenses totaling \$3,232.00 per month. The commissioner determined that Marjorie lacked sufficient property to provide for her reasonable needs because, even though she received \$232,253.00 in marital assets after the mortgage on the marital home was subtracted, Marjorie received very little income producing assets. This fact, coupled with the finding that Marjorie would need approximately six to twelve months of retraining to utilize her interior design degree, was the basis for the commissioner recommending that Steven pay Marjorie maintenance until she reached 62 years of age. Steven was recommended to pay \$3,232.00 per month in maintenance for the first six years of his obligation, with the remaining maintenance obligation to be revisited at that time.

¹ The oldest child turned 18 years of age prior to the date of the evidentiary hearing.

Finally, Marjorie requested that Steven be ordered to pay her attorneys' fees in the amount of \$12,878.25. The commissioner, after reviewing the financial status of the parties, recommended that Steven pay \$10,000.00 to Marjorie, with that money to be applied toward Marjorie's attorney's fees.

Steven timely objected to the commissioner's recommendations. While Steven brought forward six objections to the commissioner's report, his objections focused mainly upon the recommendations concerning the amount of his child support and maintenance obligations, as well as any payment for his ex-wife's attorney's fees. Despite being properly served with the objections, the trial court never scheduled or held a hearing concerning Steven's objections. Instead, the trial court chose to review the record and discuss this matter with the commissioner prior to making a ruling concerning these objections. After reviewing the record and conferring with the commissioner, the trial court overruled Steven's objections and adopted the commissioner's recommendations in their entirety. This appeal followed.

On appeal, Steven addresses four arguments. First, Steven argues that the trial court erred in ordering him to pay Marjorie maintenance until she attains the age of 62, with the first six years of payments being \$3,232.00 per month. Steven further asserts that the trial court erred in calculating his child support obligation. Additionally, Steven claims that the

trial court erred in ordering him to pay \$10,000.00 towards Marjorie's attorney's fees. Finally, Steven argues that the trial court failed to conduct a hearing concerning his objections as required by Kentucky Rules of Civil Procedure (CR) 53.06(2), and therefore the case must be remanded.

Turning to Steven's CR 53.06(2) argument that the trial court erroneously deprived him of a hearing on his objections to the commissioner's recommendations, we are compelled to agree.

CR 53.06(2) provides as follows:

Except in pendente lite matters, within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in CR 6.04. The court after hearing may adopt the report, or may modify it, or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions.

The Kentucky Supreme Court interpreted the above mentioned rule in Kelley v. Fedde, Ky., 64 S.W.3d 812 (2002). In Kelley, the Supreme Court held that CR 53.06 requires the trial court to afford the parties an opportunity for oral argument before ruling on the objections. Id., at 814. Further, the Supreme Court asserted "while a full-blown evidentiary hearing is not contemplated by the rule, the parties must be afforded an opportunity for oral argument." Id., citing Haley v. Haley, Ky. App., 573 S.W.2d 354 (1978).

Marjorie argues the trial court is not required to hold a hearing on objections to the findings of a domestic relations commissioner. We cannot agree in light of the Supreme Court's recent holding in Kelley. Additionally, Marjorie argues that Steven waived his right to a hearing by failing to object to the issuance of a ruling without a hearing. Again, this argument is simply incorrect as the Supreme Court directed otherwise in Kelley. Moreover, the first paragraph of the trial court's final order in this matter provides us with the procedure that the trial court used in ruling upon Steven's objections:

This matter is before the Court upon a Motion to confirm the Report of the Domestic Commissioner filed on August 28, 2001. Respondent filed objections to the report to which the Petitioner filed a response, to which Respondent filed a reply. Further, the matter is before the Court upon Petitioner's Motion for guidance as to the disposition of Respondent's personal property. The Court reviewed the record, including all of the memoranda of the parties, discussed the matter at length with the Domestic Commissioner, considered all other matters and otherwise was advised sufficiently.

Thus, from the language of the trial court's order, the trial court did not afford Steven an opportunity for an oral argument on his objections. This error in procedure is contrary to the clear intent of the civil rules, Haley and Kelley, all of which, we believe, require the trial court to hold at least an oral argument before ruling upon a commissioner's report when objections to that report have been timely filed.

As this ruling is dispositive on the question raised with regard to CR 53.06(2), we need not reach the merits of the remaining issues. Accordingly, the judgment of the Campbell Circuit Court is vacated and this matter is remanded for a hearing as required by CR 53.06(2).

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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