

RENDERED: February 18, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-002218-MR

KEVIN GEORGE

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JOAN L. BYER, JUDGE
ACTION NO. 02-CI-502764

MARGARET SEEGER-GEORGE
(NOW SEEGER-GATTI) AND
DIANA L. SKAGGS

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a post-decree order which awarded appellee attorney fees incurred in defending a post-decree motion filed by appellant. Appellant argues that the post-decree award of attorney fees was improper because: appellee had already been awarded attorney fees in the parties' settlement agreement that were intended to be in full

satisfaction of all claims for attorney fees; the motion for attorney fees was prompted by appellee's breach of the separation agreement; and the award was an abuse of discretion. We reject appellant's arguments and thus affirm.

Appellant, Kevin George, and appellee, Margaret Seeger-George (now Seeger-Gatti), were married in 1999 and separated in July of 2002. No children were born of the marriage, but the record indicates that Margaret had five children from a previous marriage, some of whom were disabled and resided with the parties during the marriage. Kevin filed the petition for dissolution of marriage on July 9, 2002. During mediation on October 17, 2002, the parties reached a settlement agreement which was filed in the record on October 28, 2002, and incorporated into the decree of dissolution entered on November 1, 2002. The parties agreed that the marital residence would be sold upon dissolution. As to attorney fees, the settlement agreement provided that Kevin would pay Margaret \$5,000 "as partial reimbursement for her attorney fees herein." Another provision stated that there could be no modification of the agreement except as agreed in writing by both parties.

Per the terms of the agreement, Margaret vacated the marital residence after the decree was entered. At this point,

a dispute arose between the parties over certain items of personal property which Margaret took from the premises which Kevin maintained were fixtures that were to stay with the property. Consequently, on November 27, 2002, Kevin, who was an attorney, filed a pro se motion to compel, alleging that Margaret had breached the terms of the settlement agreement by taking numerous fixtures from the property. A hearing was thereafter held on the motion. On April 8, 2003, the court entered an order finding that Margaret was entitled to take all but two of the items in question, a basketball goal and a ceiling fan. Margaret then moved for Kevin to pay the legal expenses and attorney fees she incurred in defending the motion. After a hearing on the motion, the court entered an order requiring Kevin to pay \$6,336 in attorney fees for Margaret. This appeal by Kevin followed.

Kevin first argues that allowing Margaret to receive further attorney fees in effect modified the parties' settlement agreement. Kevin maintains that since the settlement agreement was intended to be the final resolution of all claims, including those for attorney fees, Margaret was not entitled to further attorney fees. Section 5 of the agreement, entitled "RELEASE", provided:

Each party does hereby release and discharge the other from any and all claims, demands,

liabilities, obligations, damages, actions, choses in action whatsoever, including but not limited to any and all claims for past, present, and future maintenance (except as reserved in paragraph 7.1 hereof), dower, curtesy, descent and distribution and any and all other claims arising out of the marriage or otherwise, but excepting from said releases the obligations contained in the herein agreement.

Section 6 of the agreement provided:

Each party shall pay his or her own attorney and court costs. . . . Kevin shall pay to [Margaret] \$1000 per month for a period of five months commencing November 1, 2002, as partial reimbursement for her attorney fees herein.

From our reading of the settlement agreement, the attorney fees received by Margaret in the agreement were for fees that she had incurred up to entry of the decree because those were all fees that could be anticipated at the time of the agreement. In our view, the agreement did not bar Margaret from seeking attorney fees for future litigation because Margaret could not have foreseen that she would have to defend the post-decree motion filed by Kevin in this case. It would be inequitable to restrict Margaret from seeking attorney fees for unforeseeable post-decree litigation initiated by Kevin, especially given that Kevin filed the motion pro se and thus did not incur attorney fees.

Kevin next argues that he was forced to file the post-decree motion to compel because Margaret breached the settlement agreement. Thus he contends he should not be required to pay her attorney fees when it was her breach of the agreement that precipitated the motion.

The motion to compel filed by Kevin alleged that Margaret improperly took fifteen items that were fixtures when she left the marital residence. After a full hearing on the matter, the court ultimately ruled that of the fifteen items at issue, only two were required to be returned or replaced by Margaret, a ceiling fan and a basketball goal that Margaret maintained was a gift to her disabled children. Hence, the court partially ruled in favor of Kevin as to only those two items and one-half of the cleaning costs. As to all the other items, the court ruled in favor of Margaret. In its order, the court simply granted Kevin's motion in part; the court did not adjudge that Margaret breached the settlement agreement.

The agreement did not specify what items were fixtures and what items Margaret was permitted to take with her. The agreement merely provided that Margaret was to receive "[a]ll household goods and furnishings in her possession and in the marital residence excepting only the items Kevin is to receive under paragraph 2.3.3 hereof." And under paragraph 2.3.3 of the

agreement, Kevin was to get "the refrigerator he owned prior to the marriage, garage shelving and related matter, and the hot wax/paraffin equipment." Since the agreement was not specific as to what items Margaret was allowed to take from the residence, it cannot be said that Margaret breached the agreement when she took certain items. The motion was simply to clarify what items were permissible to take from the property and what items were considered part of the property.

Kevin also argues that the trial court failed to consider the parties' financial resources in its post-decree award of attorney fees to Margaret. This argument is completely without merit. In its order awarding post-decree attorney fees to Margaret, the court explicitly examined the financial resources of the parties, adjudging, "After careful consideration of the evidence before it, the Court finds that there does exist a disparity in the financial resources of the parties. The Court concludes that an award of attorney's fees in the requested amount of \$6,336.00 is justified pursuant to KRS 403.220."

Finally, Kevin argues that the court abused its discretion in awarding the post-decree attorney fees to Margaret. Under KRS 403.220, a court may award attorney fees in a domestic action if there is a disparity in the financial

resources of the parties. Gentry v. Gentry, 798 S.W.2d 928 (Ky. 1990). In Gentry, the Court also recognized that the trial court was in the best position to observe the conduct of the parties, and was permitted to award fees to discourage or sanction tactics that wasted the court's time. Id. The allocation of attorney fees under KRS 403.220 is entirely within the discretion of the trial court. Browning v. Browning, 551 S.W.2d 823 (Ky. App. 1977). The evidence in the present case revealed that Kevin earned approximately \$138,828 a year, while Margaret earned less than \$25,000 a year. Given this disparity in income and the fact that Kevin was the one who brought the post-decree motion from which he recovered very little (compared to what he sought and the costs of the motion), we cannot say that the court abused its discretion in awarding post-decree attorney fees to Margaret.

For the reasons stated above, the order of the Jefferson Family Court is affirmed.

COMBS, CHIEF JUDGE, CONCURS.

GUIDUGLI, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

Kevin George
Louisville, Kentucky

BRIEF FOR APPELLEE:

Diana L. Skaggs
Sandra G. Ragland
Louisville, Kentucky