

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002408-MR
and
NO. 2003-CA-002413-MR

GORDON JAY SETTLOW

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM TRIGG CIRCUIT COURT
v. HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 98-CI-00074

ALICE JEAN HAENDIGES SETTLOW

APPELLEE/CROSS-APPELLANT

OPINION
VACATING AND REMANDING

** **

BEFORE: HENRY AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.¹
HENRY, JUDGE: Gordon Jay Settlow and Alice Jean Haendiges
Settlow appeal and cross-appeal, respectively, from a July 14,
2003 final order and judgment of the Trigg Circuit Court
adopting the special domestic relations commissioner's report
and findings as to how maintenance should be awarded to Alice.

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Upon review, we vacate the trial court's final order and judgment and remand for further proceedings.

Gordon and Alice were married on July 25, 1970. At the time of their marriage, Alice was a nurse and Gordon was a medical intern. The parties were married for nearly thirty (30) years, during which time they had four (4) children and Gordon became a board-certified pathologist.

At some point in their marriage, Gordon and Alice separated, with Alice and the children moving to San Diego, California, and Gordon moving to the Kentucky/Tennessee area to practice medicine. However, Gordon traveled to California on a number of occasions to visit Alice and the children. Alice also visited Gordon on multiple occasions, and the two vacationed together in Europe during the fall of 1996.

Gordon filed for the dissolution of his marriage to Alice on May 14, 1998, in Trigg County, Kentucky. In August 1998, Alice consented to have the dissolution action tried in Trigg County after filing her own dissolution petition in San Diego on April 27, 1998. Following a two-day evidentiary hearing on January 14 and 15, 1999, the Trigg County domestic relations commissioner issued findings that were fully adopted by the trial court on November 29, 1999. Alice subsequently appealed from this decision.

On May 11, 2001, this court vacated the judgment of the trial court in part and remanded this case to that court for further proceedings. In particular, we held that the trial court's \$1,000 per month maintenance award was an abuse of discretion given the significant disparity between the incomes of Gordon and Alice. We accordingly remanded the case back to the trial court for reconsideration of the maintenance award.

On June 24, 2003, the special domestic relations commissioner, upon request of the trial court, filed a final report containing his recommendations that Alice be paid \$2,100 per month in permanent maintenance. On July 2, 2003, Gordon filed objections to the commissioner's report along with a motion to amend the report to comply with his objections. Of particular note is the fact that Gordon noticed the matter to be heard on August 13, 2003. On July 3, 2003, Alice filed her own objections to the commissioner's report and also moved for an amendment of the report. She also noticed the matter for oral argument on August 13, 2003.

However, on July 14, 2003, the trial court entered a final order and judgment without conducting a hearing on the parties' objections to the commissioner's report. The court noted: "Both sides have noticed hearings on their objections for August 13, 2003. However the Court has reviewed the Commissioner's report as well as the well stated exceptions and

finds that the written exceptions are adequate. Therefore no hearing is necessary." The court subsequently adopted all of the commissioner's recommendations as its final order and judgment. Gordon then filed a motion to alter, amend, or vacate the court's judgment that was denied on October 14, 2003. This appeal and cross-appeal followed.

The parties raise a number of issues on appeal, but we are compelled to focus primarily upon Gordon's argument that the trial court erred in overruling the objections and denying the motions of both parties as to the special domestic relations commissioner's findings without providing notice and a hearing. As noted above, in its order of July 14, 2003, the trial court stated: "Both sides have noticed hearings on their exceptions for August 13, 2003. However, the Court has reviewed the Commissioner's as well as the well stated exceptions and finds that the exceptions are adequate. Therefore, no hearing is necessary." Gordon notes that neither party was provided with notice of the trial court's intent to rule on the objections and the pending motions without a hearing, even though a hearing had been noticed by both parties. He adds that neither party was afforded an opportunity to present a memorandum or other material in support of his or her objections and motion, or in opposition to the objections and motion of the other party.

CR² 53.06(2), subtitled "Action on report," 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.

(Emphasis added). In Kelley v. Fedde, 64 S.W.3d 812 (Ky. 2002), the Kentucky Supreme Court held that CR 53.06 requires the trial court to afford parties an opportunity for oral argument before ruling on objections to a domestic relations commissioner's report. Id. at 814. Specifically, the Supreme Court concluded that "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, 573 S.W.2d 354 (Ky.App. 1978).

Accordingly, we must conclude that the trial court was in error here in failing to afford the parties an opportunity for oral argument pursuant to CR 53.06(2) when objections to the special domestic relations commissioner's report were timely

² Kentucky Rules of Civil Procedure.

filed.³ Therefore, we find it necessary to vacate and remand this case to the Trigg Circuit Court for proceedings consistent with this opinion. Specifically, the trial court must allow for oral argument on the parties' objections and motions as to the commissioner's report before rendering a decision.

However, with this in mind, we also feel it necessary to address Gordon's contention that the trial court erred in making new findings of fact (or, more specifically, adopting the special domestic relations commissioner's findings) following the remand of this case in May 2001. Gordon argues that the case was remanded for a new maintenance award determination based on the record as it existed at the time the first judgment was entered. As a basis for this argument, Gordon asserts that this court did not conclude that the trial court's original findings of fact were clearly erroneous in deciding to remand, meaning that those findings must have been sufficient when we ruled upon the propriety of the original maintenance award. Therefore, the argument goes, these findings should not have been disturbed by the circuit court on remand. Gordon further notes that some of the findings of fact made on remand cannot be reconciled with the original findings of fact.

³ In reaching this decision, we note that Alice offered no arguments in her brief opposing Gordon's position that the trial court erred in not allowing oral arguments on the parties' objections to the commissioner's report.

Upon reviewing our May 2001 opinion rendered in this case, we find that no explicit rulings were made as to whether the trial court should or should not make new findings of fact in determining a new maintenance award. We note, however, that this court took issue with the trial court's original finding that Alice could regain her license, return to nursing, and significantly increase her income, concluding that this assertion was "speculative." Consequently, we cannot say that this court uniformly agreed with all of the trial court's original findings of fact when it first remanded this case.

With this said, however, it appears as if the trial court's request for new findings of fact and conclusions of law from another domestic relations commissioner was perhaps unnecessary and a cause of confusion. Relatively little new evidence was presented to that commissioner; indeed, it appears from his report that he relied almost exclusively upon the evidence that had been tendered previously to the first commissioner and the trial court in reaching his conclusions. However, our Supreme Court has held that trial courts have the "broadest possible discretion with respect to the use [they] make[] of reports of domestic relations commissioners." Eiland v. Ferrell, 937 S.W.2d 713, 716 (Ky. 1997), citing Haley v. Haley, 573 S.W.2d 354 (Ky.App. 1978); Basham v. Wilkins, 851 S.W.2d 491 (Ky.App. 1993). We also note that CR 53.06(2), which

deals with the time for objections to a domestic relations commissioner's report, provides that a trial court, with respect to such a report, "may adopt, modify or reject it, in whole or in part, and may receive further evidence or may recommit it [to the domestic relations commissioner] with instructions." Id.

Given the substantial discretion afforded to trial courts as to how they use these reports, and this court's previous failure to give explicit directions as to whether new findings of fact should be made by a domestic relations commissioner, we are inclined to conclude that the trial court did not abuse its discretion here in requesting a new report from the special domestic relations commissioner. As this case is to be remanded for oral argument, the parties will be able to address any inconsistencies between the two reports before the trial court makes a ruling.

As these rulings are dispositive, the other issues raised by Gordon and Alice shall not be addressed.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
APPELLEE:

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BRIEF FOR APPELLEE/CROSS-
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