RENDERED: JUNE 2, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000025-MR

CHARLES R. HYATT — APPELLANT

v.

APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 02-CI-00074

MAUREEN R. HYATT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KNOPF AND TACKETT,[1] JUDGES; HUDDLESTON, SENIOR JUDGE.[2]

TACKETT, JUDGE: Charles Hyatt (Charles) appeals from an order of the Calloway Circuit Court in a dissolution action. Charles argues that the trial court erroneously deviated from the requirements found in Kentucky Revised Statute (KRS) 403.211(8) for apportioning extraordinary medical expenses and further undervalued the amount of damage done to the marital residence

[1] This opinion was completed and concurred in prior to Judge Julia K. Tackett's retirement effective June 1, 2006. Release of the opinion was delayed by administrative handling.

[2] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

while it was occupied by his ex-wife and their children. We disagree and affirm the trial court.

At the time of their divorce, Charles and Maureen Hyatt (Maureen) had been married for eighteen years. Charles had been employed as the CEO of a company, earning approximately $131,000.00 per year, while Maureen was a homemaker. The parties had two minor sons when Charles filed for dissolution in February 2002. At a final hearing in front of the Domestic Relations Commissioner (DRC), the parties submitted an agreed order, reserving certain issues to be determined by the trial court. The DRC submitted findings and recommendations dividing marital property, allocating debt, and establishing maintenance and child support. Maureen's share of equity in the marital residence was determined to be $12,000.00, and Charles was ordered to purchase her equity within sixty days. Until the expiration of the sixty day period, Maureen and the children could continue to occupy the house. The trial court adopted the DRC's recommendations in their entirety in an order entered August 9, 2002.

On August 22, 2002, Charles sent Maureen a letter notifying her that she was required to vacate the marital residence by October 8th, by which time he would pay her $12,000.00 for her share of the equity in the home. Maureen purchased another home and moved there with the children;

however, Charles did not pay her for her equity. When the sale occurred, the amount due to the seller was only $7,850.00, so Charles refused to pay Maureen the $12,000.00. The matter came back before the DRC who recommended that Maureen receive the entire proceeds from the sale of the house and that Charles be ordered to make up the difference of $4,150.00. The trial court entered an order adopting the DRC's recommendations on November 17, 2003. Charles filed a notice of appeal; however, the appeal was dismissed after he failed to proceed.

Subsequently, Charles filed a *pro se* motion requesting an award of damages for the condition of the marital residence at the time Maureen and the children vacated it. Charles sought $6,332.00 in damages from Maureen to replace flooring and for his new wife's labor in cleaning the house, billed at a rate of $20.00 per hour. The DRC held a hearing on July 22, 2004, and issued recommendations on August 9th. Among the issues addressed was the division of the children's extraordinary medical expenses between the parties and the amount of damage to the marital residence. Pursuant to KRS 403.211(8), the DRC recommended that the children's extraordinary medical expenses be allocated 77% to Charles and 23% to Maureen in proportion to their respective incomes. While the statute only requires the division of expenses in excess of $100.00 per child, the DRC recommended the division of all extraordinary medical expenses

as being easier for accounting purposes. In addition, the DRC found that Maureen did leave the house in a condition that exceeded normal wear and tear; however, he also opined that Charles inflated the amount of damage and recommended a credit of $500.00 against any amount which Charles owed Maureen for her equity interest in the house. In an order dated November 30, 2004, the trial court adopted the DRC's recommendations and overruled Charles' exceptions to the same. This appeal followed.

Charles argues that the trial court failed to follow KRS 403.211(8) in apportioning extraordinary medical expenses. The relevant portion of the statute reads as follows:

> (8) The cost of extraordinary medical expenses shall be allocated between the parties in proportion to their combined monthly adjusted parental gross incomes. "Extraordinary medical expenses" means uninsured expenses in excess of one hundred dollars ($100) per child per calendar year. "Extraordinary medical expenses" includes, but is not limited to, the costs that are reasonably necessary for medical, surgical, dental, orthodontal, optometric, nursing, and hospital services; for professional counseling or psychiatric therapy for diagnosed medical disorders; and for drugs and medical supplies, appliances, laboratory, diagnostic, and therapeutic services.

The DRC's recommendations contain the following language pertaining to splitting extraordinary medical expenses between the parties:

> As previously ordered, all medicals related to the children are to be split between the parties with Charles paying 77% and Maureen paying 23%. KRS 403.211(8) makes it mandatory that all "extraordinary medical expenses" are to be split between the parties in proportion to their combined adjusted parental gross incomes. Nothing in KRS 403.211 prevents a court from going further to require all uninsured medicals for the children to be split between the parties, rather, it merely provides a minimum that must be split. The undersigned typically, as in this case, recommends all uninsured medicals to be split to avoid an expensive accounting and litigation nightmare between ex-spouses arguing what medical expenses are in fact "extraordinary."

(Footnote omitted.) Charles argues that the trial court, by adopting the DRC's recommendations, ignored the language of KRS 203.211 by failing to exclude the first $100.00 of uninsured medical expenses for each child. He cites the case of Van Meter v. Smith, 14 S.W.3d 569 (Ky. App. 2000), in support of his argument. Van Meter involved a trial court's order modifying the allocation of medical expenses by assigning all medical expenses to the mother after the child's father became disabled. We held that the trial court was required to enter written findings explaining its deviation from KRS 403.211(8). The trial court in the case at hand apportioned the medical expenses

according to the requirements of the statute; however, the court chose not to exclude the first $100.00 in expenses per child in order to avoid costly accounting and litigation. Due to the history of repeated litigation between the parties, Charles fails to show that the written reason was insufficient to justify the slight deviation from the statute.

As part of his claim that the trial court failed to follow the statute's guidelines, Charles complains that his ex-wife sometimes takes the children to health care providers who are outside his insurance network, thus incurring extra medical expenses. Maureen responds that there are no pediatricians in Calloway County who participate in Charles' insurance plan. Regardless, this disagreement between the parties over which physicians should be used to treat the children was not addressed by the trial court's order and, thus, is not properly before us for review.

Finally, Charles contends that the trial court's award of damages to the marital residence was significantly less than the actual damage which occurred. Charles claimed $6,332.00 in damage to the marital home due to flooring replacement and cleaning costs. The trial court found that Maureen left the home in a filthy condition and caused damage which was beyond normal wear and tear; however, Charles' estimated damages and cost for cleaning were found to be overly inflated. Thus, he

was awarded a $500.00 credit against the amount he still owed Maureen for her equity in the house. Kentucky Rule of Procedure 51.02 governs factual issues which are determined by a judge, rather than a jury. The relevant portions of the rule state as follows:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court.

Charles has failed to show that the trial court's determination of damages was clearly erroneous.

For the foregoing reasons, the order of the Calloway Circuit Court is affirmed.

HUDDLESTON, SENIOR JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

KNOPF, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: Respectfully, I dissent from the portion of the majority opinion which affirms the trial court's allocation of the children's un-reimbursed medical expenses. As the majority correctly notes, KRS 403.211(8) requires the trial court to allocate "extraordinary medical expenses" between the parties in

proportion to their combined adjusted parental gross incomes. The statute further defines “extraordinary medical expenses” to mean “uninsured expenses in excess of one hundred dollars ($100) per child per calendar year”. The trial court and the majority conclude that all of the children’s un-insured medical expenses may be allocated once the one hundred dollar threshold is met. This interpretation is contrary to the plain language of the statute. Rather, the first one hundred dollars of uninsured medical expenses are not “extraordinary” within the definition of the statute, and such expenses are not subject to allocation. This statutory rule, as opposed to the trial court’s rule, avoids burdensome accounting and litigation by making the custodial parent responsible for payment of the child’s annual medical expenses that are less than one hundred dollars. In this sense, the one hundred dollar threshold is the equivalent of a deductible which the custodial parent must pay before the non-custodial parent is obligated to make a proportionate contribution for any additional un-insured medical expenses. Although the amount involved in this case is *de minimus*, I would hold that the trial court erred by deviating from the express language of the statute. Accordingly, I would remand for corrected findings allowing Charles a one hundred dollar credit for each child’s uninsured medical expenses. In all other respects, I agree with the majority opinion.

BRIEF FOR APPELLANT:

Charles Hyatt, *Pro se*
E. Bernstadt, Kentucky

BRIEF FOR APPELLEE:

Michael M. Pitman
Murray, Kentucky