THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jennifer K. Walters, ... Respondent,

v.

Dibbon Carl Walters, Jr., ... Appellant.

Appeal From Dorchester County
Alvin C. Biggs, Family Court Judge

Unpublished Opinion No. 99-UP-607
Heard June 6, 1999 - Filed November 29, 1999

AFFIRMED IN PART, REVERSED IN PART,
MODIFIED IN PART, AND VACATED IN PART

Gregory S. Forman, of Charleston, for appellant.

David L. DeVane, of North Charleston, for respondent.

PER CURIAM: In this post-divorce action, Dibbon Carl Walters, Jr. (Father) brought a contempt action against Jennifer K. Walters (Mother) alleging Mother interfered with his visitation and telephone contact and requesting permanent custody of the younger child. Although the family court found Mother in contempt and granted Father temporary custody of the younger child, the court denied Father's request for attorney's fees and costs. Father appeals the denial of his attorney's fees and costs and the award of attorney's fees to Mother. He also appeals from a sua sponte order prohibiting contact between his girlfriend and the children. We affirm in part, reverse in part, modify in part, and vacate in part.

BACKGROUND

The parties divorced in 1996 and have two minor daughters. Pursuant to the divorce decree, the family court granted Mother temporary custody of both children.

Shortly after the divorce, the court issued an order prohibiting Father from exposing the children to his girlfriend, Susan Payne, until such contact was approved by the family therapist. Once the therapist provided approval, Payne was allowed to resume contact with the children.

In January 1998, the family court issued a rule to show cause why Mother should not be held in contempt for disparaging Father in the children's presence and for interfering with his visitation and telephone contact. Father also moved, inter alia, for reconsideration of custody of the younger child. Although Mother initially moved to dismiss Father's motion to reconsider custody, the record does not reflect a request to reinstate the restraining order prohibiting Payne's contact with the children.

The court found Mother in contempt, granted Father pendente lite custody of the younger child, and denied Father any fees or costs. Several days later, the family court, apparently on its own, issued a supplemental order stating that "a finding was made that [Father] should not have the children around Susan Payne"and ordering that there be no contact between them.

On reconsideration, the family court issued an order upholding both the contact restriction and the denial of Father's request for attorney's fees and costs. Further, the family court awarded Mother $500 for attorney's fees incurred in defense of Father's motion for reconsideration. In its order, the family court found that during Father's case in chief, Father (1) failed to perfect his claim for attorney's fees, (2) failed to offer any expert testimony regarding his attorney's fees and costs, and (3) failed to submit evidence of his witness fees and costs. The court further held that Rule 54(d), SCRCP, which allows a prevailing party to submit a motion for costs within ten days of the receipt of written notice of the entry of final judgment, did not apply to this case.

STANDARD OF REVIEW

On appeal from the family court, this court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. Epperly v. Epperly, 312 S.C. 411, 440 S.E.2d 884 (1994). This broad scope of review, however, does not relieve the appellant of the burden of convincing us that the family court committed error. Skinner v. King, 272 S.C. 520, 252 S.E.2d 891 (1979). Nor are we required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Cherry v. Thomasson, 276 S.C. 524, 280 S.E.2d 541 (1981). Because the appellate court lacks the opportunity for direct observation of witnesses, it should accord great deference to trial court findings where matters of credibility are involved. See Aiken County Dep't of Soc. Servs. v. Wilcox, 304 S.C. 90, 403 S.E.2d 142 (Ct. App. 1991).

DISCUSSION

I.

Father asserts the family court erred in prohibiting all contact between Payne and the children. We agree.

At the hearing, Dr. Dispenza testified the parties' older child was "upset" about her contact with Payne and opined that he hadn't seen "any therapeutic need . . . for [the older child] to have any kind of a relationship with [Payne] . . . [until] maybe later on in therapy once [he] had repaired some of the damage" in Father's relationship with the child. The therapist, however, stopped short of stating that the oldest child would be harmed by contact with Payne. Although the court's order on reconsideration determined it would not be in the best interests of the children to have contact with Payne, it did not find that either child would be detrimentally affected by contact with Payne.

In a letter addressed to Father's attorney and submitted to the court, Dr. Dispenza noted the younger child had developed a close relationship with Payne and this relationship had not interfered with the child's relationship with Mother. He also indicated that the romantic relationship between Payne and Father was psychologically healthy and that ending the relationship between Payne and the younger child would result in a loss to the child of an emotionally supportive person who has been a healthy influence at a critical time.

We hold the family court erred in prohibiting contact between the children and Payne. See Epperly, 312 S.C. at 414, 440 S.E.2d at 885 ("In an action on appeal from the Family Court, this Court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence.") Particularly given the fact Father has custody of the parties' younger child, we find the terms of the family court's order overly broad and unreasonable. See Jackson v. Jackson, 279 S.C. 618, 310 S.E.2d 827 (Ct. App. 1983) (holding the family court's prohibition against exposing a child to his father's live-in girlfriend was unreasonable absent a finding the girlfriend's presence adversely affected the child).

We thus vacate the court's February 11, 1998 order prohibiting all contact between the children and Payne. Our ruling reinstates the restrictions provided in the parties' final order and decree of divorce dated June 1996. This order mutually restrains the parties "from exposing the minor children to overnight guests of the opposite sex whom are unrelated by blood or marriage . . . ."

II.

Father next alleges the family court erred in failing to grant him fees and costs based solely on his failure to request this relief during his case in chief. Father specifically argues that he should be permitted to request fees and costs via a Rule 54, SCRCP, post trial motion.

A. Dr. Dispenza's Fees[1]

Initially, we point out that we disagree with the court's rationale for denying Father Dr. Dispenza's fees. In its order on reconsideration, the court found Father failed to present evidence of Dr. Dispenza's fee during his case in chief. During the hearing, Dr. Dispenza attempted to testify as to the nature and amount of his fee, but the trial court interrupted him stating, "I will do the fee part. That is my job. I am not going to do it this very second. You submit your fee and we will do what we have to do." Under these circumstances, it was error for the court to deny Father Dr. Dispenza's fees based on a failure to present supporting evidence during his case in chief.

Based on our own review of the record, we hold Mother should be responsible for one-half of Dr. Dispenza's fee. Mother should remit payment directly to Dr. Dispenza or, if Dr. Dispenza has already been fully compensated, directly remit payment to Father as reimbursement for one-half of the total fee.

B. Attorney's Fees and Costs

Father admittedly failed to offer any evidence of his attorney's fees during his case in chief, and the court refused to reopen the case to allow him to submit an affidavit. Without some other mechanism by which he can receive fees, he is thus precluded from receiving such relief. See Gainey v. Gainey, 279 S.C. 68, 301 S.E.2d 763 (1983) (ruling that a party who seeks attorney's fees has the burden to show that the request is well founded and failure to offer any evidence on the issue of attorney's fees precludes an award). Father contends that Rule 54(d) and (e), SCRCP, allows him to obtain attorney's fees and costs through a post trial motion.[2]

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[1] Father also suggests he is entitled to Ms. Tarpey's fee of $225. Unlike in the case of Dr. Dispenza, the record does not reflect that there was an attempt to bring her fee to the attention of the court during Father's case in chief. Thus, any entitlement to her fee would fall within Father's other arguments.

[2] Rule 2, SCRFC, provides that pursuant to Rule 81, SCRCP, the South Carolina Rules of Civil Procedure apply in family court to the extent they are not inconsistent with the

According to Rule 54(d), "A motion for costs, supported by an affidavit that the costs are correct and were necessarily incurred in the action, may be filed by the prevailing party within 10 days of the receipt of written notice of the entry of final judgment." Rule 54(d), SCRCP. Our supreme court has already determined that Rule 54(d), SCRCP, is applicable in family court divorce actions and that an award of costs need not be specified in the divorce decree. See Finley v. Finley, 299 S.C. 99, 382 S.E.2d 890 (1989). However, "costs" as embraced by S.C. Code Ann. §§ 15-37-10 to -220 and Rule 54(d) do not include attorney's fees.[3] See Black v. Roche Biomedical Lab., A Div. of Hoffman-LaRoche, Inc., 315 S.C. 223, 433 S.E.2d 21 (Ct. App. 1993); see also Steinert v. Lanter, 284 S.C. 65, 325 S.E.2d 532 (1985). Thus, Father is precluded from submitting his attorney's fees under Rule 54(d).

Rule 54(e), however, establishes that "taxable costs" include costs authorized by statute and sanctions imposed in favor of the prevailing party, including reasonable attorney's fees, if allowed under any statute or rule of civil procedure. Rule 54(e)(1), SCRCP. Because the legislature, pursuant to S.C. Code Ann. § 20-7-420(2) and (38), has granted the family court the authority to assess suit money, including attorney's fees, against a party involved in an action, it follows that Father could request his witness fees as costs and his attorney's fees as sanctions. See S.C. Code Ann § 20-7-420(2), (38) (Supp. 1998). Thus, in appropriate circumstances Father could be entitled to these fees. See generally Brown v. Brown, 44 S.C. 378, 22 S.E. 412 (1895) (reiterating that in courts of equity, the recovery of costs is within the discretion of the court).

We note that in Father's affidavit accompanying the rule to show cause, he asked the court to sanction Mother for her violations and requested she be required to pay attorney's fees and costs. Father argues that Rule 54(e) applies because his request for attorney's fees was in the nature of a sanction and in the nature of compensatory contempt. The court, however, declined to award compensatory contempt or specifically sanction Mother by ordering her to pay Father's fees and costs. Instead the court chose to sanction Mother by ordering her to pay an $800 fine by February 20, 1998, or serve sixty days in jail. This decision was well within the court's discretion. See Lindsay v. Lindsay, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997) ("Even though a party is found to have violated a court order, the question of

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statutes and rules governing family court. See Rule 2, SCRFC; Rule 81, SCRCP. Rule 2 does, however, list specific rules of civil procedure that are inapplicable in family court. Only subsection (c) of Rule 54 is among those listed.

[3] Section 15-37-10 provides that the rule regarding recovery of costs is applicable to courts of equity unless otherwise ordered by the court.

whether or not to impose sanctions remains a matter for the court's discretion."), cert. denied, (June 18, 1998). Thus, Father's argument fails.

Based on our reading of the record and our understanding of the parties' history, we believe it appropriate for the parties to pay their own attorney's fees and witness fees, with the exception of Dr. Dispenza's fee. See Epperly, 312 S.C. at 414, 440 S.E.2d at 885. Thus, we find that any error the court may have committed in denying Father the right to file a Rule 54 motion was harmless error.[4]

III.

Finally, Father argues the family court erred in awarding Mother attorney's fees incurred in defense of his motion to reconsider. Because many of the beneficial results obtained by Mother have been reversed by our decision herein, we reverse the award of attorney's fees to Mother. Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991) (listing beneficial results obtained as a factor to be considered in awarding attorney fees).

For the foregoing reasons, the decision of the family court is

AFFIRMED IN PART, REVERSED IN PART, MODIFIED IN PART, and VACATED IN PART.

CURETON, ANDERSON, and STILWELL, JJ., concur.

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[4] Additionally, assuming the court erred in refusing to reopen the case to hear Father's request for attorney's fees and costs, we find this harmless error also.