In re Marriage of B.

COLORADO COURT OF APPEALS

Court of Appeals No.: 08CA0790
Arapahoe County District Court No. 05DR1286
Honorable Robert H. Russell, Judge

In re the Marriage of

R.B.,

Appellee,

and

S.B.,

Appellant.

ORDERS VACATED AND CASE
REMANDED WITH DIRECTIONS

Division V
Opinion by: JUDGE BERNARD
Graham and Booras, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: April 2, 2009

Kelly Garnsey Hubbell + Lass, LLC, Marie Avery Moses, Denver, Colorado, for Appellee

Ewing & Ewing, PC, Mary Ewing, Englewood, Colorado; Anne Whalen Gill, LLC, Anne Whalen Gill, Sharlene J. Aitken, Castle Rock, Colorado, for Appellant

In this post-dissolution matter between S.B. (mother) and R.B. (father), mother appeals from the court's orders finding the parties' older child (C.B.) emancipated and awarding attorney fees to father. We vacate the orders and remand for further findings by the trial court.

I. Background

Father filed a petition for dissolution of the parties' marriage in May 2005. In June 2005, C.B. turned nineteen and an interim order was entered by the magistrate declaring her emancipated. A temporary orders hearing was held in August 2005, however, at which both parties testified that C.B. had a long-term disability, was unable to financially support herself, and was being supported by father. The magistrate entered temporary orders, including findings that C.B. had a disability and was not capable of supporting herself financially, and that father had the responsibility to support her. No specific child support provisions relating to C.B. were included in the temporary orders, however.

In 2006, the parties entered into a separation agreement, which was approved by the magistrate and incorporated into the

decree. The agreement contained parenting time and child support provisions relating only to the parties' younger child and no provisions relating to C.B., other than the statement that because she had reached the age of nineteen, the parenting plan provisions would not pertain to her.

In 2007, mother filed a motion to modify child support, which, in relevant part, sought support for C.B., contending that father had stopped voluntarily supporting her and that mother was providing all of C.B.'s financial support. Father responded that the issue of C.B.'s emancipation was res judicata because of the June 2005 order. He also sought attorney fees, arguing that mother's motion was frivolous.

A hearing was held before the magistrate, who set another hearing before the trial court to determine whether C.B. was emancipated and whether any prior finding of the court was binding on that issue. Two telephone hearings were then held by the trial court, neither of which was recorded, and the court subsequently entered an order that stated, that "[t]he parties' child, [C.B.] . . . is emancipated." The court also awarded father his attorney fees

incurred in responding to mother's motion.

II. The Emancipation Order

Mother contends that the trial court's order does not contain sufficient findings in support of its decision that C.B. was emancipated. We agree that additional findings are needed.

"A trial court's order must contain findings of fact and conclusions of law sufficiently explicit to give an appellate court a clear understanding of the basis of its order and to enable the appellate court to determine the grounds upon which it rendered its decision." *In re Marriage of Rozzi*, 190 P.3d 815, 822 (Colo. App. 2008). Without a proper presentation of these matters, an appellate court "can no more serve its function than the trial court can in the absence of proper pleadings." *Mowry v. Jackson*, 140 Colo. 197, 200, 343 P.2d 833, 835 (1959). Where the necessary findings of fact and conclusions of law are lacking, and a party seeks relief in the appellate court, the correct procedure is to vacate the order and remand the case to the trial court. *Id.* at 202, 343 P.2d at 836.

Here, the trial court's order contains no findings of fact or conclusions of law to support the decision that C.B. is emancipated.

We are unable to determine whether the court relied solely on the prior interim order entered by the magistrate immediately after C.B. turned nineteen, whether the court relied on the facts relating to emancipation that were established at the temporary orders and other hearings, or whether there was some other basis for the court's decision. Thus, we are unable to review the order. On remand, the court should make additional specific findings sufficient to give this court a clear understanding of the basis of its order. *See Rozzi*, 190 P.3d at 822.

Father contends that the trial court made oral findings at one of the telephone conferences. However, there is no record of that conference or of any findings made at it, and the court's written order does not refer to any such findings. Thus, we have no basis to conclude that the court's written order intended to memorialize such findings.

Because we are unable to discern the basis for the trial court's order, and remand for further findings, we do not reach the other issues raised by the parties.

III. The Attorney Fees Order

Mother further contends that the trial court erred by awarding attorney fees to father without citing a legal basis for the award or making findings to support the award. Again, we agree that remand is necessary for further findings.

We review a trial court's attorney fees award for abuse of discretion and will only reverse the award if it is not supported by the evidence. *See Spring Creek Ranchers Ass'n v. McNichols*, 165 P.3d 244, 246 (Colo. 2007). We review de novo, however, the legal analysis employed by the court in reaching its decision on attorney fees. *Colo. Citizens for Ethics in Gov't v. Comm. for Am. Dream*, 187 P.3d 1207, 1220 (Colo. App. 2008).

Colorado follows the traditional American Rule that parties are required to bear their own legal expenses unless a statute, court rule, or contractual provision expressly modifies the American Rule. *In re Marriage of Sanchez-Vigil*, 151 P.3d 621, 623 (Colo. App. 2006).

Attorney fees may be awarded under section 13-17-102(4), C.R.S. 2008, when the court finds that an attorney or party brought an action, or any part thereof, that lacked substantial justification, meaning that the action was substantially frivolous, substantially

groundless, or substantially vexatious. *In re Marriage of Rodrick*, 176 P.3d 806, 815 (Colo. App. 2007). To justify an award of attorney fees under this statute, a trial court must make a finding that a claim lacked substantial justification, and must state its reasons for that finding. *See In re Marriage of Aldrich*, 945 P.2d 1370, 1379 (Colo. 1997); *In re Marriage of Gomez*, 728 P.2d 747, 750 (Colo. App. 1986). In addition, when assessing an amount of fees, the trial court must consider the relevant factors in section 13-17-103(1), C.R.S. 2008, and make findings explaining how the court arrived at the amount of the award. *See Aldrich*, 945 P.2d at 1378-79; *In re Marriage of Naekel*, 181 P.3d 1177, 1179 (Colo. App. 2008).

Here, although father sought attorney fees on the basis that mother's motion was frivolous, the trial court's order does not state a legal basis for the award, and the court made none of the findings required by sections 13-17-102(4) and 13-17-103(1). Thus, remand is necessary for further findings regarding father's request for fees, including the basis for the award. *See Yaekle v. Andrews*, 169 P.3d 196, 201 (Colo. App. 2007), *aff'd*, 195 P.3d 1101 (Colo. 2008).

We are not persuaded by father's argument that we may affirm

the award under section 14-10-119, C.R.S. 2008, which provides that, after considering the financial resources of the parties, the court may order a party to a dissolution action to pay a reasonable amount for attorney fees incurred by the other party. Section 14-10-119 permits the court to apportion attorney fees and costs based upon the relative economic circumstances of the parties in order to equalize their status and to ensure that neither party suffers undue economic hardship as a result of the proceedings. *Aldrich*, 945 P.2d at 1377. In awarding fees and costs under this statute, a trial court must make findings concerning the parties' relative incomes, assets, and liabilities. *Id.* at 1378. The court must then apportion fees and costs in light of the statute's equitable purpose, making further findings that explain how and why it arrived at the specific amount of the award. *Id.*

The court's order here does not cite section 14-10-119, and does not contain the necessary findings to support an award under that statute. Thus, we may not affirm the award on that basis.

We further reject father's argument that because mother objected to his motion to amend the attorney fees order to add

additional findings, she is precluded by the doctrine of invited error from arguing that the trial court has not stated a sufficient basis in support of the award. Mother's objection to amending the trial court's findings was based on father having drafted the original attorney fees order. She did not contend that the order need not be amended because it already contained sufficient findings. Thus, the doctrine of invited error does not apply. *See Horton v. Suthers*, 43 P.3d 611, 618 (Colo. 2002)(holding that invited error bars a party from reversing his or her previous position taken in the litigation, and profiting from error that he or she induced). Because father's attorney drafted the order that the court signed, if error was invited into the case, it was invited by father, and not by mother.

In addition, the trial court register of actions indicates that the court denied father's motion to amend because the case was on appeal, and not because the court was persuaded by mother's objections. Thus, by objecting to father's motion to amend, mother did not invite the error of lack of sufficient findings to support the court's order, and she is not precluded from raising that issue on appeal.

The orders are vacated and the case is remanded for further proceedings as directed.

JUDGE GRAHAM and JUDGE BOORAS concur.