

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
September 26, 2013

In the Matter of MKK, Minor.

No. 302292
Washtenaw Circuit Court
Family Division
LC No. 08-000889-DP

No. 302320
Washtenaw Circuit Court
Family Division
LC No. 08-000040-AD

Before: WILDER, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

In these consolidated cases, appellant, MKK’s father, appeals as of right from the trial court’s denial of his request for attorney fees. This is the third time these cases have been to this Court. Docket No. 302320 involves an adoption proceeding, and Docket No. 302292 involves appellant’s paternity action. We affirm.

Most of the background facts can be found in this Court’s prior opinion, *In re MKK*, 286 Mich App 546, 548-555; 781 NW2d 132 (2009). The issue before the Court in that opinion was the interplay between the Adoption Code, MCL 710.21 *et seq.*, and the Paternity Act, MCL 722.711 *et seq.* This Court vacated the trial court’s orders, which had given priority to the adoption case, and instead directed for appellant’s paternity action to proceed. *Id.* at 568.

After this Court remanded, the trial court entered an order of filiation, denoting appellant as MKK’s father. The trial court then conducted an evidentiary hearing, which spanned six days from July 19, 2010, though July 26, 2010, for the purpose of determining custody between the parents. After the conclusion of the hearing, the trial court concluded that the best-interest factors “overwhelmingly” favored appellant. Accordingly, the trial court entered an order

granting appellant sole legal and physical custody of MKK, while providing that appellee¹ would have supervised parenting time.

On August 10, 2010, appellant moved for the recovery of attorney fees against attorneys John Mills, Herbert Brail, and Stephanie Benedict. Mills represented the prospective adoptive parents in the adoption proceedings, while Brail and, later, Benedict represented appellee in the paternity proceedings. Appellant claimed that attorney fees were warranted on the basis of a party raising a frivolous defense and cited to MCR 2.114(D) and (E), MCL 600.2591, and MCR 2.625(A)(2). Appellant also relied on various rules of professional conduct, including Rule 3.1 (Meritorious Claims and Contentions), Rule 3.2 (Expediting Litigation), Rule 3.4 (Fairness to Opposing Party and Counsel), Rule 4.4 (Respect for Rights of Third Persons), and Rule 8.4 (Misconduct). The gravamen of appellant's request for attorney fees was that the various counsel worked as a "virtual 'tag team'" and "functioned as a legal partnership" in a concerted effort to block the paternity action, which in turn made it easier for MKK's adoption to proceed. Further, appellant alleged that appellee and the prospective adoptive parents colluded to thwart appellant, "presumably on the advice of counsel."

Appellant also alleged that Brail portrayed appellee as being a college student, when he knew she was not. Appellant relied on an affidavit of someone who claimed to have overheard Brail "shush[]" appellee when she told him outside the courtroom at an early adoption proceeding that she was not a college student. Brail, in turn, submitted an affidavit, in which he did not recall any conversations where he "shushed" appellee, but he also stated that if any client tried to start any discussion with him in the presence of others, he would attempt to quiet the client until they could be in private.

Appellant also alleged that Brail instructed appellee to rebuff any efforts to establish appellant as the legal father in order to allow the adoption to go through under a lower (i.e., easier) standard of evaluation.²

Related to Benedict, appellant accused her of making assertions in her pleadings that were contrary to law. Specifically, appellant alleged that Benedict refused to accept that DNA testing was "reliable." The pleadings filed by Benedict, however, show that she asserted only that DNA testing could not "conclusively" prove paternity, as appellant alleged, not that DNA testing was not "reliable." Moreover, Benedict acknowledged in that same document that Michigan law, MCL 722.716(5), presumed paternity when DNA testing revealed an identification of 99% or higher.

The trial court denied appellant's motion, finding that none of the above allegations warranted the award of attorney fees. First, the trial court held that appellant had not provided it

¹ Even though there are multiple appellees on appeal, our use of "appellee" will refer to MKK's mother.

² The standard to terminate a putative father's parental rights is much lower than the standard to terminate a legal father's parental rights. See MCL 712A.19b; MCL 710.39.

with any tangible evidence of improper collusion by the attorneys. Second, the trial court found that there was insufficient evidence on the record to infer that Brail elicited or procured perjured testimony. Third, the trial court noted that all of Brail's communications with appellee were protected by the attorney-client privilege, and that when viewing Brail's affidavit along with the rest of the record, it could not infer or find that Brail had suggested or counseled appellee to lie or make any factual misrepresentation to any court. Fourth, the trial court found that Benedict did not say that DNA testing was "unreliable." Since Benedict's pleadings acknowledged the proper law governing the presumption of paternity, her filing taken as a whole was not "frivolous."

Appellant argues on appeal that the trial court erred when it denied his request for attorney fees against attorneys Brail, Mills, and Benedict. We disagree.

Generally, attorney fees are not recoverable unless a statute, court rule, or common-law exception to this general prohibition exists. *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004). Appellant claims on appeal that the trial court should have awarded attorney fees under the common law, the rules of professional conduct, and MCR 2.114. Each of these topics will be addressed in turn.

I. COMMON LAW

Appellant's attempt to claim that the common law required him to be awarded attorney fees fails. He was unable to identify any case law establishing that attorney fees were required for the circumstances present in this case.

Courts have the inherent authority "to control the movement of cases on its docket by a variety of sanctions," including the assessment of attorney fees. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 640; 607 NW2d 100 (1999) (quotation marks omitted). However, this power can only be invoked when there is "misconduct" on the part of a party or attorney. *Id.* at 639. In the context of attorney fees, however, the *Persichini* Court stated, "We conclude that a court's inherent power to sanction misconduct and to control the movement of cases on its docket includes the power to award attorney fees as sanctions *when the egregious misconduct of a party or an attorney causes a mistrial.*" *Id.* at 640-641 (emphasis added). The Court explained that "[t]he ability to impose such sanctions serves the dual purpose of deterring flagrant misbehavior, particularly where the offending party may have deliberately provoked a mistrial, and compensating the innocent party for the attorney fees incurred during the mistrial." *Id.* at 641. Here, it is clear that there was no mistrial. Further, any "delays" introduced in the proceedings at the circuit court were the result of the various appeals to this Court and the Supreme Court and the results of orders entered by the various trial judges in the matter. In sum, appellee did not engage in egregious or flagrant misbehavior that caused any delay. As the trial court aptly recognized, appellee and any of the attorneys were not obligated to acquiesce in the paternity action. Accordingly, the trial court did not abuse its discretion in failing to award attorney fees though its inherent authority.

Further, appellant's reliance on *In re Costs & Attorney Fees*, 250 Mich App 89; 645 NW2d 697 (2002), is misplaced. Although this Court affirmed the award of sanctions in that case, it did not do so on the basis of "common law." Instead, it relied upon MCR 2.625(A)(2)³ and MCL 600.2591⁴ as the authority for assessing the sanctions. *Id.* at 94. Therefore, appellant has failed to substantiate his claim that the common law required the sanction of the assessment of attorney fees.

II. MICHIGAN RULES OF PROFESSIONAL CONDUCT

Appellant also claims that many rules of professional conduct were violated and that, as a result, he should have been awarded attorney fees. This claim has no merit. Appellant has offered no authority supporting his view that the violation of a rule of professional conduct is a ground for awarding attorney fees. Moreover, our review of the law has not found any support for this position either. In fact, the very first rule in the Michigan Rules of Professional Conduct provides the following:

Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules do not, however, give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a rule. [MRPC 1.0(b).]

Thus, the rules themselves do not authorize or contemplate the recovery of attorney fees for any rule violation.

III. MCR 2.114

Appellant next argues that the trial court was required to assess attorney fees under MCR 2.114(E). We disagree.

MCR 2.114 provides, in relevant part, the following:

(D) The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that

(1) he or she has read the document;

(2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by

³ MCR 2.625(A)(2) provides that "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591."

⁴ MCL 600.2591(1): "Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing costs and fees against the nonprevailing party and their attorney."

existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

(3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(E) If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

Appellant is incorrect in his assertion that attorney fees are “mandatory” under this court rule. While MCR 2.114(E) states that a court “shall impose” *sanctions* for violations of MCR 2.114(D), it does not require the assessment of *attorney fees*. MCR 2.114(E) clearly provides that the sanction “may include” reasonable expenses, including attorney fees. “The word ‘may’ denotes permissive and not mandatory action.” *CD Barnes Assocs, Inc v Star Heaven, LLC*, 300 Mich App 389, 425; ___ NW2d ___ (2013). Thus, the underlying premise of appellant’s argument is not valid.

Further, appellant has failed to establish that MCR 2.114(D) was violated at any time. He fails to identify what specific documents were signed in violation of MCR 2.114(D). Instead, appellant lists a litany of perceived misconduct on the part of the various attorneys. But this court rule deals explicitly with *signed documents* – not other conduct, and thus the failure to specify for the trial court or this Court which documents were signed in violation of this rule prevents appellant prevailing on this ground.

IV. MCR 2.623(A)(2); MCL 600.2591

As noted earlier, MCR 2.625(A)(2) and MCL 600.2591 allow for the assessment of attorney fees when a party brings forth a “frivolous” civil action or defense to a civil action. Even though he does not delineate either of these as grounds for attorney fees in his brief on appeal, this appears to be the heart of appellant’s complaints, and we will briefly review his claim for attorney fees under these provisions.

MCL 600.2591(3)(a) defines “frivolous” as at least one of the following:

- (i) The party’s primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
- (ii) The party had no reasonable basis to believe that the facts underlying that party’s legal position were in fact true.
- (iii) The party’s legal position was devoid of arguable legal merit.

The trial court found that none of the attorneys’ actions or defenses was frivolous, and this finding is not clearly erroneous. See *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576

(2010) (a court’s finding regarding whether a position was frivolous is reviewed like any other factual finding, for clear error). A great number of appellant’s arguments relate to conduct outside of the courtroom (e.g., attorneys “colluding” against appellant, attorneys providing appellee with a “virtual road map on how to abuse the judicial system, attorneys instructing appellee to perform illegal activities, such as lying under oath, etc.), and do not relate to actual “actions” or “defenses.”

However, an undeniable portion of appellant’s argument on appeal and at the trial court is that it was frivolous for the attorneys to pursue the adoption action when there was a pending paternity action. Appellant specifically takes exception to the fact that appellee and Brail did not agree to the entry of an order of filiation at the outset of the proceedings. However, we agree with the trial court that appellant has not identified any authority that *requires* a mother to submit to the entry of such an order, and we also have found no such authority.

The main obstacle that appellant encountered at the circuit court was that the adoption proceeding initially was given priority over the paternity action. Without the paternity action resolving first, he was relegated to being a “putative father,” instead of the recognized legal father. The trial court accepted the position put forth by Brail that MCL 710.25 of the Adoption Code made it clear the adoption proceeding was to take precedence over any other proceeding, including appellant’s paternity action. While this Court ultimately reversed that decision, Brail’s position in front of the trial court was not frivolous. MCL 710.25(1) states that “[a]ll proceedings under this chapter shall be considered to have the highest priority and shall be advanced on the court docket so as to provide for their earliest practicable disposition.” Thus, Brail’s argument – that the general rule should apply – was not frivolous because (1) it was not done with the purpose of harassing or embarrassing appellant – it was to effectuate the adoption; (2) Brail had a reasonable basis to believe that the adoption proceeding should have priority; and (3) since the statute itself provides that adoption proceedings are given priority, it is clear that Brail’s position was not devoid of legal merit. This Court, of course, reversed the trial court’s decision because it found that the “good-cause” exception of MCL 710.25(2)⁵ applied and that the paternity action was to have priority on remand. *In re MKK*, 286 Mich App at 563. The fact that this Court concluded that the exception to MCL 710.25’s general rule of priority applied does not transform Brail’s position at the trial court into a frivolous one. See *Kitchen v Kitchen*, 465 Mich 654, 663; 641 NW2d 245 (2002) (“[M]erely because this Court concludes that a legal position asserted by a party should be rejected does not mean that the party was acting frivolously in advocating its position.”)

⁵ MCL 710.25(2) provides that “[a]n adjournment or continuance of [an adoption proceeding] shall not be granted without a showing of good cause.”

Affirmed. Appellees, as the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Pat M. Donofrio
/s/ Jane M. Beckering