

NOT DESIGNATED FOR PUBLICATION

No. 104,077

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

INGRID A. CAMPBELL,
Appellee,

v.

BOYD P. BURNETT,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; ALLEN R. SLATER, judge. Opinion filed June 24, 2011.

Affirmed.

Boyd Burnett, appellant pro se.

J. Bradley Short, of Short, Borth & Thilges, Attorneys at Law, L.L.C., of Overland Park, for appellee.

Before LEBEN, P.J., GREEN and MARQUARDT, JJ.

Per Curiam: Boyd Burnett appeals from the trial court's award of attorney fees to Ingrid Campbell. Burnett also appeals the trial court's denial of his motion. On appeal, Burnett contends that the trial court abused its discretion in awarding attorney fees to Campbell. We disagree. In addition, Burnett maintains that the trial court abused its discretion when it denied his motion without a hearing. We disagree. Accordingly, we affirm.

Burnett and Campbell were married on February 9, 2000. The parties have one child, Jackson. The parties were later divorced on November 5, 2007. The issues involved here deal with postdivorce issues.

On October 20, 2009, Burnett filed a 49-page recusal motion and memorandum under K.S.A. 20-311d. Additionally, on December 18, 2009, Burnett filed a motion entitled "Motion Seeking Adoption of Case Manager's Make-Up Time Award and Other Matters." In his motion, hereinafter referred to as the parenting time motion, Burnett requested that the trial court affirm the case manager's decision and somehow deter Campbell from violating the parenting time schedule.

On January 25, 2010, the trial court summarily dismissed both motions. The trial court dismissed the recusal motion, without prejudice, because it violated K.S.A. 20-311d. In addition, the trial court dismissed the parenting time motion after Burnett admitted that he had already received the additional parenting time as directed by the case manager. The trial court awarded Campbell \$5,693 in attorney fees for her time spent in responding to the recusal motion. Additionally, the trial court awarded Campbell \$1,049 in attorney fees for her time spent in responding to the parenting time motion.

On January 26, 2010, Burnett filed a revised recusal motion, this time without a memorandum in support. Again, the trial court dismissed Burnett's recusal motion. Then, on May 25, 2010, the chief district judge granted Burnett's recusal motion.

Burnett timely filed this appeal. On appeal, Burnett claims that the trial court erred in awarding Campbell attorney fees in response to his two good-faith motions. Additionally, Burnett argues that the trial court abused its discretion when it denied his parenting time motion without allowing him a hearing on the issue.

The award of attorney fees by the trial court was proper.

Burnett argues that the trial court erred in awarding attorney fees to Campbell based on her time spent in responding to his two good-faith motions. Burnett contends that there is no basis in law or equity for either of the awards of attorney fees.

When reviewing an award, this court does not reweigh the testimony and evidence presented, nor does this court assess the credibility of the witnesses. This court will not set aside an attorney fee award when it is supported by substantial competent evidence. *In re Marriage of Kopac*, 30 Kan. App. 2d 735, 738, 47 P.3d 425 (2002). In addition, K.S.A. 60-1610(b)(4), grants the trial court authority to award attorney fees to either party as justice and equity require. Moreover, where the trial court has authority to grant attorney fees, its decision is reviewed under the abuse of discretion standard. *Estate of Kirkpatrick v. City of Olathe*, 289 Kan. 554, 572, 215 P.3d 561 (2009).

Attorney fees for recusal motion

Burnett argues that Campbell should not have been awarded attorney fees in the amount of \$5,693 for responding to his recusal motion. Burnett argues that Campbell has a higher income; that Campbell could have cut down on some of her legal fees by representing herself, because she is an attorney; that he should not be penalized for representing himself; that the trial court erred in failing to hold a prompt hearing as required by the statute; that no harm resulted from Burnett listing the reasons for the recusal in the motion because the case was sealed; that the statute prohibits a judge from punishing a party for filing a recusal motion; that Campbell's own conduct increased the fees; that he should not be penalized for exercising his right to free speech; and that there was inadequate documentation of Campbell's legal fees.

The trial court is an expert in the area of attorney fees and can draw on and apply its own knowledge and expertise in evaluating their value and reasonableness. An appellate court is also an expert on the reasonableness of attorney fees; however, an appellate court does not substitute its judgment for that of the trial court on the amount of an attorney fee award unless in the interest of justice the appellate court disagrees with the trial court. *Johnson v. Westhoff Sand Co.*, 281 Kan. 930, 940, 135 P.3d 1127 (2006). Burnett's arguments and points will not be reconsidered on appeal where substantial evidence supports the trial court's decision.

In granting fees for time spent responding to the recusal motion, the trial judge found that "the motion does not comply with the statute, which is very clear and easy to read, and I find that that motion should not have been filed without complying with the statute, that Ingrid Campbell was forced to retain counsel to respond to that motion."

Based on these facts, we find that there was substantial evidence to support the trial court's decision to award attorney fees for Campbell's time spent responding to the recusal motion.

Attorney fees for parenting time motion

The trial court awarded Campbell attorney fees in the amount of \$1,049 in responding to the parenting time motion. Again, Burnett contends that there is no basis in law or equity for this award of attorney fees. In addition, Burnett argues that the trial court denied his due process right by denying his motion without a hearing; that the trial court incorrectly stated that neither party requested oral argument; that that trial court incorrectly stated that there was no available remedy for this motion; and that Burnett prevailed in part on this motion so no attorney fees should have been awarded.

In granting fees for time spent in responding to the parenting time motion, the trial judge found that "there is no remedy that is available. There is none suggested. I don't really see a basis for that motion. And here again, I am going to award attorney's fees to respond to the motion that had no remedy."

Campbell provided affidavits which detailed her attorney fees. Burnett did not object to the trial court's award of attorney fees and failed to respond to the attorney fee affidavits within the 10 days granted by the trial court. The trial court found that the fees Campbell requested were reasonable under the standards set forth in Supreme Court Rule 1.5(a)(3), (4), (7) (2010 Kan. Ct. R. Annot. 458). The trial court awarded Campbell \$6,742.00 in attorney fees.

Based on these facts, we find that there was substantial evidence to support the trial court's decision to award attorney fees for Campbell's time spent responding to the parenting time motion. Because substantial evidence supports the award of attorney fees for both motions, we cannot say that no reasonable person would take the view adopted by the trial court. Moreover, we affirm the trial court's award of attorney fees to Campbell.

We find no abuse of discretion in the trial court's denial of Burnett's motion.

Next, Burnett argues that the trial court violated his due process rights when it denied his parenting time motion without a hearing. Burnett contends that the trial court incorrectly stated that neither party had requested oral argument on the issue. In addition, Burnett contends that the trial court erred in stating that no remedy was available for the motion.

In response, Campbell argues that the motion was moot because Burnett had already received the make-up parenting time he was requesting. Campbell further argues

that Burnett's motion was not timely. Under K.S.A. 23-1003, a party has 10 days to respond to the written recommendations of a case manager. Campbell argues that because Burnett failed to respond within the 10 days, his request for a hearing was not properly before the trial court.

Under Supreme Court Rule 133(c) (2010 Kan. Ct. R. Annot. 221), a motion must contain a request for oral argument if a party wishes to have a hearing. "In the absence of any request by either party for oral argument in accordance with this Rule, the judge may set the matter for hearing or rule upon the motion forthwith and communicate the ruling to the parties." (2010 Kan. Ct. R. Annot. 221.) In *George v. Capital South Mtg. Investments, Inc.*, 265 Kan. 431, 461-62, 961 P.2d 32 (1998), our Supreme Court held that the trial court did not err in ruling on a motion without a hearing where oral argument hearing was not requested according to Rule 133.

Here, Burnett contends that he requested a hearing on this motion. Nevertheless, at a hearing on January 25, 2010, the trial judge addressed Burnett's parenting time motion and stated, "No party has asked for oral argument, therefore I can proceed pursuant to Rule 133, Subparagraph C." Burnett did not object to this statement and did not object after the trial court stated its ruling. If Burnett wanted a hearing or had requested a hearing, he should have objected to the trial court's statement. Issues not raised before the trial court cannot be raised on appeal. *In re Care & Treatment of Miller*, 289 Kan. 218, 224-25, 210 P.3d 625 (2009).

We find that it was not an abuse of discretion for the trial court to deny Burnett's parenting time motion without a hearing. Because Burnett failed to show prejudice, there is no error. Additionally, Burnett failed to properly request oral argument on the motion and failed to object when the court addressed the issue. Moreover, the trial court properly complied with Supreme Court Rule 133 by communicating the ruling to the parties.

We grant a portion of Campbell's requested attorney fees for this appeal.

Campbell has asked this court, under Supreme Court Rule 7.07(b) (2010 Kan. Ct. R. Annot. 62) and K.S.A. 60-1610, to award her appellate attorney fees and expenses. In an affidavit attached to her motion, counsel for Campbell indicated the total cost for defending this appeal was \$11,004.00. Burnett filed a detailed response objecting to Campbell's request for fees and expenses.

This court has authority to award attorney fees for services on appeal in cases where the trial court had authority to award attorney fees. Supreme Court Rule 7.07(b). Additionally, K.S.A. 60-1610(b)(4), grants the trial court authority to award attorney fees to either party as justice and equity require.

After considering Burnett's objections carefully, his arguments fail. Burnett argues that it was unnecessary for Campbell to oppose the recusal motion and for her to oppose this appeal. Burnett argues that no response was necessary to either and that he should not be penalized for Campbell's ill-advised decisions. There is no legal support for this argument. Clearly, it was necessary for Campbell to oppose Burnett's appeal to this court because it involved her award for attorney fees.

We have carefully considered Campbell's motion and affidavit for appellate attorney fees and we determine that an award of \$5,000 to Campbell would be an adequate award for attorney fees for this appeal.

Affirmed.