

Commonwealth Of Kentucky
Court Of Appeals

NO. 96-CA-2422-MR

STEVEN J. LICHTENSTEIN

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ERNEST A. JASMIN, JUDGE
ACTION NO. 90-CI-9025

ROBERTA JILL LICHTENSTEIN
(NOW BARBANEL)

APPELLEE

AND

NO. 97-CA-0031-MR

STEVEN J. LICHTENSTEIN

APPELLANT

V. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JERRY J. BOWLES, JUDGE
ACTION NO. 96-FC-7465

ROBERTA JILL LICHTENSTEIN
(NOW BARBANEL)

APPELLEE

OPINION
AFFIRMING IN 96-CA-2422-MR
REVERSING AND REMANDING IN 97-CA-0031-MR

** ** * * *

BEFORE: GUDGEL, CHIEF JUDGE; GARDNER and KNOPF, JUDGES.

GARDNER, JUDGE. Appellant, Steven Lichtenstein (Steven), has filed two appeals from opinions and orders of the Jefferson Circuit Court and Family Courts in this case dissolving his marriage to Roberta Jill Lichtenstein (Roberta). After reviewing the numerous issues raised by Steven and the record below, this Court affirms regarding the issues filed in the first appeal but reverses the family court's opinion and order upholding an order of garnishment and execution in the second appeal.

Steven and Roberta married in 1978 and separated in November 1990. The couple had two children, one born in September 1980 and one born in February 1984. Steven graduated from medical school during the marriage, completed a fellowship in pediatric ophthalmology in 1988 and is engaged in private practice in Louisville. Roberta graduated from law school during the marriage and has practiced law with several firms.

The circuit court bifurcated the trials in this case and considered the custody issue in June 1992. The court ordered Steven to pay \$1,949 per month child support effective October 1, 1991. The court ordered Steven to pay \$1,000 per month maintenance effective April 1, 1992, \$1,500 per month maintenance effective May 1992, and \$3,000 per month maintenance effective June 1992. The court also ordered Steven to pay all uninsured medical expenses commencing May 31, 1992, and ordered him to maintain medical insurance for the children effective the same date. Steven has

filed several motions for relief regarding child support and maintenance, and those motions were passed for later consideration. The divorce proceedings were very contested with both parties filing numerous motions and changing attorneys several times.

The financial issues were assigned to a domestic relations commissioner (the commissioner), and a hearing was scheduled for May 24, 1994. Steven left in early May 1994 for a medical relief trip to Romania. Apparently, his legal counsel had advised him against it, but he chose to go anyway. On May 10, 1994, Steven's counsel at that time filed a motion seeking that his law firm be allowed to withdraw as counsel.¹ The circuit court granted the motion on May 16, 1994. Steven returned around May 20, 1994.

A hearing was held before the commissioner on May 24, 1994² and continued until the next day. In November 1994, the commissioner filed her report and recommendations. In part, the commissioner found that Steven's true earnings were a minimum of \$150,000 annually and that he had deliberately run up his business expenses in order to make it appear that his personal income was greatly reduced. The commissioner recommended Steven be granted no

¹Counsel maintained that not only had Steven gone on the trip, but he also took his office manager with him. Counsel stated that they had planned to depose both the manager and Steven's certified public accountant (CPA) in his absence.

²Steven maintains in his brief that he orally moved for a continuance on that date, but that this motion was not recorded. The commissioner later testified before the circuit court that Steven made no such motion and in fact wanted to get the proceedings over with.

reduction in child support and that he continue to pay \$1,949 per month child support until December 30, 1994, at which time it would increase to \$2,300 per month. The commissioner also recommended that Steven's obligation to pay maintenance during the pendency of this action be terminated during any period in which Roberta had employment. She recommended that maintenance be suspended, conditioned upon Steven satisfying the obligations to Roberta set forth in the order regarding property division, attorney fees and costs, current and future child support and past due maintenance arrearage. The commissioner valued Steven's medical practice at \$144,000. The commissioner found an arrearage of \$57,765.21 in child support, maintenance, and medical insurance and granted a common law judgment against Steven for that amount.

Steven filed exceptions to the commissioner's report and recommendations. He primarily argued that he was prejudiced by his counsel's decision to withdraw shortly before the commissioner's hearing and by the commissioner's alleged decision not to allow a continuance. He also moved the circuit court for a new trial or to offer additional evidence. The circuit court held a hearing to consider the various issues and in an opinion and order in June 1996, overruled both parties' exceptions to the commissioner's report. The court affirmed the commissioner's report and recommendations and incorporated them into its order. The court specifically upheld the commissioner's conclusions regarding maintenance and child support. The court denied Steven's motion

for a new trial. Steven's first appeal is from this opinion and order of the circuit court.

On November 7, 1996, Louisville Children's Eye Specialists, P.S.C. (Eye Specialists), a corporation wholly owned by Steven, was administratively dissolved by the Kentucky Secretary of State's Office for failure to file an annual report. On December 6, 1996, Roberta caused an order of garnishment to be issued against Steven, doing business as Eye Specialists, based upon the judgment she obtained against Steven in the divorce case. Eye Specialists' checking account at Great Financial Bank was garnished in the amount of \$23,058.86, and the execution against Steven was used to attach furniture and equipment owned by Eye Specialists. On December 10, 1996, Eye Specialists applied to the Kentucky Secretary of State for reinstatement. The application was granted and Eye Specialists was issued a certificate of existence dated December 13, 1996, which reflected an incorporation date of December 28, 1990.

Steven and Eye Specialists filed a joint motion to quash garnishment wherein both entities sought a determination that the garnishment and execution were improper and should be quashed. The Jefferson Family Court in an opinion and order upheld the garnishment.³ It concluded that while Eye Specialists was revived, the property garnished by Roberta was legally transferred during

³Following the circuit court's opinion and order in June 1996, the family court program began operating and this case was transferred from circuit court to family court.

the period that the corporation had been administratively dissolved. Steven's second appeal is from this opinion and order.

Steven first argues to this Court that the commissioner and the circuit court erred by denying his motion for a new trial or for leave to present additional proof. After reviewing the record below, specifically the evidence presented before the circuit court at a hearing to consider exceptions to the commissioner's report, this Court has uncovered no error or abuse of discretion by the court below.

Generally, a trial court has broad discretion in granting or refusing a continuance of a trial, and unless that discretion has been abused, an appellate court will not disturb the trial court's ruling. Hall v. Commonwealth, Department of Highways, Ky., 511 S.W.2d 204, 205 (1974); Walker v. Farmer, Ky., 428 S.W.2d 26, 28 (1968); Lewis v. Liming, Ky. App., 573 S.W.2d 365, 368 (1978). An appellate court may reverse a trial court's decision not to grant a new trial only if the trial court's decision was clearly erroneous. Humana of Kentucky, Inc. v. McKee, Ky. App., 834 S.W.2d 711, 725 (1992).

In the instant case, this Court has found no abuse of discretion or clear error by the trial court regarding the continuance or new trial issues. Witnesses including the commissioner who conducted the hearing as well as Roberta's former counsel testified that Steven never asked for a continuance and in fact requested that they proceed, because he wanted to conclude the

matter.⁴ The record also reflects that Steven represented himself at the commissioner's hearing following his counsel's withdrawal and continued to represent himself for several months following the hearing. The record reveals that Steven undertook several actions against his counsel's advice, thus leading counsel to withdraw before the hearing. Thus, there was evidence presented that his actions before the commissioner were inconsistent with the relief he sought from the circuit court. We have found nothing in the record which would have rendered the trial court's decision not to grant a continuance or new trial clearly erroneous.

Steven next contends that the circuit court erred by requiring him to pay \$2,300 per month child support. He maintains that this amount is excessive and that the spirit of the child support guidelines do not support such an amount. We decline to disturb the circuit court's ruling. Kentucky Revised Statute (KRS) 403.211(2) states, "[t]he child support guidelines in KRS 403.212 shall serve as a rebuttable presumption for the establishment or modification of the amount of child support. Courts may deviate from the guidelines where their application would be unjust or inappropriate." One of the criteria provided for in the statute which would allow adjustment of the guideline award is combined

⁴Apparently, there is nothing in the record to support Steven's argument that he wanted a continuance. Steven says he made his request before the tape recorder was turned on. Roberta's former counsel who appeared at the hearing stated that he remembered some discussion regarding Steven wanting to proceed, but he could not find the discussion on the taped record of the commissioner's hearing.

parental income in excess of the Kentucky child support guidelines. KRS 403.211(3). "The court may use its judicial discretion in determining child support in circumstances where combined adjusted parental gross income exceeds the uppermost levels of the guideline table." KRS 403.212(5). See Redmon v. Redmon, Ky. App., 823 S.W.2d 463 (1992). The guidelines are not designed to cover all possible scenarios, and the legislature has not taken away the trial court's broad discretion in ensuring that the needs of the children will continue to be met. Id., at 465.

In the case at bar, Steven's and Roberta's monthly income exceeded the highest income provided for in the statutory table. We have found no abuse of discretion by the trial court in setting the support based upon Steven's income. Further, Steven has provided no authority to support his position.

Steven also argues that the circuit court erred by reserving the issue of maintenance. Steven's argument is directly refuted by James v. James, Ky. App., 618 S.W.2d 187 (1981). The same argument was made in that case, and this Court disagreed, finding that KRS 403.200 does permit a court to reserve maintenance. Id., at 188. The statute allows the trial court to provide for probable changes in either party's ability to be self-supporting. Id. The statute expressly places decisions regarding the amount and duration of maintenance within the discretion of the trial court. Id.

In the case at hand, the court ordered that Steven's obligation to pay maintenance to Roberta would be suspended,

effective with the date of her finding employment and would continue to be suspended until further order of the court. The court noted that the suspension of the maintenance was conditional upon Steven satisfying the obligations to Roberta. The court ruled that if Steven failed to satisfy those obligations set forth within three years or fell more than two months behind in child support, Roberta would be able to renew a maintenance request. We have reviewed the court's ruling and have found it reasonable and not an abuse of discretion.

Next, Steven argues that the circuit court erred in awarding Roberta a common law judgment for \$57,765.21, representing pendente lite maintenance, child support and medical insurance arrearages. This argument clearly lacks merit. The record reflects that this amount was the result of payments for either maintenance, child support or medical insurance that Steven failed to make. Many of these rulings setting the payments to be made had been contested earlier by Steven. Steven was responsible for those payments and cannot later have amounts changed that already had been adjudicated. The authority he cites is clearly distinguishable.

We next consider Steven's argument that the trial court erred in the method of valuing his medical practice. He maintains that the trial court failed to adequately value goodwill by not using the capitalization of earnings method. He also states that the trial court failed to consider the substantial debts of the

practice. This Court has uncovered no clear error by the trial court on this issue and declines to disturb its finding.

Goodwill should be considered in valuing a closely held corporation in a dissolution action. Drake v. Drake, Ky. App., 809 S.W.2d 710, 713 (1991). A trial court's valuation in a divorce action will not be disturbed on appeal unless it is clearly contrary to the weight of the evidence. Underwood v Underwood, Ky. App., 836 S.W.2d 439, 444 (1992). This is especially true where the court's figure falls within the range of competent testimony. Id.

The commissioner heard testimony from James A. Gravitt, C.P.A., who valued Steven's practice at between \$144,000 and \$156,000. Gravitt reviewed financial statements and records of the business, reviewed raw data and reviewed the depositions of Steven's accountant. The trial court valued the practice at \$144,000, the low end of the expert's valuation. Thus, the court's valuation was within the range of competent testimony. Steven bears the burden of showing evidence that refutes the expert's testimony, and he has failed to do so in the instant case.

Steven argues as well that the trial court erred in dividing assets and liabilities. He argues that the division was unjust and that Roberta provided no proof that itemized debts were nonmarital and thus, the trial court erred in allocating all of the debts to him. KRS 403.190(1) states that in a proceeding for dissolution of marriage, the court shall assign each spouse's property to him or her.

It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including: (a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as a homemaker; (b) Value of the property set apart to each spouse; (c) Duration of the marriage; and (d) Economic circumstances of each spouse when the division of property is to become effective. . . .”

Id. Property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property. KRS 403.190(3). This Court in Bodie v. Bodie, Ky. App., 590 S.W.2d 895 (1979), rejected the argument that KRS 403.190 creates a presumption that all debts acquired during the marriage are marital debts. The statute does not create a presumption as to marital debts, and one cannot be judicially implied. Id., at 896. “Consideration should be given to the nature of the debts based upon the receipt of benefits and the extent of participation.” Id.

In the instant case, we again have found no abuse of discretion by the trial court regarding this issue. Evidence was presented that Steven incurred many debts himself, thus leading to his problems. There was also evidence of dissipation by Steven. Some of the items listed in Steven’s brief such as arrearages and attorney fees are not debts and are problems of his own making. We decline to disturb the trial court’s findings. We affirm the trial court on all issues in Steven’s first appeal.

We now turn to Steven’s second appeal. He argues that the family court’s opinion and order conflicts with the provisions of the Kentucky Business Corporation’s Act and decisions of

Kentucky's highest court, and is therefore reversible error. He contends that the family court relied on inapplicable law and ignored the applicable law that a corporation continues to exist for purposes of "winding up" its affairs even after it has been administratively dissolved. After examining the applicable statutes and case law regarding this issue, we have concluded that the family court erred.

KRS 271B.14-200 provides, "[t]he secretary of state may commence a proceeding under KRS 271B.14-210 to administratively dissolve a corporation if: (1) The corporation does not file its annual report to the secretary of state within sixty (60) days after it is due. . . ." "A corporation administratively dissolved continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under KRS 271.B:14-050 and notify claimants under KRS 271B.14-060 and 271B.14-070." KRS 271B.14-210(3). KRS 271B.14-505 states,

(1) A dissolved corporation shall continue its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including: (a) Collecting its assets; (b) Disposing of its properties that will not be distributed in kind to its shareholders, (c) Discharging or making provision for discharging its liabilities; (d) Distributing its remaining property among its shareholders according to their interests; and (e) Doing every other act necessary to wind up and liquidate its business and affairs. (2) Dissolution of a corporation shall not: (a) Transfer title to the corporation's property. . .[.]

Further, KRS 271B.14-220 provides that a corporation administratively dissolved may apply to the secretary of state within two years after the effective date of dissolution. If the secretary of state determines that the application contains the required information, he or she shall cancel the certificate of dissolution and prepare a certificate of reinstatement with the effective date of reinstatement. KRS 271B.14-220(2). "When the reinstatement is effective, it shall relate back to and take effect as of the effective date of the administrative dissolution and the corporation shall resume carrying on its business as if the administrative dissolution had never occurred." KRS 271B.14-220(3).

The Kentucky statute does not set any specified time in which the officers and directors of a corporation must close up its affairs, nor does it provide for a specific manner of winding up the business. Greene v. Stevenson, 295 Ky. 832, 175 S.W.2d 519, 523 (1943). If the stockholders do not wind up the corporation as expeditiously as possible, it may be that the stockholders have a cause of action if injury can be shown by reason of the delay. Id. The purpose of the statute allowing extension of time to a dissolved corporation to wind up its business is to provide for the administration of corporate property by the corporation itself during the period, and to permit the title to its property to remain in the corporation itself until it winds up its affairs. Id., at 523-524. The effect of such statutes is to abrogate the common law rules relative to the reversion of corporate real

estate, escheat of its personal property, and extinguishment of the debts owed by it. Id., at 524. See also Stearns Coal & Lumber Co. v. Douglas, 299 Ky. 314, 185 S.W.2d 385 (1944).

Generally, dissolution of a corporation does not take away or destroy its property. 19 C.J.S. § 864 at 509 (1990). After dissolution, the property and the assets of the corporation are preserved for the benefit of those entitled to share in them either as creditors or stockholders. Id. Statutes continuing the existence of a corporation after its dissolution generally provide that it shall be continued as a corporate body for a limited time for the purpose of settling its affairs including the power to dispose of and convey its property. Id.; § 862 at 516-17. Generally, during this period, the dissolved corporation enjoys most of the powers with which a corporation is vested including disposing and conveying its property. Id., at 518.

Courts in several other jurisdictions have considered issues surrounding a corporation's power during the "wind up" period and have reached similar conclusions. See Penasquitos, Inc. v. Superior Court, 812 P.2d 154 (Cal. 1991) (holding that the corporation exists indefinitely for the purpose of winding up and settling affairs of the corporation such as administering surviving assets and liabilities); Elk River Mill and Lumber Co. v. Georgia-Pacific Corp., 330 P.2d 404 (Cal. Ct. App. 1958) (holding that pursuant to the general rule for a three year wind up period, the corporation's rights that it had of whatever nature are preserved in full vigor during this period); Addy v. Short, 89 A.2d 136 (Del.

Supr. 1952) (ruling that during the three year wind up period, the corporation's title and possession to property are unimpaired; its property rights remain in full vigor during the period); City of Klamath Falls v. Bell, 490 P.2d 515 (Or. Ct. App. 1971) (noting that the Oregon statute providing for five years for a corporation to wind up its affairs includes the purpose of conveying, transferring and releasing real or personal property); Krebs v. Morgantown Bridge & Improvement Co., 87 S.E.2d 609 (W.Va. 1955) (noting that the state statute allows for a dissolved corporation to wind up affairs and that its property shall be subject to payment of corporate obligations). See also Matter of National Medical Properties, Inc., 1980 W.L. 6373 (Del. Ch. 1980); Mackay & Knobel Enterprises, Inc. v. Teton Van Gas, Inc., 460 P.2d 828 (Utah 1969).

In the case at bar, the family court failed to consider Kentucky's statutory provision which extends the life of a corporation which has been administratively dissolved for purposes of winding up its affairs. The case upon which it relied, Psychic Research and Development Institute of Maryland, Inc. v. Gutbrodt, 415 A2d 611 (Md. Ct. App. 1980), did not address the issue as well. In fact, Maryland's law appears distinguishable as the case states that under that state's law, once a proclamation dissolving the corporation is issued, the forfeiture puts an end to corporate existence. It is true that a revived corporation would take title only to those assets which were not disposed of during the period of corporate demise, see Id.; however, in the instant case, Eye

Specialists had not ceased to exist and was in a wind up phase. It received reinstatement within one month of dissolution. Under Kentucky law as set out above and based upon the law of other states, the property of Eye Specialists did not automatically revert to its shareholder, because it existed for the corporation to meet its obligations in winding up its affairs. The family court erred as a matter of law in upholding the garnishment of the corporation's assets. Some of the cases relied upon by Roberta pre-date the later cases setting out the current rule. Thus, we must reverse the family court's order upholding the garnishment as it was based upon an erroneous legal premise.⁵ This Court remands for proceedings consistent with this opinion.

For the foregoing reasons, this Court affirms the Jefferson Circuit Court regarding issues in the first appeal but reverses the family court regarding the garnishment issue in the second appeal and remands for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEFS FOR APPELLEE:

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⁵Roberta could have possibly proceeded on a piercing the corporate veil theory if she could prove that Eye Specialists was Steven's alter ego; see Culver v. Culver, Ky. App., 572 S.W.2d 617 (1978), however she did not proceed under that theory.

