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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001785-MR

RONNIE GAY CORNETT — APPELLANT

v.

APPEAL FROM BOYLE FAMILY COURT
HONORABLE DOUGLAS BRUCE PETRIE, JUDGE
ACTION NO. 02-CI-00366

KATHLEEN KAY CORNETT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MINTON, SCHRODER AND TAYLOR, JUDGES.

SCHRODER, JUDGE: This is an appeal from those portions of a decree of dissolution determining the value of certain marital assets, finding that appellant had dissipated marital assets, and awarding maintenance to appellee. Upon review of the record and the applicable law, we adjudge that the family court properly valued the assets at issue, there was substantial evidence of dissipation of marital assets, and there was no abuse of discretion in awarding maintenance. Thus, we affirm.

Appellant, Ronnie Cornett, and appellee, Kathleen Cornett, were married in 1967. Kathleen was 52 years old at the time of the divorce and had a high school education. During the marriage, Kathleen stayed home to raise the parties' two children (now grown) and did not work outside the home until 1991. At that time, Kathleen began working in a convenience store in Danville called Triangle Mart, which the parties built and began operating in 1989. Ronnie was 55 at the time of the divorce and also had only a high school education. From 1969 to 1984, Ronnie worked for U.S. Steel Mining. From 1984 to 1989, he was employed by Arch Mineral Corporation as a mine manager. In 1992, Ronnie went to work for Castle Rock Coal Corporation until 1993, when he and two other individuals formed Colliers & Associates, Inc. ("Colliers"). At the time of the hearing in this case, Ronnie was vice-president and 50% owner of Colliers and Jonah Mining, LLC ("Jonah") and Jonah's various subsidiaries. Colliers is a mining consulting company which performs safety, management and insurance assessments for mining-related businesses. Ronnie and his partner, Thomas McClain, perform the consulting services for Colliers. Jonah was formed in 2002, also by Ronnie and McClain, as a holding company for three contract mining subsidiaries – Mason Mining ("Mason"), CMP Mining, LLC ("CMP"), and Mungeon Equipment, LLC

("Mungeon"). Some of Colliers' best clients are Jonah's mining companies.

The parties separated in May of 2002, and in August of 2002, Kathleen filed the dissolution action. The hearing in the case was held on January 29 and 30, 2004, and the court entered its findings of fact, conclusions of law, and decree of dissolution on August 3, 2004. The decree awarded Kathleen the following:

1.) 2000 Suburban
2.) 1994 Cadillac Seville
3.) 1993 bass boat valued at $14,000
4.) Farmer's National Bank checking account - $3,000
5.) Farmer's National Bank brokerage account - $46,741
6.) Pacific Life Insurance Policy - $28,958
7.) Triangle Mart – valued by the court at $553,900
8.) House and 40 acres in Boyle County – with equity of $165,000
9.) Home furnishings – valued at $15,435
10.) Cash - $184,649 – to balance the division of assets
11.) Jewelry - $15,500
12.) Artwork - $4,000
13.) Bank One account - $8,400
14.) Maintenance - $1,600 per month until she begins receiving monies under the qualified domestic relations order as to

the U.S. Steel pension. At that point, the maintenance would be reduced to $1,000 a month until May 1, 2014 when she begins receiving payments under the Arch pension plan.

Ronnie was awarded:

1.) BB&T Checking Account - $6,000

2.) Note receivable from McClain - $12,000

3.) Mason Mining – valued by the Court at $885,815

4.) Colliers - $27,020

5.) Mungeon - $5,000

6.) Farm in Casey County - $163,450

7.) 2003 Truck - $40,000

8.) Farm equipment - $40,000

9.) Guns, gun safe and knives - $14,425

The following debts were also assigned to Ronnie:

1.) Loan on truck - $30,000

2.) American Express credit card - $19,885

3.) GM credit card - $15,445

4.) First Southern line of credit - $50,000

Ronnie now appeals the court's valuation of Mason Mining and Triangle Mart, the court's finding that Ronnie dissipated $121,928 in marital assets, and the award of

maintenance to Kathleen. We shall first address the valuation of Mason Mining.

Each party presented expert testimony on the value of Mason. Tim Snoddy testified on behalf of Ronnie, and Calvin Cranfill testified on behalf of Kathleen. Mason was formed in February 2002 for the purpose of operating a mine in West Virginia known as Camp Creek Mine #1. At the hearing Mr. Cranfill valued Ronnie's 50% interest in Mason at $1,377,820 if no reduction was taken for mine closure liability, and $1,035,721 if such liability was taken. Mr. Snoddy valued the entity at -$5,400,000 because of mine closure liability. The potential mine closure liability at issue in this case is based on the Multi-Employer Pension Plan Amendment Act of 1980, 29 U.S.C. § 1381 ("MPPAA"), which authorizes a multi-employer plan to assess a signatory employer a pro rata share of the plan's unfunded vested benefits in the event the employer withdraws from the plan. In the case of the United Mine Workers of America 1974 Pension Plan, these post-closure liabilities have two components: health insurance liabilities and retirement benefit liabilities. Whether the employer would have any post-closure withdrawal liabilities and, if so, how much would be dependent on many contingencies – whether the employer actually withdraws from the plan, whether the benefits are unfunded at the time of withdrawal (dependent on the date of withdrawal, the

economy, and management of the plan), the extent the benefits are unfunded at the time of withdrawal (again dependent on the economy, how many participants are in the plan, how generously benefits are set, etc.), how many employees the company has at the time of withdrawal, and whether the employer is the last signatory employer of the employees.

The constitutionality of the contingent liability provision of the MPPAA was challenged and upheld by the United States Supreme Court in Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 106 S. Ct. 1018, 89 L. Ed. 2d 166 (1986). In Godchaux v. Conveying Techniques, Inc., 846 F.2d 306 (5th Cir. 1988), a dispute arose over whether the seller of a business had violated warranties in the sales contract which represented that the company did not have any liabilities and that the company's financial statements had been prepared according to generally accepted accounting principles. After the buyer purchased the business, it withdrew from the union multi-employer pension plan and was assessed $225,753 in withdrawal liability. The buyer claimed that the seller breached a warranty in the sales contract when it represented that the business had no liabilities at the time of the sale when, in fact, it had the withdrawal liability. The buyer also claimed that the seller breached its representation that financial statements were prepared according to generally accepted accounting principles

when the financial statement did not disclose information about the union pension plan or potential withdrawal liability. The Court rejected both claims. As to the representation of the existence of no liabilities at the time of sale, the Court adjudged that withdrawal liability does not exist until the employer actually withdraws from the plan. Since the seller had not withdrawn from the plan at the time of the sale, the court reasoned that it could accurately represent that it had no liabilities at the time of the sale. The Court emphasized the speculative nature of the liability, both in terms of the existence of the liability and the amount of the liability. The Court also concluded that the seller did not breach its warranty that its financial statement was prepared in accordance with generally accepted accounting practices when it failed to disclose the union pension plan or the potential withdrawal liability, noting that said information did not affect the value of the business at the time of the sale.

"Where expert testimony is conflicting, the issue becomes a question to be determined by the finder of fact, in this case the trial court." Howard v. Kingmont Oil Co., 729 S.W.2d 183, 186 (Ky.App. 1987). A trial court's finding as to the value of marital property will not be reversed unless it is clearly erroneous. Roberts v. Roberts, 587 S.W.2d 281 (Ky.App.

1979). The date of valuation of marital assets is the date of trial. Brosick v. Brosick, 974 S.W.2d 498 (Ky.App. 1998).

Mr. Snoddy admitted on cross-examination that he received his figures for computing the withdrawal liability from Mason's management and that he (Snoddy) did not understand all the variables that went into calculating the liability. Paul Dean, the former comptroller of Colliers, testified that when he was preparing the balance sheets for Jonah for the mid-year 2003, he was instructed by McClain and Ronnie to lump together 2002 and 2003 on those balance sheets in order to offset the gains in 2003 by the losses in 2002 and that he was further instructed to use a figure of 104% of gross wages to compute liability rather than the 15% he had previously been told to use. Specifically, Dean testified in his deposition:

> [A]t the time that I was working there, it was my understanding that it had been established at approximately 15 percent, so that was the number they were using. But during months preceding this, Mr. McClain made it known that they were looking to increase withdrawal liability from within the union and it could be as high as 212 percent.

Interestingly, when the last set of financial documents were produced for the year-end 2003, liability was down to $288,406 from $836,962 reported only a few months earlier. It should also be noted that no withdrawal liability was used in preparing the financial statements of Mason that

were submitted to Farmers National Bank as forecasts for lending purposes. It was established that Mason generated a profit of $783,631 in 2003 after all expenses were paid, and $957,342 in management fees had been paid to entities owned and controlled by McClain and Cornett. In fact, Mason generated sufficient cash flow in one quarter to retire its $450,000 start-up loan. Cranfill used a figure of 15% of gross wages to compute Mason's withdrawal liability, and testified that even that amount was too speculative to be reliable.

The court accepted the 15% figure used by Cranfill to compute Mason's withdrawal liability and valued Ronnie's interest in Mason at $885,815. In so doing, the court pointed to the questionable accounting practices employed by Mason in anticipation of this litigation. Relying on Godchaux, the court also reasoned that the 104% figure used by Snoddy was too speculative. From our review of the record, we believe the court's decision to accept the 15% figure was supported by substantial evidence.

Ronnie also argues that the court erred in valuing Mason by applying the 18.3% discount factor and by applying a 17.5% discount for marketability and control. The court took an average of the figures presented by Cranfill and Snoddy in arriving at these figures, which was within its discretion, and

thus there was substantial evidence to support the court's discount figures.

Ronnie additionally faults the court for valuing Mason based on there being three more years on its only service contract, when there were only 2.5 years left on the contract at the time of the hearing. Ronnie maintains that Snoddy based his valuation on the remaining 2.5 years and cites to the point in the videotape of the hearing where Snoddy's testimony to this effect was supposedly located. However, when we reviewed the videotape, there was no such testimony at that time on the tape. See CR 76.12(4)(c)(v). It appears that Ronnie merely cited to the beginning of Snoddy's testimony. Later in his testimony, Snoddy testified that Mason's contract with Hobet Mining was for a total of four years, which was the same as Cranfill's testimony. Again, the court's method of valuation was supported by substantial evidence.

We now move onto Ronnie's argument that the trial court erred in finding that Ronnie dissipated $121,928 in marital assets. It was undisputed at the hearing that Ronnie has a girlfriend named Sheila Haggin who now works at Colliers. Haggin, a hairdresser by training and experience, was put on the payroll of Colliers in January 2003 as McClain's administrative assistant and began earning $4,000 every two weeks. Prior to that date, Ronnie's salary from Colliers had been $6,000 every

two weeks. After Haggin was hired, Ronnie's salary dropped to $2,000 every two weeks. In the same time period, McClain continued to make his $6,000 every two weeks. Paul Dean testified that after Ronnie's divorce action had been filed, Ronnie and McClain came to him and told him that they needed to hide money for Ronnie, so part of his salary would now be paid to Haggin. There was also evidence that Colliers paid Haggin $4,037 in health insurance benefits in 2003 and provided her with a vehicle that year which resulted in a $7,191 benefit to her. Further, Ronnie testified that he bought Haggin a ring valued at $1,200-$1,500 and made credit card payments for her in the amount of $5,500. The lower court adjudged that the full amount of assets dissipated was $121,928 and awarded Kathleen one-half of that amount to restore her share of the marital estate. A court may find that a party dissipated marital assets when it is satisfied by a preponderance of the evidence that marital property was expended during a period when the parties were separated or dissolution was impending and there is a clear showing of intent to deprive the other spouse of his or her proportionate share of marital property. Brosick v. Brosick, 974 S.W.2d 498 (Ky.App. 1998). From our review of the above evidence, Kathleen made a sufficient showing that Ronnie dissipated marital property during the parties' separation in order to deprive her of her share of the property.

We next address Ronnie's claim that the family court erred in assessing the value of Triangle Mart at $553,900 instead of the stipulated amount of $600,000. The parties stipulated prior to trial that the value of Triangle Mart was $600,000. However, at trial it was revealed that during the pendency of the divorce, Kathleen had approached Ronnie with the necessity of changing the logo and signage on the store to permit the continued marketing of BP products. The evidence established that if Ronnie had agreed to the change and executed the necessary documents before December 31, 2003, then the cost to the business of making the changes would have been $9,000. Having failed to meet the deadline, the cost was to be $46,100. Ronnie did not dispute this evidence, but maintained that he did not believe he could execute the documents necessary to change the logo and signage because of the court's status quo order and because he did not want to burden a prospective purchaser with having to fulfill the obligation. The family court found both arguments by Ronnie untenable, noting that Ronnie chose to ignore the court's status quo order when it came to dissipating marital assets to benefit Haggin, while purportedly interpreting it so as to not allow him to save Triangle Mart $37,100 when it came to cooperating with Kathleen.

We liken the parties' stipulation regarding the value of Triangle Mart to a separation agreement between the parties

which the court implicitly found, pursuant to evidence adduced at trial, to be unconscionable because of the significant monies Triangle Mart would have to expend to continue in business. Under KRS 403.180(2), the court is bound by the terms of a parties' separation agreement regarding division of assets unless it finds the terms unconscionable. Burke v. Sexton, 814 S.W.2d 290 (Ky.App. 1991). As there was evidence of this $46,100 liability of Triangle Mart which was occasioned by Ronnie's unwillingness to cooperate with Kathleen, we cannot say that the court erred in valuing the property at $553,900.

Ronnie's remaining argument is that the family court erred in awarding Kathleen maintenance. Ronnie was required to pay Kathleen $1,600 per month until she begins receiving monies under the qualified domestic relations order as to the U.S. Steel pension. At that point, the maintenance is to be reduced to $1,000 a month until May 1, 2014 when she begins receiving payments under the Arch pension plan. Ronnie argues that considering the assets Kathleen was awarded in the decree and the income she will earn from working at Triangle Mart, Kathleen is not entitled to an award of maintenance under KRS 403.200(1). KRS 403.200(1) provides:

> (1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent

> spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:
> (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and
> (b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

Kathleen was 52 years of age at the time of the divorce and she had no education beyond high school. The only job she has had outside the home was working at Triangle Mart doing the bookkeeping since 1991. Kathleen stated that prior to the parties' separation, Ronnie ran Triangle Mart and was responsible for the major decisions of the business. After he left, she was thrust into the role of managing the store, a role she maintained she was ill-equipped to handle. According to Kathleen, since Ronnie has been gone from Triangle Mart, the business has declined. Kathleen testified that when Ronnie left, she began paying herself $2,800 every two weeks. Because of cash-flow problems and an upcoming tax bill, she recently reduced her salary to $2,000 every two weeks, $52,000 a year. Kathleen testified that she has also recently suffered from health problems that would make it difficult for her to continue working. She has had two surgeries - one on her wrist and arm and one on her neck. Because of the pain from these conditions,

Kathleen stated that she has a problem sitting and working for long periods.

The major assets Kathleen received in the decree were Triangle Mart, valued at $553,900, the marital residence, with equity of $165,000, and $184,649 in cash. Kathleen testified that she wants to sell Triangle Mart and buy a home in Louisville to be near her sons and grandchildren. Kathleen estimated her yearly expenses at $60,000. In awarding Kathleen maintenance, the family court looked at Kathleen's age, her lack of education, her health problems and the fact that she did not have sufficient experience to continue managing Triangle Mart in a profitable manner. The court also found that it would likely take some period of time for Kathleen to receive her cash entitlement from Ronnie and for the assets she was awarded to be liquidated.

An award of maintenance is a matter within the discretion of the trial court. Browning v. Browning, 551 S.W.2d 823 (Ky.App. 1977). The trial court may grant maintenance to a spouse only if it finds that the party seeking maintenance lacks sufficient property to provide for her reasonable needs and is unable to support herself through appropriate employment. Mosley v. Mosley, 682 S.W.2d 462 (Ky.App. 1985). We cannot say that the family court abused its discretion in awarding Kathleen maintenance in light of the evidence that Kathleen will not be

able to continue working at Triangle Mart or obtain other employment that would cover her expenses, and the fact that her assets, namely Triangle Mart, could not be readily liquidated to provide for her reasonable needs.

Finally, we address Kathleen's motion before this Court for attorney fees pursuant to CR 11 and CR 73.02(4). The motion as it relates to the allegations that appellant acted in bad faith in attempting to obtain an inadequate *supersedeas* bond and in attempting to cloud the title to certain real estate awarded to Kathleen is not properly before this Court, as it relates to matters over which the family court would have continuing jurisdiction. The only portion of the motion properly before this Court is related to the allegation that appellant acted in bad faith in raising issues in its prehearing statement which were not preserved for appeal. These issues were not thereafter raised in appellant's brief, and we cannot say the allegation rises to the level of warranting CR 11 or CR 73.02(4) relief. Accordingly, appellee's motion for attorney fees is hereby DENIED.

For the reasons stated above, the judgment of the Boyle Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE

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