

RENDERED: NOVEMBER 4, 2005; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-001620-MR

DEBRA JANE BALL

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT  
HONORABLE RONNIE C. DORTCH, JUDGE  
ACTION NO. 02-CI-00429

DAVID CRAIG BALL

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

BARBER, JUDGE: This appeal stems from a dissolution of marriage proceeding originating in Ohio County, Kentucky. The parties were married on November 10, 2000. At the time of the marriage, Appellee, David Craig Ball (David), owned a one-third share of Paxton & Ball, Inc., an S corporation. After separating November 23, 2002, Appellant, Debra Jane Ball (Debra) filed for a dissolution of marriage from David on December 6, 2002. An interlocutory decree was entered on August 8, 2003, dissolving

the parties' marriage while reserving all other issues for determination at a later date. The remaining issues were presented to Hon. William L. Wiesman, Domestic Relations Commissioner, (Commissioner) at a hearing on August 25 and 26, 2003. During the hearing, testimony was received from two certified public accountants (C.P.A.), Robert Kuphal, on behalf of Debra; as well as David Anderson, long-time accountant for Paxton & Ball,<sup>1</sup> on behalf of David, regarding the change in the value of David's interest in Paxton & Ball during the parties' marriage. Subsequently, the Commissioner filed his report with the clerk on October 10, 2003. Debra filed exceptions to the report in its entirety on October 20, 2003. Debra's exceptions were supplemented by a memorandum in support of exceptions to the Commissioner's recommended order, filed April 27, 2004. David filed his response to Debra's memorandum on May 17, 2004. Judge Ronnie C. Dortch did not hold a hearing on Debra's exceptions and overruled them based upon the record on July 14, 2004. The Court found that the Commissioner's report was based upon credible evidence and supported by applicable law. Debra now appeals the Commissioner's finding related to the change in value of David's interest in Paxton & Ball during the parties' marriage.

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<sup>1</sup> Mr. Anderson testified that his C.P.A. firm had served Paxton & Ball for 25 years. He also testified that he had personally prepared the financial documents for Paxton & Ball for the past 10 years with the exception of part of one year.

There is also a second issue appealed by Debra. On November 10, 2003, Debra filed a motion requesting the trial court to refer the matter back to the Commissioner for additional proof in light of newly discovered evidence. Debra gave no indication as to the identity of the evidence in her motion. As a result, David responded requesting disclosures regarding the evidence's nature. On December 23, 2003, Judge Dortch entered an order allowing Debra to submit evidence to the court in support of her motion. On January 9, 2004, Debra filed a motion containing more explanation as to the nature of the evidence as well as attaching copies of financial documents and a video transcript of a video deposition. The newly discovered evidence related to the deposition of Russell Snodgrass, a one-third interest holder of Paxton & Ball. Mr. Snodgrass provided financial documents which reflected an increase in his investment equity from December 18, 2001, through March 31, 2003. Debra argued in her motion that the same increase would be applicable to David because he, like Mr. Snodgrass, owned a one-third interest in the company. David filed a response to Debra's motion on February 2, 2004. Debra filed a reply on February 3, 2004. Judge Dortch denied Debra's motion to refer the matter back to the Commissioner on March 5, 2004, based upon the record. Debra then filed a motion to reconsider the order overruling her on March 9, 2004, and David filed a response

thereto on March 15, 2004. Without a hearing, Judge Dortch issued an order denying Debra's motion to reconsider on April 5, 2004.

Debra now argues it was error for the trial court to refuse to refer the matter back to the Commissioner for additional proof based upon newly discovered evidence. We will first examine Debra's argument that the Commissioner erred in his valuation of David's interest in Paxton & Ball during the parties' marriage in the findings of fact of the Commissioner's report.

Kentucky Rule of Civil Procedure 52.01 states in pertinent part for actions tried without a jury, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court." As a result, when the trial court adopts the recommendations of the Commissioner, those recommendations fall under the same standard of review as applied to a trial court's findings. See Greater Cincinnati Marine Service, Inc. v. City of Ludlow, 602 S.W.2d 427, 429, (Ky. 1980) and Wells v. Sanor, 151 S.W.3d 819, 822 (Ky.App. 2004). First we determine the appropriate standard of review.

Our court cannot disturb the findings of a trial court in a case involving dissolution of marriage unless those findings are clearly erroneous. Cochran v. Cochran, 746 S.W.2d 568, 569-570, (Ky.App. 1988), (citing Johnson v. Johnson, 564 S.W.2d 221 (Ky.App. 1978)), see also Rife v. Fleming, 339 S.W.2d 650, 652, (Ky. 1960). Findings of fact are not clearly erroneous if supported by substantial evidence. Black Motor Company v. Greene, 385 S.W.2d 954 (Ky.App. 1964), (citing Massachusetts Bonding & Insurance Co. v. Huffman, 340 S.W.2d 447 (Ky. 1960)). Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. Secretary, Labor Cabinet v. Boston Gear, Inc., a Div. of IMO Industries, Inc., 25 S.W.3d 130, 134, (Ky. 2000).

A trial court's ruling as to valuations in a dissolution action will not be disturbed on appeal unless clearly contrary to the evidence submitted. Gomez v. Gomez, 168 S.W.3d 51, 55 (Ky.App. 2005), (citing Clark v. Clark, 782 S.W.2d 56, 58 (Ky.App. 1990)). This is the rule even in cases where evidence exists upon which the value could have been much higher or lower. Purdom v. Purdom, 498 S.W.2d 131, 133 (Ky. 1973). The trial court is required to render a judgment of a business' value which reflects reality, but is not required to use a

particular methodology to reach that conclusion. Gomez supra 168 S.W.3d at 55, (citing Clark supra, 782 S.W.2d at 60). The task of the appellate court is to determine whether the trial court's approach fairly estimated the value of the business and the individual's interest. Id. (citing Clark supra, 782 S.W.2d at 59).

There is no dispute between the parties that David's ownership interest itself is non-marital property in that he owned same prior to the parties' marriage. What is at issue is the increase in value of David's interest in Paxton & Ball during the parties' marriage. Kentucky Revised Statute 403.190(2)(e) states "marital property" means all property acquired by either spouse subsequent to the marriage except the increase in value of property acquired before the marriage to the extent that such increase did not result from the effort of the parties during the marriage. In other words, an increase in value of non-marital property may be marital or non-marital depending on why the increase in value occurred. Goderwis v. Goderwis, 780 S.W.2d 39, 40 (Ky. 1989), (citing Stallings v. Stallings, 606 S.W.2d 163 (Ky. 1980)). An increase in value of non-marital property during marriage which is the result of a joint effort of the parties establishes the increase in value of the non-marital property as marital property. Id. The efforts of the parties may include the contribution of one spouse as a

primary operator of the business and the other spouse as primarily a homemaker. Id. According to the record, David worked at Paxton & Ball while Debra maintained the marital home. Therefore, we believe the marital property exception in KRS 403.190(2)(e) is not applicable to the facts presented to us in this appeal and any increase in value in David's share in Paxton & Ball during the parties' marriage would be marital property and subject to division by the trial court.

We now turn to the Commissioner's report. The Commissioner stated the following in his report about the change in value of David's interest in Paxton & Ball:

The primary asset involved is one-third interest in the corporation, Paxton and Ball, Inc. Shortly before the marriage, the current shareholders of Paxton and Ball purchased their interest from Mr. Tichenor for a negotiated sum of Seven Million Three Hundred Forty-Nine Thousand Dollars (\$7,349,000.00) which constitute 85% of the ownership. Two CPA's testified as to the value of the business at the date of marriage and the value of the business at the beginning of the year 2003. The Petitioner's CPA, Robert Kuphal, testified that the business was currently losing money. He further stated that the asset approach of valuing the business had a negative effect from the date of marriage until June of 2003. He did not use market income approach over present values, but applied a formula based upon debt reduction and concluded that the business was currently worth considerably more than the total value of Eight Million Six Hundred Forty-Six Thousand (\$8,646,000.00) at the date of the marriage. Mr. Kuphal testified

that in the year 2000, the business lost Three Hundred Ninety-Three Thousand Two Hundred Eight Dollars (\$393,208.00) and that in the year 2002, the business continued to lose. Its 2001 loss amounted to One Hundred Seventy-Eight Thousand, Three Hundred Eighty-Five Dollars (\$178,385.00).

The Respondent's CPA, David Alexander, testified that he had done work on Paxton and Ball for many years. This, of course, included years that other persons were primary owners of Paxton and Ball. His testimony on the value of Paxton and Ball in November of 2000 and its value in November, 2002, had declined. During the period of the marriage, his testimony was that retained earnings had decreased Three Hundred Eighty-One Thousand, Eight Hundred Twenty-Five Dollars (\$381,825.00).

Based upon the tax returns and the testimony of CPA's, the Court finds that the value of the business has decreased considerably during the time of the marriage. Inasmuch as Kentucky does not provide for splitting the losses that occur during the marriage of a business and the fact that the Respondent is a minority owner, the Commissioner concludes that there is no property to be divided in the Paxton and Ball asset.<sup>2</sup>

The Commissioner found the testimony on this matter by Mr. Anderson to be more reliable than that provided by Mr. Kuphal. The Commissioner had the opportunity to judge the credibility of each witnesses in relation to this issue and this court shall give his findings due regard. CR 52.01 In circumstances of conflicting testimony, a reviewing court may

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<sup>2</sup> Commissioner's Report, p.2-3.



not and will not disturb the findings of the Commissioner so long as it is supported by substantial evidence. Bentley v. Bentley, 500 S.W.2d 411, 412, (Ky.App. 1973), (citing Sharp v. Sharp, 491 S.W.2d 639 (Ky. 1973) and Adams v. Adams, 412 S.W.2d 857 (Ky. 1967)), see also Ori v. Steele, 399 S.W.2d 727, 728, (Ky.App. 1966).

Following a review of the record and trial video, we believe the Commissioner's finding in relation to the change in value of David's interest in Paxton & Ball during the marriage is supported by substantial evidence. Each C.P.A. provided the Commissioner with substantial explanation as to the basis of their respective valuations. The Commissioner could have relied on Mr. Kuphal's testimony and reached a different result. The fact that the Commissioner chose not to does not provide evidence of error warranting a reversal on appeal. Because the Commissioner's finding related to the change in value of David's Paxton & Ball interest during the parties' marriage was supported by substantial evidence, the findings fail to satisfy the clearly erroneous standard and must be affirmed.

We next turn to Debra's second basis of her appeal, the trial court's denial of her request to have the matter referred back to the Commissioner.

As stated above, Debra filed a motion asking the court to refer her case back to the Commissioner for taking of

additional proof in light of newly discovered evidence. This evidence consisted of deposition testimony<sup>3</sup> from Russell Snodgrass, a one-third owner of Paxton & Ball, as well as financial documents prepared for the benefit of the creditors of Paxton & Ball as well as Mr. Snodgrass. As stated earlier, the trial court ultimately denied Debra's request to refer the matter back to the Commissioner for additional proof.

Typically, a motion such as that filed by Debra is filed after a final judgment has been rendered by the trial court. Unfortunately, Debra failed to cite which Kentucky Rule of Civil Procedure she was relying on in her motion to refer her matter back to the Commissioner, but the motion reads as though she is relying upon Kentucky Rule of Civil Procedure 59.01. Ky. R. Civ. P. (CR) 59.01(g) states "A new trial may be granted to all or any of the parties on all or part of the issues for any of the following causes: . . . (g) Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at trial." In the instant case, Debra's motion to refer the matter back to the Commissioner for additional proof based upon newly discovered evidence is unusual in that it was filed after the Commissioner's report was filed but before the trial court's final order adopting or rejecting said report was entered. We

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<sup>3</sup> The deposition of Mr. Snodgrass was taken on December 16, 2003.

believe Debra's motion was akin to a Ky. R. Civ. P. (CR) 59.01 motion and will treat it as such.

Under Ky. R. Civ. P. (CR) 59.01(g), newly discovered evidence may be grounds for a new trial only if the moving party shows that she could not, with reasonable diligence, have discovered and produced the evidence at trial. Glidewell v. Glidewell, 859 S.W.2d 675, 677 (Ky.App. 1993), (citing Walker v. Farmer, 428 S.W.2d 26 (Ky. 1968)). In order for the trial court to grant a new trial on the ground of newly discovered evidence that evidence must be so strong and persuasive that a different result would "necessarily follow." Massey v. McKinley, 690 S.W.2d 131, 135 (Ky.App. 1985), (citing Thomas v. Surf Pools, Inc., 602 S.W.2d 437, (Ky.App. 1980)). The trial court is granted broad discretion in ruling on a Ky. R. Civ. P. (CR) 59.01 motion based on newly discovered evidence. Glidewell supra, 859 S.W.2d at 677, (citing Gibbs v. Commonwealth, 723 S.W.2d 871 (Ky.App. 1986), *overruled on other grounds by Commonwealth v. Christie*, 98 S.W.3d 485 (Ky. 2002)).

Upon a review of the motions and the documents filed relating thereto as well as the Snodgrass deposition video transcript, we affirm the trial court for three reasons. First, Debra did not state with specificity why this "newly discovered" evidence was not available to her prior to the hearing in August 2003 other than to say that she had specifically requested the

documents produced by Mr. Snodgrass prior to the final hearing and she was advised the documents were not available. However, Mr. Snodgrass stated several times during his deposition that Mr. Kuphal received every financial document he requested from Paxton & Ball. Second, Debra does not state that Russell Snodgrass was unavailable as a witness at the time of the hearing in August 2003. In fact, Mr. Snodgrass stated during his deposition that he was available as a witness, waiting in the hallway outside the hearing room during a part of the August 2003 hearing. Third, we do not feel that the additional evidence received from the Snodgrass deposition was of a type likely to change the result of the original hearing, because Mr. Snodgrass repeatedly stated the reason the financial documents he provided at the deposition were prepared was for the benefit of creditors of Paxton & Ball as well as his own. Based on the foregoing, we believe the trial court's denial of Debra's motion to reconsider its denial of her motion to refer her matter back to the Commissioner for additional proof was proper and we affirm.

For the reasons set forth above, the finding of fact by the Commissioner related to the valuation of the change in value of David's interest in Paxton & Ball during the parties' marriage is supported by substantial evidence and is not clearly erroneous. We also believe the trial court's April 5, 2004

order denying Debra's motion to reconsider its denial of her motion to refer her matter back to the Commissioner for additional proof was proper. Therefore, we affirm the Ohio Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Leigh A. Jackson  
Hartford, Kentucky

BRIEF FOR APPELLEE:

Mike McKown  
Hartford, Kentucky