

RENDERED: MARCH 23, 2007; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2005-CA-002534-MR

MILTON DALE BUSKILL

APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE HENRY M. GRIFFIN, III, JUDGE  
CIVIL ACTION NO. 01-CI-01095

THOEBE MARIE BUSKILL

APPELLEE

OPINION  
AFFIRMING

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BEFORE: VANMETER AND WINE, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Milton Dale Buskill (Dale) appeals from an order of the Daviess Circuit Court with respect to its characterization of certain property as marital, its valuation of his business property, its findings regarding tracing, and its award

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<sup>1</sup> Senior Judge David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

of maintenance to his ex-wife, Thoebe Marie Buskill (Thoebe), in their dissolution of marriage action. We affirm.

Dale and Thoebe were married on August 30, 1986. After fifteen years of marriage and four children, the couple separated in September 2001. On September 18, 2001, Thoebe filed for divorce. The Commissioner's Pendente Lite Recommendation<sup>2</sup> was entered on October 11, 2001. Although Dale and Thoebe briefly reconciled in 2002, the couple separated permanently on June 28, 2002.

Prior to his marriage to Thoebe, Dale purchased a residence located at 8669 Crisp Road, Whitesville, Kentucky, with his former wife, Lora, by deed dated April 24, 1984. Pursuant to their divorce decree, Lora conveyed to Dale her interest in the property by deed dated September 24, 1985. Following his marriage to Thoebe, Dale executed a trustee deed on February 28, 1989, transferring title from Dale alone to Dale and Thoebe, with a right of survivorship.

In 1986, shortly before his marriage to Thoebe, Dale and his father, Milton Buskill, started a trucking business called Buskill Freight Lines, Inc. (BFL). BFL was formed by merging the accounts<sup>3</sup> of two other predecessor companies, B&B Trucking and D&D Trucking, into it and thus becoming one entity. Dale and Milton also owned Spencer Leasing (Spencer), a company that leased equipment to BFL only; BFA, Inc.

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<sup>2</sup> It required, among other things, that Dale “not dispose, sell, convey, mortgage, destroy, or otherwise do away with any assets during the pendency of this matter and he is ordered to not conduct the business of BFL, Inc. and its subsidiaries other than in the normal and ordinary course of business.”

<sup>3</sup> The primary accounts on May 9, 1986 (BFL's date of inception), included Alcan, Commonwealth, NSA, and Southwire Rod and Cable.

(BFA), a warehousing and leasing company; and Buskill Properties (BP), a partnership. Collectively, the four businesses are known as Buskill Enterprises. On February 12, 2002<sup>4</sup>, Dale started two additional businesses in Nashville: CPA Leasing, LLC and Classic Pride and Associates, LLC. The Nashville businesses included the purchase of specialized equipment to perform contractual duties for BFI Waste Service, a nationally known waste management company.

The case was referred to a domestic relations commissioner (DRC) for hearings in November and December 2003. Both parties offered considerable evidence, including testimony regarding the marital residence and testimony of several experts regarding the value of the businesses. After the lengthy hearings, the Supplemental Report of Commissioner was filed on March 24, 2005.

Regarding the marital residence, the DRC concluded that Dale, in “making the Trustees deed, did not intend to make a gift of the property to [Thoebe] that would cause it to be considered all marital.” The DRC found that the marital residence had both marital and nonmarital components, stating:

The marital component is attributed to the fact that the first mortgage on the property at the time of the marriage was paid with marital funds. Adding to the marital component is the fact that a shop was constructed on this property during the marriage. In determining the value of the marital component, the Commissioner has considered the case of *Brandenburg v. Brandenburg*, 617 S.W.2d 871 and *Travis v. Travis*, S.W.3d 904. David Presnell, an appraiser, placed the value of the marital residence at \$138,500.00 on the date the parties married. The preponderance of the evidence indicates that the balance due on the first mortgage at the date of marriage

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<sup>4</sup> It was during this time that Dale and Thoebe, although discussing reconciliation, were nevertheless subject to the terms of the October 2001 Pendente Lite order.

was approximately \$6,500.00. The balance was paid during the marriage. Mr. Presnell also placed an appraised value on the property for May, 1991 which was immediately prior to the addition of the shop. He placed that value at \$155,000.00. Mr. Presnell then placed a value on the property for August, 1991, the point of which the shop had been completed. He placed a value of \$165,500.00 on the property at that point. The Commissioner finds these figures to be correct and should be used in calculating the marital component of the marital residence. Using these figures in the Brandenburg formula would yield the percentages contained in [Dale's] brief, pages 33 and 34. Therefore, the Commissioner finds that the marital residence, including the 9.73 acres, has a value of \$268,000.00. Of this value, \$188,370.00 is [Dale's] pre-marital and \$79,630.00 is marital to be divided equally between the parties . . . .

Regarding the businesses, the DRC determined that Dale failed to properly trace any nonmarital interest in BFL and concluded that the four Buskill Enterprises had a marital value of \$1,346,700 and the two Nashville businesses had a negative value of \$351,000. The DRC rejected Thoebe's argument that she should only share in the positive value of the four Buskill Enterprises and not in the negative value of the Nashville businesses. The DRC awarded Dale "all of the business interests" and determined that he "shall pay [Thoebe] one-half of the net value of all six businesses."

Regarding the maintenance issue, the DRC determined that Thoebe's projected income of \$15,000 to \$18,000 per year, as suggested by her past work experience and education level, "would not be expected to meet her reasonable needs, nor would the income that she is expected to earn from her division of marital assets." The DRC found that Dale would be able to meet both his own financial needs, as well as

contribute to Thoebe's, and thus awarded her "maintenance in the sum of \$1,000.00 per month for ten (10) years."

Both parties filed timely exceptions to the DRC report. Dale argued that the DRC erred by awarding Thoebe maintenance and by finding that he had not traced his nonmarital interest in BFL. Thoebe argued, among other things, that the DRC erred by finding that the 8660 Crisp Road residence was not entirely marital property; by offsetting the marital value of Buskill Enterprises (\$1,346,700) with the negative value of the Nashville businesses (\$351,000), thereby significantly reducing her award; and by awarding her only \$1,000 per month in maintenance.

On June 14, 2005, the court heard the parties' exceptions to the DRC's report. On July 14, 2005, the court entered its order. The court adopted the DRC's findings that:

The marital residence was owned by [Dale] prior to the marriage. After the marriage, [Dale] transferred this property into he and [Thoebe's] joint names. . . . In regard to whether the transfer was a gift, the court must look at the donor's intent (in this case [Dale]) in determining whether the transfer was a gift. In making that determination, the donor's testimony is highly relevant of the donor's intent. The donor's intent can be determined from his testimony as well as inferred from surrounding circumstances. [Dale's] testimony was that he made the transfer into the joint names of he and [Thoebe] to achieve some peace of mind. He states that she was constantly "nagging" (his words) him to put her name on the deed. He testified that her actions included "crying, begging and getting mad" to have her name placed on the deed. He testified that he finally acquiesced in her demands after many months, not to make a gift, but to gain some peace of mind. There was some testimony from [Thoebe] that also indicated that an underlying motivation

could have been to protect the residence from creditors of [Dale's] business interests.

Contrary to the DRC's finding that the residence was only partially marital, the court determined when Dale executed the trustee's deed, he completed a gift of his entire nonmarital interest to both him and Thoebe. The court found it of no consequence that Thoebe "urged, pleaded or nagged" Dale into making the gift. The court found that Dale's "intent in gaining peace of mind by satisfying his wife's pleas and demands by sharing ownership in the marital residence amount[ed] to donative intent." The court ordered that the property should be sold and the parties' interest, after payment of the cost of the sale, be divided equally.

Regarding the business interests, the court adopted several findings of the DRC, but concluded that "[w]hile the parties were in contemplation of divorce, [Dale] unilaterally decided to and did invest in" the Nashville businesses, which had a current negative net worth of \$351,000. The court ordered that Dale reimburse Thoebe \$175,000 for her share of the involuntary investment in the Nashville businesses. By order dated November 10, 2005, the court amended that amount to \$10,000, on motion by Dale, because his actual investment from marital funds into the Nashville businesses was only \$20,000.<sup>5</sup> Dale was awarded the corporate stock in the Nashville businesses at a \$0.00 valuation, instead of the negative worth.

The court also adopted the findings of the DRC that Dale had not properly traced his alleged nonmarital interest in BFL. The court found that "for the purpose of

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<sup>5</sup> The \$351,000 figure was the amount for which Dale had personally assumed liability when the businesses failed, not the amount he initially invested (\$20,000) from marital funds.

establishing a non-marital interest in BFL, valuation of the accounts is speculative and does not accurately reflect non-marital contribution to the corporation by [Dale].”

Regarding Buskill Enterprises, the court adopted the findings of the DRC that it had a marital value of \$1,346,700. The court awarded all of the business interests to Dale and ordered that he pay Thoebe one-half of the net value of Buskill Enterprises.

Regarding the award of maintenance, the court adopted several factual findings of the DRC. However, the court concluded that Thoebe would have sufficient assets and projected income to meet her reasonable needs upon execution of the terms of the decree, but not until then. The court ordered Dale to pay Thoebe \$2,500 per month in maintenance until execution of all terms of the decree. This appeal by Dale followed.

The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court. Kentucky Rules of Civil Procedure (CR) 52.01. Thus, when the trial court adopts the recommendations of the DRC, those recommendations fall under the same standard of review that is 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).

In reviewing issues in an action for dissolution of marriage, we must defer to the considerable discretion of the trial court unless it has committed clear error or has abused that discretion. The trial court's findings of fact will “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.” CR 52.01. Substantial evidence has been 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). Mere doubt as to the correctness of a finding will not justify its reversal. *Allen v. Devine*, 178 S.W.3d 517, 524 (Ky.App. 2005). “After a trial court makes the required findings, it must then apply the law to the facts.” *Id.* “The determination of the proper law to be applied to the facts is reviewed *de novo.*” *Id.*

Marital property must be distributed in accord with Kentucky Revised Statutes (KRS) 403.190. Pursuant to this provision, the court must assign each spouse their nonmarital property and then divide the couple's marital property in “just proportions,” without regard to marital misconduct and in light of the following factors: each spouse's contribution to the acquisition of the marital assets, including homemaking duties; the value of each spouse's nonmarital property; the duration of the marriage; and the economic circumstances of each spouse at the time of distribution. KRS 403.190(1)(a)-(d).

Dale first argues that the trial court clearly erred when it determined that he intended to make a gift of a one-half interest in the marital residence to Thoebe. We disagree.

Dale correctly argues that the intent of the donor is the primary factor in determining whether a gift has been made. *Sexton v. Sexton*, 125 S.W.3d 258, 268-69 (Ky. 2004). “The intention of the donor may not only be 'expressed in words, actions, or a combination thereof,' but 'may be inferred from the surrounding facts and

circumstances, including the relationship of the parties [,]' as well as 'the conduct of the parties [.]'" *Id.* at 269, *citing* 38 Am.Jur.2D Gifts § 19 (1999).

Here, from its findings, it is apparent that the court used the correct analysis in determining that Dale intended to transfer his nonmarital interest in the marital residence to him and Thoebe with right of survivorship. Dale made the transfer after nearly three years of marriage. Whether he did it for peace of mind is of no consequence. The court's factual finding in this regard is not clearly erroneous; thus, we are not at liberty to disturb it.

Dale next contends that the court erred when it awarded him the corporate stock of the Nashville businesses at a zero value. We disagree.

The trial court, after considering expert testimony from both parties, determined that the Nashville businesses had a current negative net worth of \$351,000. Additionally, the court found that establishing future profitability of the businesses would be speculative. It is without question that Dale used \$20,000 of marital funds to purchase the Nashville businesses without Thoebe's knowledge. In fact, Thoebe was unaware of the Nashville businesses until she signed the 2002 tax returns. At the time Dale started the Nashville businesses, he was required to observe the terms of the October 2001 Pendente Lite order, specifically that he "not dispose, sell, convey, mortgage, destroy, or otherwise do away with any assets during the pendency" of the dissolution proceedings. The fact that the parties briefly reconciled before dissolution did not negate the order.

Dale unilaterally chose to personally obligate himself with the \$351,000 negative value of the Nashville businesses. Contrary to Dale's assertion, the trial court

did not ignore the negative valuation of the Nashville businesses by the expert witnesses of the parties. Rather, the court refused to allow Dale to be rewarded for ignoring the Pendente Lite order and to offset the enormous negative value of the Nashville businesses against the positive value of Buskill Enterprises. Moreover, we agree with the trial court that the future profitability of the businesses would be speculative at best, especially in light of the fact that they have been complete failures from inception. Under these facts, the trial court did not err when it awarded Dale a zero value on the corporate stock of the Nashville businesses.

Dale also argues that the court abused its discretion when it denied him an offset of the negative value of the Nashville businesses against the positive value of Buskill Enterprises. We disagree.

As stated above, Dale unilaterally chose to financially obligate himself to the \$351,000 negative value of the Nashville businesses. The DRC determined that Dale should be allowed to offset the negative value against the value of Buskill Enterprises, thereby sharing the negative value equally between Dale and Thoebe. Dale contends the trial court should have adopted the DRC's recommendation because the DRC was in a better position to view the evidence and judge witness credibility.

Concerning commissioner's reports, CR 53.06(2) states that trial courts "may adopt the report, or may modify it, or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions." Under the circumstances of this case, we find no abuse of discretion by the court in rejecting the DRC's

recommendation and in denying Dale's request to offset the negative value of the Nashville businesses against the positive value of Buskill Enterprises.

Dale's next arguments all relate to his alleged nonmarital contributions to BFA. Dale avers that trial court erred when it found that he did not trace the value of his nonmarital interest in BFL; concluded it was mere speculation as to the value of the predecessor accounts of BFL; and abused its discretion when it concluded that the valuation of the accounts did not accurately reflect his nonmarital contributions to BFL. We disagree.

In KRS 403.190(2) (b), marital property is defined, in part, as "all property acquired by either spouse subsequent to the marriage except: . . . (b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise or descent." Subsection (3) of KRS 403.190 creates a presumption that all property acquired during the marriage is marital property, but it permits this presumption to be overcome by proof that the property was acquired as in subsection (2) of the statute. In *Chenault v. Chenault*, 799 S.W.2d 575 (Ky. 1990), the Kentucky Supreme Court relaxed some of "the draconian requirements laid down in earlier cases," but nonetheless reiterated that Kentucky will "adhere to the general requirement that nonmarital assets be traced into assets owned at the time of dissolution[.]" Id. at 579.

Here, neither Dale nor his expert could identify the specific contracts from May 9, 1986 that were brought into the business of BFL. Dale was also unable to show what portion, if any, those accounts made up BFL's business as of June 30, 2003, the date

of its valuation. Dale did offer the testimony of an expert who determined that he brought \$119,000 into BFL upon its formation. However, Thoebe offered her own expert to counter Dale's claims.

Having reviewed the record and the court's findings, we conclude that the record contained ample evidence to support the court's findings and that none of the findings were clearly erroneous. Furthermore, it was for the trial court to judge the credibility of the witnesses. CR 52.01. When there is a conflict in the evidence, the trial court, not this court, has the responsibility to decide what evidence to believe. *See Ghali v. Ghali*, 596 S.W.2d 31 (Ky.App. 1980); *Adkins v. Meade*, 246 S.W.2d 980 (Ky. 1952). Thus, the court did not abuse its discretion in concluding that Dale did not meet his burden to establish a claim of nonmarital interest in BFL.

Finally, Dale argues that the maintenance award is erroneous and constitutes an abuse of discretion. An award of maintenance may be made in the sound discretion of the trial court. *Clark v. Clark*, 782 S.W.2d 56, 59 (Ky.App. 1990). To reverse an award or denial of maintenance, the complaining party must show an "absolute abuse" of this discretion by the trial court. *Id.* at 60.

Dale contends that the trial court abused its discretion because it conditioned the award of maintenance on his full compliance with the divorce decree. The terms of the decree included collection on a promissory note that is payable over thirty years and collection on another note that is in dispute. The court made its decision with full knowledge of these facts and additionally took into consideration the income of

the parties and the duration of the marriage. Having reviewed the facts and the basis for the court's ruling, we conclude that the award does not amount to an abuse of discretion. The judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

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