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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000447-MR
AND
NO. 2006-CA-000529-MR

RONALD DRURY — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KEVIN L. GARVEY, JUDGE
CIVIL ACTION NO. 05-CI-500336

KIMBERLY DRURY — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; GRAVES,[1] SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Ronald Drury appeals from the Findings of Fact, Conclusions of Law, Decree of Dissolution and Judgment of the Jefferson Circuit Court holding that his business labor and future earnings are marital assets. Ronald's ex-wife,

[1] Senior Judge John W. Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Kimberly Drury, cross-appeals from the judgment of the court, challenging its characterization of certain property as non-marital and its maintenance award. We affirm.

Ronald and Kimberly were married on December 30, 1976. Ronald is the owner and sole proprietor of Drury's Landscape and Maintenance. Kimberly is a teacher for the Jefferson County Public Schools. The parties have four children, all beyond the age of majority. The parties built their marital residence upon 1.7 acres of land deeded solely in Ronald's name by his parents. Ronald filed a petition for dissolution on January 31, 2005. Following a trial on October 4, 2005, the court entered its Findings of Fact, Conclusions of Law, Decree of Dissolution and Judgment on December 8, 2005. On January 31, 2006, the court entered its order regarding both parties' motions to alter, amend and/or vacate. The order amended Kimberly's interest in the marital residence to $44,771.91; amended the installment period for Ronald's payments to Kimberly; amended the findings of fact regarding maintenance; and granted post judgment interest to Kimberly. This appeal and cross-appeal followed.

We begin with a general statement of our standard of review. 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." Kentucky Rules of Civil Procedure (CR) 52.01. A finding of fact is clearly erroneous unless it is supported by substantial evidence. *Black Motor Co. v. Greene*, 385 S.W.2d 954, 956 (Ky. 1964). 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). Legal issues will be reviewed *de novo*. *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky.App. 2002).

Ronald argues that the trial court erred by relying on a "calculation analysis" to determine that his labor was a "capital marital asset" subject to distribution. We disagree.

Ronald contends that his business, Drury Landscape Maintenance, Inc., has little value as a distributable asset because it mainly involves manual labor. Essentially, Ronald avers that Kimberly's expert witness for the property valuation, Helen Cohen, employed a flawed calculation analysis that included "goodwill". Ronald argues that the business value should properly be limited to the value of its fixtures and accounts, contending that Cohen's inclusion of goodwill in the valuation process was erroneous. Ronald did not offer any testimony, expert or otherwise, concerning the entire value of the business.

A trial court's valuation of marital property in a divorce action will not be disturbed on appeal unless it is clearly contrary to the weight of the evidence. *Underwood v. Underwood*, 836 S.W.2d 439 (Ky.App. 1992), overruled on other grounds, *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001); *Clark v. Clark*, 782 S.W.2d 56 (Ky.App. 1990). Kentucky courts have not specifically adopted any certain approach in

valuing businesses in domestic cases. *Clark*, 782 S.W.2d at 59. It is, however, well established that the goodwill contained in a business is a factor to be considered in arriving at the value of the business and thus is part of that marital asset to be divided between the parties. *Id.*; *Heller v. Heller*, 672 S.W.2d 945, 947 (Ky.App. 1984). In *Clark*, this Court considered the various methods of evaluating goodwill, stating that

> [t]here are a number of acceptable methods which courts may adopt. There is no definitive rule or best method for valuing goodwill. The determination of goodwill is a question of fact rather than law, and each case must be determined on its own facts and circumstances. Thus, the trial court was correct in adopting and applying the capitalization of excess earnings method. As stated earlier, the trial court's valuation of goodwill should not be disturbed if it appears reasonable.

Clark, 782 S.W.2d at 60 (citations omitted). Here, the trial court relied on the expert testimony of Cohen in making its determination of the landscaping business' value. Cohen's testimony provided a range of value for the business based upon not only goodwill, but past profitability and comparative professional success with other similar businesses. Based on these facts, and as the trial court's valuation of the landscaping business appears reasonable and not contrary to the weight of the evidence, we will not disturb it.

Ronald next argues that the maintenance awarded to Kimberly, combined with the award to her of marital interest in the landscaping business, amounts to an impermissible "double dipping" of his future earnings. However, we have no trouble determining that the valuation method used by Cohen to value the landscaping business

was based upon Ronald's past earnings, not his future earnings. Thus, there was no double recovery here, and no error by the trial court. Ronald's argument is without merit.

On cross-appeal, Kimberly argues that the trial court erred in finding that the real property upon which the marital residence was built is non-marital. We disagree.

Kimberly correctly argues that a trial court must determine the donor's intent at the time of the transfer. *See e.g., Hunter v. Hunter*, 127 S.W.3d 656 (Ky.App. 2003). Here, Kimberly avers that the "court's findings are not supported by the testimony and evidence as to the circumstances at the time of the transfer." Kimberly contends that the 1.7 acres of land upon which the marital residence sits should have been considered marital property, and thus divided equally.

In making its determination the the real property was non-marital, the court stated:

> [Ronald] asserts that the land upon which the marital residence sits is non-marital in nature. As noted above, evidence established that the land has been in his family for many years and it has been the intention of the family members for it to remain so. [Ronald's] father testified, in no uncertain terms, that the conveyance of the land was to [Ronald] only in order to prevent a division of the property in the event dissolution proceedings were ever initiated.
>
> The Court concludes that the land in question is the non-marital property of [Ronald] . . . .

The trial court concluded that the value of the property was $50,910.00 and awarded it as the non-marital property of Ronald. Additionally, the deed of the property to Ronald from his parents was in Ronald's name alone. Further, the court found that the "1.7 acre

tract of land is right in the middle of the husband's parents' property and it is clear that the husband's parents did not want to risk this piece of land going to someone outside the family." Based upon the evidence in the record, it is readily apparent that the court properly determined the donors' (Ronald's parents) intent at the time the land was transferred. Had Ronald's parents intended Kimberly to share in the gift, they could have easily included her name on the deed. Such was not the case. As the trial court's findings on this matter are supported by substantial evidence, we find no error.

Kimberly next argues that the court abused its discretion when it allowed Ronald to pay Kimberly her marital interests in both the residence and landscaping business in "small periodic installments" over nearly three years. Kimberly contends that this forced her out of the marital residence with insufficient funds or income to establish a new residence. We note that the court provided for Kimberly's sufficient support via maintenance beginning in December of 2005. Moreover, Ronald's first payment to Kimberly was due January 15, 2006, in the amount of $7,461.99. Kimberly's argument is without merit.

Kimberly next argues that trial court abused its discretion in allowing Ronald's non-marital claim on his Individual Retirement Account. Essentially, Kimberly contends that Ronald failed to raise this non-marital claim in the mandatory Disclosure Statement and waited until the day before trial to bring the issue to her attention. Kimberly argues that she was unfairly prejudiced by Ronald's non-disclosure because she

had insufficient time to adequately prepare a defense. Kimberly's raised this argument in her motion to alter, amend and/or vacate. In denying her motion the court stated

> [Kimberly] complains that [Ronald] failed to follow the Trial Order and therefore, the Court should not consider this non-marital claim. The Court entered a Trial Order on August 23, 2005. Paragraph Three of that Trial Order requires the parties to "at least ten days before trial, both parties shall submit Findings of Fact and Conclusions of Law . . . . in support of their proof at trial." Paragraph Three of the Trial Order is in bold print and underlined. **BOTH** attorneys for both parties **agreed** to submit their proposed findings on the day of Trial, October 4, 2005, instead of at least ten days before trial. Had the parties complied with the Court's Trial Order, [Kimberly] would have had notice of [Ronald's] claim which was contained in his proposed findings. The Court's findings of Fact were in conformance with the proof presented at Trial. The Court did not err regarding this non-marital claim on the IRA account because there was overwhelming proof to support the claim.

Kimberly's argument is without merit.

Finally, Kimberly argues that the trial court abused its discretion in limiting both the amount and duration of the maintenance award. We disagree.

Kimberly contends that the trial court disregarded the standard of living during the marriage as well as the fact that she will not receive payment for her total interest in the marital estate until October 15, 2008. Kimberly avers that because she presented expenses totaling over $8,000.00 that it was an abuse of discretion to limit the amount of maintenance to only $1,000.00 per month and its duration to only 6 years.

It is well settled that matters relating to maintenance are questions delegated to the sound and broad discretion of the trial court. An appellate court will not

disturb the trial court's order unless the decision is unsupported by substantial evidence. *Bickel v. Bickel*, 95 S.W.3d 925 (Ky.App. 2002). Here, the trial court considered all the relevant factors concerning an award of maintenance. It found that "upon review of [Kimberly's] submitted expenses, the Court concludes that they are very inflated." Thereafter, the court carefully determined the reasonable expenses of both parties and their respective incomes. Based upon these facts, we have no trouble determining that the court did not abuse its discretion in deciding the maintenance award.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-APPELLEE:

Steven D. Yater
Louisville, Kentucky

BRIEF FOR APPELLEE/CROSS-APPELLANT:

Eugene L. Mosley
Kelsey A. Colvin
Louisville, Kentucky