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NOT TO BE PUBLISHED  
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NO. 96-CA-3102-MR

ERIC MULLINS

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE EDDY COLEMAN, JUDGE  
ACTION NO. 92-CI-0590

LARA MULLINS

APPELLEE

OPINION  
AFFIRMING IN PART,  
REVERSING IN PART,  
AND REMANDING

\* \* \*

BEFORE: GUDGEL, CHIEF JUDGE, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal by Eric Mullins alleging that the Pike Circuit Court erred in valuing his family-owned business without taking into account the liabilities of the corporation, and in not considering the actual incomes of the parties when

establishing child support. Upon reviewing appellant's argument and the applicable authorities, we affirm in part, reverse in part, and remand.

Eric Mullins and Lara Mullins were married on December 21, 1984. The marriage produced three children. The parties separated in April 1992, and a decree of dissolution was entered on July 1, 1992. The decree reserved, inter alia, property and child support issues. Hearings were conducted before the Domestic Relations Commissioner on March 1, 1994, September 21, 1994, and March 20, 1995. The Commissioner rendered his report and recommendations on October 30, 1995. Eric filed objections to this report, which were overruled. On July 11, 1996, the trial court issued its supplemental findings of fact, conclusions of law and decree which adopted the Commissioner's report in all material respects. Appellant timely filed a motion to alter, amend, or vacate the supplemental decree. This motion was overruled in its entirety on October 16, 1996. This appeal followed.

Appellant first assigns three allegations of error regarding the trial court's valuation of Mullins Enterprises, Inc. Mullins Enterprises is a closely held corporation which hauls coal and owns coal trucks for this purpose. At the time of the parties' marriage, the company was a partnership, but it was incorporated in 1989. One-third of the thirty total shares of stock were issued equally to Eric, Eric's mother, and Eric's

father. In late 1993, while the trial court proceedings were underway, Eric sought to sell the stock, ostensibly because he was financially strapped and needed the cash. On November 19, 1993, by offer of judgment pursuant to CR 63, Eric offered to transfer one-half of the shares to Lara, or, alternatively, to sell all his shares to her for \$10,000. Lara rejected this, and Eric subsequently sold his shares back to the corporation for \$10,000. At trial, Michael Litafik, CPA, testified that the net worth of the company was negative \$12,245.00. Lara's expert, Nora Ferrell, testified that the value of the company was \$421,051.00, including \$111,540.00 in goodwill. The Commissioner and trial court declined to include goodwill in the value of the company, and held the value of the company to be \$309,511.00, with Eric's one-third interest being \$103,170.33. The value of Lara's fifty percent share of Eric's one-third share was therefore determined to be \$51,585.17.

Appellant first argues that the trial court's reliance on the testimony of Lara's expert, Nora Ferrell, was clearly erroneous, given her complete disregard of the corporation's liabilities. The trial court accepted \$309,511.00 as the value of the company. This corresponds to the fair market value of the company's assets as determined by Ferrell. Fair market value represents the price that a willing seller will take and a willing buyer will pay for property, neither being under any

compulsion to sell or buy. Central Kentucky Drying Company, Inc. v. Commonwealth, Department of Housing, Buildings, and Construction, Ky., 858 S.W.2d 165, 167 (1993). Eric argues that the company has significant debt and that Ferrell failed to take this debt into consideration in valuing the company. Ferrell states that the amount of debt is irrelevant, apparently because she assumes that the seller will take responsibility for any debts owing on the property. Ferrell states, "If I buy a business from you why should I care what you owe on it. If I buy a house from you why should I care what you owe on it?"

Clearly Ferrell's assumption is that the seller will pay off any debt associated with the property. Eric argues that debt should be considered because the relevant consideration is the value of the equity in the assets. We agree with Eric. The valuation method used by the trial court was based upon the appraised value of the assets of the company as of the date of the parties' separation. The trial court used this as a surrogate for the value of the actual marital asset, the stock in the corporation. However, this methodology ignores what is in effect the marital debt corresponding to the marital asset. Assuming the stock were sold for \$309,511.00, and, pursuant to Ferrell's assumption, the Mullinses remained responsible for the debt, it is fair to presume that the debt would be paid out of the proceeds. Then, only \$309,511.00 minus the debt would remain

in the hands of the sellers, the Mullinses. It is one-sixth of this amount that is Lara's marital share. It was clearly erroneous for the trial court to accept Ferrell's method, which confers upon appellee the full value of the assets, without consideration of the corresponding debt.

Eric next argues that the testimony of Ferrell included the hearsay use of the appraisal evidence of another expert whose qualifications were not shown and who was not subject to cross-examination. We disagree. KRE 703(a) provides that if information is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Ferrell testified that she has in the past relied upon estimates provided by others in performing her appraisals. Further, the Commissioner commented that he would weigh the source of the appraisal in his deliberations regarding Ferrell's testimony. While we were less than impressed by the foundation for the admission of this evidence, we may not overturn a decision by the trial court unless the decision was clearly erroneous or unless in reaching it the court abused its discretion. Boggs v. Burton, Ky. App., 547 S.W.2d 786 (1977). The trial court did not abuse its discretion in permitting Ferrell, an expert, to testify regarding hearsay appraisals provided to her by a non-testifying source.

Eric next argues that the value of his interest in Mullins Enterprises must be limited to \$10,000 in light of the fact that he offered to sell the shares to Lara for this price. We disagree. The offer was made in late 1993 pursuant to CR 68. Lara did not accept the offer. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. CR 68. The proper application and utilization of the Civil Rules should be left largely to the supervision of the trial judge and we must respect his exercise of sound judicial discretion in their enforcement. Dairyland Insurance Co. v. Clark, Ky., 476 S.W.2d 202, 203 (1972). Eric seeks to use his offer for a purpose other than to determine costs. CR 68(3) specifically proscribes the use of the offer of judgment in this manner. Further, there may be sound, non-financial reasons for Lara to not want to become a minority stockholder in a business controlled by the family of her ex-husband.

Appellant next assigns two allegations of error relating to the trial court's computation of his child support payments. Appellant first argues that the trial court impermissibly imputed income to him for purposes of child support. In 1992 and 1993, the trial court issued temporary child support orders which recognized Eric's financial benefits derived from his ownership in Mullins Enterprises. These orders

recognized a monthly income for Eric of approximately \$5,000.00 per month. Appellant alleges that since he sold his stock in 1994, he no longer receives any monetary benefit from ownership in the company, his wages decreased significantly, and his documented gross income for 1994 was only \$1,740.00 per month.

In its supplemental findings of fact, the trial court stated that:

the Court . . . finds now that the [appellant's] true income, all factors being considered including his use of company vehicles as an economic benefit, is approximately \$5,000 per month. Following his purported transfer of his interest in the company subsequent to the Commissioner's evidence, [appellant] claimed that his income was only \$1,740.00 per month. . . . Since the alleged sale, [appellant's] lifestyle and duties with the company have essentially remained about the same and the Court finds that said sale was not an arms length transaction, was not a bona fide sale and may not have occurred at all.

The trial court, through its Commissioner, had the opportunity to consider and weigh the credibility of the witnesses. Its findings cannot be set aside unless they are clearly erroneous. CR 52.01; Lawson v. Loid, Ky., 896 S.W.2d 1, 3 (1995); Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986). Further, Eric has failed to reconcile why he would sell his stock for ten \$1,000-installments when, as a consequence, he incurred substantial permanent losses of monetary benefits associated with being a stockholder. The trial court did not abuse its

discretion in imputing additional income to appellant for purposes of calculating child support.

The appellant next argues that the trial court erred in that it did not calculate child support based upon Lara's actual income. At some point, appellee had been employed as a substitute teacher making approximately \$60.00 per day; however, appellee acknowledges that by the time of the decree she had obtained full-time employment making \$26,638.00 annually (\$2,219.83 per month). In the supplemental decree, the trial court stated that appellee had "received full-time employment, but that employment has not been renewed and she will apparently go back to being a substitute teacher." Appellant alleges in his brief that Lara, in fact, remained employed on a full-time basis. Lara did not address this issue in her brief. At the May 8, 1996 hearing, appellee testified that she had received notice from the Superintendent of the Pikeville Independent School System that her contract would not be renewed for the 1996-1997 school year. However, she testified that she was "not sure" whether her contract would be renewed and that her principal told her "not to be too upset" about the letter. On cross-examination, appellee agreed that the school system was required to send the letter to all non-tenured teachers and that the letter does not mean appellee will not be rehired. KRS 403.212(2)(a) must be read as creating a presumption that future income will be on a par with



the worker's most recent experience, and the party who wants the trial court to use a different income level in applying the child support guidelines should bear the burden of presenting evidence to support the requested finding. Keplinger v. Keplinger, Ky. App., 839 S.W.2d 566, 569 (1992). The uncertain nature of a spouse's work is not a factor justifying a deviation from the statutory child support guidelines. Keplinger, supra. Appellee's ambivalent testimony regarding her future employment is insufficient to satisfy the presumption guidelines under Keplinger. On remand, the trial court should establish child support on the basis of appellee's full-time income unless she meets her burden of establishing a decrease in her future income pursuant to Keplinger, supra.

The order of the trial court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

ALL CONCUR

BRIEF FOR APPELLANT:

Elizabeth S. Hughes  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Lawrence R. Webster  
Pikeville, Kentucky