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Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-003410-MR (Direct Appeal)

ROBERT JOHN BURCKARDT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOHN WOODS POTTER, JUDGE
ACTION NO. 95-CI-002110

SUSIE KOCH BURCKARDT and
CYNTHIA C. STONE

APPELLEES

AND

No. 1996-CA-003428-MR (Cross-Appeal)

SUSIE KOCH BURCKARDT

CROSS-APPELLANT

v. CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOHN WOODS POTTER, JUDGE
ACTION NO. 95-CI-002110

ROBERT JOHN BURCKARDT

CROSS-APPELLEE

OPINION

AFFIRMING IN PART, REVERSING IN PART AND REMANDING

* * * * *

BEFORE: BUCKINGHAM, GUIDUGLI, and HUDDLESTON, Judges.

BUCKINGHAM, JUDGE. Robert John Burckardt (Robert) appeals and Susie Koch Burckardt (Susie) cross-appeals from the findings of fact, conclusions of law, and decree of dissolution of marriage entered by the Jefferson Circuit Court. Having considered the record, the arguments of counsel, and the applicable law, we affirm in part, reverse in part and remand.

Robert and Susie were married in 1974. They have four children, two of whom were still minors when the trial court entered its decree in 1996. Robert is an anesthesiologist and was one of eleven shareholders in Anesthesiology Associates, P.S.C. (the P.S.C.), as of the date of the valuation of his interest in that P.S.C. Susie holds a master's degree in social work and a master's degree in business administration. Robert's annual income exceeds \$400,000, and Susie has not worked outside the home since the birth of their first child in 1976.

Robert has appealed on the issues of the proper valuation of his interest in the P.S.C., the level of his income, the maintenance award to Susie, and his child support obligation. Susie has cross-appealed on the issues of the failure of the trial court to award interest on marital property equalization payments ordered to be made to her by Robert, and on the issue of the manner in which the trial court handled the parties' Clifford trust. We will examine each issue separately herein.

One of the main issues before the trial court was the proper valuation of Robert's interest in the P.S.C. Robert's expert witness testified that the fair market value of Robert's

interest in the P.S.C. was \$183,000, based upon recent arm's-length stock transactions in the P.S.C. as well as an adjusted net assets method of valuation. The witness's valuation conforms to a prescribed formula used by the P.S.C. when a new physician is made a partner in the P.S.C. or when a physician decides to sell his interest in the P.S.C. That valuation did not take goodwill into account. Susie's expert witness valued Robert's interest in the P.S.C. at \$522,154. The witness arrived at that figure by taking the average value of five methods of valuation: the book value method, the straight capitalization method, the capitalization of earnings method, the years purchase method, and the professional corporation method. The witness considered goodwill in valuing the P.S.C.

The trial court declined to adopt the valuation of either party's expert witness and valued Robert's interest in the P.S.C. at \$380,000. The court stated that it arrived at its valuation by taking the salary differential between an anesthesiologist employee of the P.S.C. and a shareholder of the P.S.C., reducing that amount by one-third to account for taxes, and then adding the accounts receivable. The court compared the salary of a shareholder of \$450,000 to the salary of an anesthesiologist employee who had not yet been made a shareholder of \$150,000, arriving at a difference of \$300,000 which was reduced by \$100,000 to account for taxes. It then added the accounts receivable amount of \$180,000 to the \$200,000 figure to arrive at a total of \$380,000 for Robert's interest in the P.S.C.

A trial court's valuation of 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, Ky.App., 836 S.W.2d 439, 444 (1992). See also Clark v. Clark, Ky.App., 782 S.W.2d 56, 58 (1990). In order to make a determination as to whether the trial court's valuation is clearly contrary to the weight of the evidence, this court is under the duty to "examine the methods utilized by the trial court to see if it clearly erred in valuing the corporation's assets" keeping in mind that there is no "single best method" for such a valuation. Clark, supra, at 58-59. No mathematical precision is necessary in arriving at a valuation figure as "[t]he task of the appellate court is to determine whether the trial court's approach reasonably approximated the net value of the partnership interest." Id. at 59.

Robert's main contention on this issue is that the trial court erred by adding any value to the P.S.C. for goodwill. He notes that goodwill has been found to exist when a professional practice can be sold for more than the value of its fixtures and accounts receivable. Id. He argues that since his interest could not be sold for more than the \$180,000 valuation which was based on the accounts receivable prescribed formula used by the P.S.C., then the P.S.C. had no goodwill for valuation purposes and the trial court erred in valuing the P.S.C. in excess of \$180,000.

Other definitions of goodwill, however, include "the expectation that patrons or patients will return because of the reputation of the business or firm" and "the excess of return in a given business over the average or norm that could be expected for that business." Id. Furthermore "[t]here is no definitive rule or best method for valuing goodwill" as "[t]he determination of goodwill is a question of fact rather than law, and each case must be determined on its own facts and circumstances." Id. at 60.

Robert's limited view of goodwill is without merit. There was testimony that an anesthesiologist in this area would have an average income for 1993-95 of \$238,200. Robert's annual income during that same period, however, was approximately \$450,000. This income level clearly constitutes an "excess of return in a given business over the average or norm that could be expected for that business." Id. Furthermore, the P.S.C.'s relationship with the hospitals, particularly Jewish Hospital, indicated "the expectation that patrons [i.e., the hospitals and their staff] . . . will return because of the reputation of the business or firm." Id. We determine that the trial court did not err in refusing to value Robert's interest in the P.S.C. in accordance with the P.S.C.'s rigid formula which placed no value on goodwill.

The next question is whether the trial court's approach in determining Robert's interest in the P.S.C. "reasonably approximated" the net value of that interest. Id. The trial

court took into account the fact that a physician wishing to become a partner in the P.S.C. was obligated to work as an employee at a lesser rate of income for a period of approximately three years until that physician was permitted to become a shareholder. This method of working for a reduced income for a period of time was used by the P.S.C. rather than requiring a prospective shareholder to pay a fixed amount to buy into the P.S.C. While the methodology used by the trial court may have been unique, there is no "definitive" method for valuing a corporation similar to the P.S.C. Id. at 59-60. The trial court's valuation appears to be reasonable, and we will not disturb it on appeal.

Robert's second argument is that the trial court failed to take into account the tax consequences which accompany its valuation of the P.S.C. According to Robert, he has a zero basis in his shares of the P.S.C. This means that if he sold those shares, the entire amount he received from that sale would be taxable at a rate of 32.4 percent (combined federal and state). Thus, Robert asserts that the true value of his interest in the P.S.C. was \$123,708 ($\$183,000$ [his valuation of his shares in the P.S.C.] \times 67.6 percent [taking into account the 32.4 percent tax rate] = \$123,708).

Robert's argument in this regard is without merit for several reasons. First, the trial court specifically took taxes into account when arriving at its valuation of the P.S.C. Second, Robert cites to no authority which conclusively mandates

that a trial court must consider all of the possible tax consequences when dividing marital property.¹ Finally, Robert will not suffer any tax consequences unless he sells his interest in the P.S.C., which would occur after the dissolution of the parties' marriage.²

Robert next alleges that the trial court erred in finding that he had an annual income of \$450,000 to \$500,000 despite the fact that he testified that his estimated earnings for 1996 would be approximately \$400,000. Susie accurately responds to that argument by noting that any figure regarding Robert's 1996 income would have been pure speculation by the trial court since the trial of this action was held in June 1996, well before the year ended. As Robert's 1995 W-2 wage and tax statement from the P.S.C. shows that Robert had an income of \$454,244.85, we cannot say that the trial court's finding regarding Robert's income was clearly erroneous. See Johnson v.

¹ Robert cites Owens v. Owens, Ky.App., 672 S.W.2d 67 (1984), but that case merely requires a trial court to take into account "severe economic circumstances" which would accompany an order to sell an asset. Id. at 69. This scenario is obviously distinguishable from the case sub judice.

² "Courts have generally found that consideration of tax consequences is either required or at least appropriate where the consequences are immediate and specific and/or arise directly from the court's decree, but find they are not an appropriate consideration where speculation as to a party's future dealings with property awarded to him or her would be required." Tracy A. Bateman, Annot., Divorce and Separation: Consideration of Tax Consequences in Distribution of Marital Property, 9 ALR 5th 568 (1993). Also, KRS 403.190(1)(d) requires a trial court to consider the "[e]conomic circumstances of each spouse when the division of property is to become effective . . ." (Emphasis added.)

Johnson, Ky.App., 564 S.W.2d 221, 222 (1978), which holds that an appellate court "may not disturb the findings of the trial court in a case involving dissolution of marriage unless those findings are clearly erroneous."

Robert's fourth argument is that the trial court's award of maintenance was clearly erroneous and an abuse of discretion, both as to amount and duration. The trial court ordered Robert to pay Susie \$6,000 per month for five years and \$3,000 per month for the three years immediately thereafter. As we review this issue, we note that "maintenance determinations are within the sound discretion of the trial court" and will not be disturbed "unless absolute abuse is shown" Clark, supra, at 60. See also Russell v. Russell, Ky.App., 878 S.W.2d 24, 26 (1994), holding that "[t]he amount and duration of maintenance is within the sound discretion of the trial court."

Although Robert does not argue that Susie is not entitled to some amount of maintenance, he contends that the amount and duration are excessive. He asserts that Susie is well educated but simply does not desire to work. According to Robert, Susie wants to stay home and be involved with the children even though they are now older and have no specialized needs.

According to KRS 403.200(2), a trial court is to consider "all relevant factors" in deciding the amount and duration of a maintenance award. Among the enumerated factors a trial court is to consider are:

(a) The financial resources of the party seeking maintenance, including marital property apportioned to him . . . ;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(c) The standard of living established during the marriage;

(d) The duration of the marriage;

(e) The age, and the physical and emotional condition of the spouse seeking maintenance; and

(f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

Considering the duration of the marriage, the standard of living established during the marriage, and the ability of Robert to meet his needs while meeting those of Susie, we conclude that the trial court's maintenance award was neither clearly erroneous nor an abuse of discretion either as to duration or amount.

Finally, Robert argues that the trial court clearly abused its discretion in awarding child support. The trial court found, for child support purposes, that Robert's income was \$350,000 (his income from the P.S.C. less maintenance and other payments made to Susie). The trial court further imputed an income of \$100,000 to Susie (the \$72,000 she receives in maintenance plus an imputed income due to her education level plus income she derived from her share of the marital assets). After using those incomes and extrapolating from the child

support guidelines, the trial court ordered Robert to pay \$2,500 per month in child support. The trial court explained that it also took into account the fact that it had ordered Susie to pay all of the children's expenses other than food and entertainment expenses which occur when the children are with Robert.

Robert argues that since the joint custody order of the trial court results in the parties' sharing possession of the children on a roughly equal basis, the trial court should have reduced his child support obligation by one-half. He cites Downey v. Rogers, Ky.App., 847 S.W.2d 63 (1993), as authority. He also again reiterates his argument that the trial court should have found his income to have been only \$400,000 per year before deductions for maintenance, etc., are taken.

This court noted in Downey that "the trial court could take into consideration the period of time the children reside with each parent in fixing support, and could deviate from the guidelines . . . if convinced their application would be unjust." Id. at 65. (Emphasis added.) However, there is nothing in Downey which would mandate a reduction in child support based upon the parties' sharing physical possession of the children on an equal basis. In fact, the Downey court noted that the trial court did not abuse its discretion when it did not deviate from the guidelines, despite the parties' sharing of physical possession of the children. Id. Also, the Downey court noted that although some expenses (such as food) are reduced for the parent without possession of the children "[m]any, if not most,

expenses necessary to provide a home continue throughout the month regardless of where the children reside." Id. at 64.

We also note that the statutory child support guidelines are not applicable in this case and that "courts have the flexibility to fashion appropriate orders" in such cases. Brown v. Brown, Ky.App., 952 S.W.2d 707, 708 (1997). Using the income figures assigned to the parties by the trial court, their combined monthly income is \$37,500. The highest combined monthly income on the child support guidelines is \$15,000. Extrapolating the figures in the child support guidelines by 2.5 (\$37,500 is 2.5 times greater than \$15,000), Robert's child support obligation would have been \$3,595.80 per month.³ Since the trial court ordered Robert to pay only \$2,500 per month, we will not say that its determination was an abuse of discretion, especially given the fact that a trial court is under no obligation to adjust a child support order due to the parents' splitting physical possession of the children.⁴

The final portion of Robert's argument concerns the portion of the decree which required Robert and Susie to equally divide the equestrian expenses of their daughter, Jennifer. We do not consider horseback riding expenses to be "extraordinary needs" as set forth in KRS 403.211, which allows courts to adjust

³ This does not include any deductions for health care costs for the children.

⁴ The trial court did state that it gave Robert a "slight" credit due to the amount of time the children spent with him.

the child support guidelines for situations constituting extraordinary circumstances. See Smith v. Smith, Ky.App., 845 S.W.2d 25, 26 (1992), where this court deemed private music lessons to not constitute extraordinary needs under the statute. While the case sub judice is somewhat distinguishable in that it does not involve the application of child support guidelines, we nonetheless agree with Robert that the payment for Jennifer's riding expenses should be voluntary, not court-mandated, even given the wide discretion afforded to the trial court by Johnson, supra, and KRS 403.211(4). We therefore reverse the trial court on this issue.

Susie's first argument on her cross-appeal is that the trial court erred in not ordering that Robert pay interest to her on the amount of \$194,242 that he was ordered to pay her to equalize the division of the marital assets. The trial court merely ordered that Robert be allowed to pay Susie the amount of \$5,000 per month without interest until the full amount is paid.

Hardin v. Hardin, Ky.App., 711 S.W.2d 863 (1986), holds that in cases like the one sub judice, interest should be ordered on the deferred payments of the fixed amount. Id. at 865. The Hardin court also stated that "if factors are present which would make an interest award inequitable, it may be disallowed." Id. See also Young v. Young, Ky., 479 S.W.2d 20, 22 (1972), and KRS 360.040, which states that "[a] judgment shall bear twelve percent (12%) interest compounded annually from its date."

The trial court noted in its order on motions to reconsider filed by the parties that “[i]t was probably error for this Court to allow Dr. Burckardt to discharge the judgment at \$5,000 per month without interest.” Even though the trial court raised the issue sua sponte and Susie apparently never specifically requested interest on the judgment, Susie was nevertheless entitled to such interest unless an interest award was inequitable. Hardin, supra. As the trial court noted that it probably erred and failed to give specific reasons why it did not award interest to Susie on the amount to be paid to her, we are unable to properly review this matter to determine whether the trial court abused its discretion in denying interest. We thus remand this issue to the trial court for a determination of whether certain factors exist which would make an award of interest inequitable in this case.

Susie’s other contention is that the trial court did not deal properly with the parties’ Clifford trust. In 1981, the parties established a Clifford trust for their children’s benefit with Robert as grantor and Susie as trustee. The trial court directed that Susie could expend funds she received from the trust “as agreed by the parties or on the four children’s post high school education.” The court also ordered that any withdrawals from the trust by Robert must be divided equally with Susie.

Susie argues that the dissolution of the trust and the division of its corpus between the parties would be “the most

effective way to assure full compliance with the stated purpose of the trust and minimize disagreement over use of the funds." However, Susie cites to no authority which would authorize the trial court to terminate the trust. In addition, she does not cite to any authority which would demonstrate that the trial court's actions in regard to the trust were clearly erroneous or an abuse of discretion. We will not disturb the trial court's decree in this regard.

The judgment of the Jefferson Circuit Court is affirmed in part, is reversed as to the equestrian expenses of Jennifer, and is remanded for further determinations on whether interest should be paid by Robert to Susie on the deferred equalization payments.

All CONCUR.

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