RENDERED: June 25, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-003446-MR (DIRECT APPEAL)
NO. 1997-CA-000025-MR (CROSS APPEAL)

GLYN KERBAUGH — APPELLANT/CROSS-APPELLEE

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE ROGER CRITTENDEN, SPECIAL JUDGE
ACTION NO. 93-CI-000482

LINDA CHERYL KERBAUGH — APPELLEE/CROSS-APPELLANT

OPINION AFFIRMING AND
ORDER DENYING MOTION TO DISMISS

** ** ** ** **

BEFORE: GUIDUGLI, MILLER, AND DYCHE, JUDGES.

GUIDUGLI, JUDGE. This is an appeal and cross-appeal from a domestic relations order of the Boyle Circuit Court regarding the issues of maintenance, property distribution, and retirement fund distribution. We affirm.

Glyn D. Kerbaugh (Glyn) and Linda Cheryl Kerbaugh (Cheryl) were married on December 29, 1973. They had three children during their marriage. On December 29, 1993, Glyn filed a petition to dissolve the marriage. On April 24, 1995, a decree dissolving the marriage was entered, reserving, however,

property, custody, child support, and maintenance issues. The case was referred to a Special Domestic Relations Commissioner (DRC), and hearings were held in September and October 1995. On June 10, 1996, the DRC issued his recommendations. Among other things, the DRC determined that each parties' retirement fund was exempt from division; assigned the parties' three percent interest in United Warehousing Company to Glyn, the value of which was determined to be negligible; accepted the value of Glyn's CPA firm as proposed by Glyn; and determined that Cheryl was not entitled to maintenance.

The parties each filed exceptions to the DRC's report with a Special Judge assigned to the case. Following arguments, on October 30, 1996, the trial court entered an order substantially accepting the DRC's recommendations. The only modification to the DRC's recommendations relevant to this appeal is the trial court's award of $1,200.00 per month in maintenance to Cheryl. Following the trial court's decision, Glyn appealed and Cheryl cross-appealed.

The sole issue raised in Glyn's appeal is the trial court's award of $1,200.00 per month in maintenance to Cheryl.

Glyn first contends that the trial court erred as a matter of law because it failed to make the statutorily required finding that Cheryl is unable to support herself through appropriate employment as required by KRS 403.200(1)(b).

KRS 403.200(1) provides that a trial court may grant a maintenance order only if it finds that the spouse seeking

maintenance (a) lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and (b) is unable to support herself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

Glyn correctly asserts that the trial court failed to find that Cheryl is unable to support herself through employment as required by KRS 403.200(1)(b). Following the trial court's entry of its final order, however, Glyn did not request a finding on that issue or otherwise bring the omission to the trial court's attention. On November 3, 1997, Cheryl filed a motion with this Court to dismiss Glyn's appeal based upon his failure to seek additional findings pursuant to CR 52.02. The motion was passed to this panel for disposition.

In the case at bar, the DRC set forth substantial findings relating to maintenance issues. The findings of a DRC, to the extent adopted by the trial court, are to be considered findings of the trial court. CR 52.01. The trial court did not specifically reject the DRC's findings and we construe this, to the extent the trial court's awarding of maintenance was not inconsistent with the findings, as an adoption by the trial court of the DRC's findings. Hence, the trial court, through its adoption of the DRC's findings, made findings relating to maintenance issues. Glyn contested this issue throughout the proceedings and following the trial court's award of maintenance to Cheryl, he timely filed an appeal. We discern no basis to

dismiss Glyn's appeal, and accordingly Cheryl's motion to dismiss is denied.

However, a final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless the failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to CR 52.02. CR 52.04. Cheryl correctly states that Glyn did not do this. Accordingly the trial court's failure to make the statutory finding relating to Cheryl's ability to support herself is not reversible error.

Glyn also argues that the trial court erred in awarding maintenance to Cheryl because she is able to support herself through appropriate employment and to maintain the standard of living which she previously enjoyed during the marriage.

The relevant findings of the trial court, as adopted, were as follows: the parties were married for twenty-one years; during the marriage Glyn was primarily the person employed and earning the income; during the marriage Cheryl was a homemaker taking care of the children; the parties had established a relatively comfortable standard of living during the marriage; Cheryl's lifestyle was rather simple and she did not need a lot of extras; Cheryl has an income of $30,000.00 from her job as a school teacher; Cheryl's income, while not an excessive amount, will not place her in a situation of destitution; Glyn has a gross income of approximately $135,000.00. Since the trial court awarded maintenance, it is obvious that the trial court rejected

the following finding of the DRC: "Glyn, because of his assumption of the marital debt, is in a very unfavorable financial position and will be in such a financial position as not to be able to pay maintenance over and above his child support."

The amount and duration of maintenance is within the sound discretion of the trial court. Weldon v. Weldon, Ky. App., 957 S.W.2d 283, 285-286 (1997); Russell v. Russell, Ky. App., 878 S.W.2d 24, 26 (1994). Furthermore, in matters of such discretion, "unless absolute abuse is shown, the appellate court must maintain confidence in the trial court and not disturb the findings of the trial judge." Id. (emphasis original); See also Clark v. Clark, Ky. App., 782 S.W.2d 56, 60 (1990); Platt v. Platt, Ky. App., 728 S.W.2d 542 (1987); and Moss v. Moss, Ky. App., 639 S.W.2d 370 (1982). "In order to reverse the trial court's decision, a reviewing court must find either that the findings of fact are clearly erroneous or that the trial court has abused its discretion." Perrine v. Christine, Ky., 833 S.W.2d 825, 826 (1992).

The findings of the trial court reflect that Glyn earns $135,000.00 per year while Cheryl earns $30,000.00 per year. These findings were not clearly erroneous as they are supported by the testimony, financial schedules, and tax returns filed into the record. The trial court ordered Glyn to pay Cheryl $1,200.00.00 per month, or $14,400.00 per year. Considering the nonmarital and marital property assigned to Cheryl, her annual income, the standard of living established by the parties during

their marriage, and the vast discrepancy in the incomes of the parties, we cannot say that the trial court abused its discretion in awarding Cheryl maintenance of $1,200.00 per month.

Glyn argues that he lacks the ability to satisfy the marital indebtedness apportioned to him and pay maintenance to Cheryl. It is undisputed that the parties have endured financial difficulties in the course of their marriage. The trial court apportioned $140,000.00 in debt to Glyn, and his debt service obligation will undoubtedly hamper his disposable income. "The fact that appellee is "heavily indebted," however, does not necessarily absolve him from the duty to pay maintenance." Carter v. Carter, Ky. App., 656 S.W.2d 257, 260 (1983). In view of Glyn's level of income, we do not believe that the fact that he has a high level of debt should absolve him from a maintenance obligation.

In her cross-appeal, Cheryl argues that the trial court's decision to assign no value to the parties' interest in United Warehousing Company was clearly erroneous; that the decision of the trial court to adopt in toto Glyn's valuation of his CPA practice was clearly erroneous; and that the trial court erroneously refused to apply amended KRS 403.190(4) to the division of Glyn's retirement benefits.

During the marriage, the parties obtained a three percent interest in United Warehousing Company. Based upon an appraisal filed into the record, the fair market value of the fee simple interest in the real property as of December 20, 1993, was approximately $5.7 million, with a debt of about $4.6 million.

The trial court determined that this asset, while it might have some value, was minimal at best and assigned the interest in United Warehousing to Glyn; the trial court assigned no value to the interest. Based upon the surplus of the warehouses worth over its debt, Cheryl contends that the parties' three percent interest is worth approximately $33,000.

A trial court's valuation in a divorce action will not be disturbed on appeal unless it is clearly contrary to the weight of the evidence, Heller v. Heller, Ky. App., 672 S.W.2d 945, 947 (1984); Underwood v. Underwood, Ky. App., 836 S.W.2d 439, 444 (1992). In this case we cannot conclude that the trial court was clearly erroneous in its conclusion to assign no value to the interest in United Warehousing. Roberts v. Roberts, Ky. App., 587 S.W.2d 281, 283 (1979). Glyn testified as to the value of the warehouse interest. In this regard, he testified that the warehouse had some very unprofitable years; that the warehouse's largest customer, which accounted for sixty percent of its business, was planning on moving out; and that the warehouse did not have any value. "Under CR 52.01, the Appellate Court's review of the trial court's decision is limited to reversing only clearly erroneous findings, keeping in mind that the trial court had opportunity to hear evidence and observe witnesses so as to judge credibility." Chalupa v. Chalupa, Ky. App., 830 S.W.2d 391, 393 (1992); Bealert v. Mitchell, Ky. App., 585 S.W.2d 417 (1979). In the case sub judice, the trial court heard conflicting evidence and determined that the warehouse had negligible value. Disagreeing with a finding is not sufficient

to rule the finding as clearly erroneous. Hence we must affirm the trial court's disposition of the warehouse issue.

Glyn is a partner in the CPA firm Kerbaugh & Rodes. Glyn's expert, Dewitt Hisle, valued the CPA practice at $222,000, while Cheryl's expert, Tom Cooper, valued the business at $406,000. The trial court accepted the value determined by Glyn's expert. Cheryl contends that the trial court's acceptance of the value of the CPA firm as determined by Glyn's expert was clearly erroneous. We disagree.

As with our review of the trial court's findings relating to the value of the warehouse, our review of the trial court's valuation of the CPA firm is limited to whether the valuation was clearly erroneous in that the valuation was unsupported by substantial evidence. "[T]he trial court's judgment and valuations in an action for divorce will not be disturbed on appeal unless it was clearly contrary to the weight of evidence." Clark v. Clark, Ky. App., 782 S.W.2d 56, 58 (1990).

The parties each presented expert testimony regarding the value of the CPA firm, and, in this battle of the experts, the trial court chose to accept the valuation proposed by Glyn's expert. Glyn's expert used the capitalization of excess earnings method for evaluating the goodwill of the practice. This method for valuing a business has previously been accepted by this court. See Clark, supra. There is no indication from the evidence in the case at bar that the trial court incorrectly applied the capitalization of excess earnings method. The trial

court stated, "[i]t is clear to the Court that Dewitt Hisle's valuation has been throughly thought out and worked through in this case." Cheryl contends that the valuation applied an incorrect risk factor; however, this disagreement does not persuade us that the trial court was clearly erroneous in accepting the expert testimony valuing the CPA practice at $222,000.00.

Cheryl's final argument in her cross-appeal is that the trial court erroneously refused to apply the July 15, 1996, amendment to KRS 403.190(4) in considering the parties' retirement accounts.

Prior to the July 1996 amendment, KRS 403.190(4) provided, in all cases, that if the retirement benefits of one spouse was excused from classification as marital property then the retirement benefits of the other spouse must also be excepted. Turner v. Turner, Ky. App., 908 S.W.2d 124, 125 (1995). The July 1996 amendment modified the KRS 403.190(4) exception to provide that the level of exception provided to the spouse with the greater retirement benefit shall not exceed the level of exception provided to the other spouse. The value of Cheryl's retirement plan at the time of the dissolution was approximately $13,000.00, while Glyn's plan was valued at approximately $34,000.00. Cheryl contends that the July 1996 amendment requires the difference in value, approximately $21,000.00, to be considered as divisible marital property.

The petition for dissolution was filed on December 29, 1993. The marriage was dissolved on April 24, 1995. The DRC

entered his recommendations on June 10, 1996. The amendment was effective on July 15, 1996, and the trial court issued its decision on October 30, 1996. Cheryl's retirement benefits were earned pursuant to her employment as a school teacher. Teacher retirement benefits are exempted from treatment as marital property. KRS 161.700(2). Accordingly, when the DRC entered his recommendations, he excluded Glyn's retirement benefits from the divisible marital estate, and this recommendation was accepted by the trial court. Cheryl did not raise the July 1996 amendment until after the trial court had entered its decision when she filed a CR 59 motion to amend judgment.

The statute, as amended, is silent as to whether the July 1996 amendment should have any retroactive application. "No statute shall be construed to be retroactive, unless expressly so declared." KRS 446.080(3). "A statute will not have retroactive effect unless such intent is clearly expressed in the statute." ITT Commercial Finance Corp. v. Madisonville Recapping Co., Inc., Ky. App., 793 S.W.2d 849, 851 (1990); Roberts v. Hickman County Fiscal Court, Ky., 481 S.W.2d 279 (1972).

However, "[w]hen a statute is purely remedial or procedural and does not violate a vested right, but operates to further a remedy or confirm a right, it does not come within the legal concept of retrospective law nor the general rule against the retrospective operation of statutes." Miracle v. Riggs, Ky. App., 918 S.W.2d 745, 747 (1996). If the purpose of an amendment is remedial and a claim was still pending at the time the amendment became effective, the new version of the statute

applies. Thornsbury v. Aero Energy, Ky., 908 S.W.2d 109, 111 (1995). Cheryl argues that the amendment was remedial and that the amendment to the statute should therefore have been applied in the case at bar. We disagree.

In Peabody Coal Co. v. Gossett, Ky., 819 S.W.2d 33 (1991), the Supreme Court explained the concepts of remedial and retrospective legislation as follows:

> A retrospective law, in a legal sense, is one which takes away or impairs vested rights acquired under existing laws, or which creates a new obligation and imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past. Therefore, despite the existence of some contrary authority, remedial statutes, or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of such rights, do not normally come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes. In this connection it has been said that a remedial statute must be so construed as to make it effect the evident purpose for which it was enacted, so that if the reason of the statute extends to past transactions, as well as to those in the future, then it will be so applied although the statute does not in terms so direct, unless to do so would impair some vested right or violate some constitutional guaranty. Quoting {73 Am.Jur.2d Statutes Sec. 354 (1974)} (Footnotes omitted.) Peabody Coal Co. v. Gossett, Ky., 819 S.W.2d 33, 36 (1991).

The correct date for valuation of marital assets is the date of the dissolution decree. Clark v. Clark, Ky. App., 782 S.W.2d 56, 62 (1990). Trial courts often enter a bifurcated dissolution decree, reserving the property distribution issues for later adjudication. Since all property acquired prior to the

entry of the decree is presumed to be marital, Stallings v. Stallings, Ky., 606 S.W.2d 163, 164 (1980), entry of the decree serves to fix the rights of the parties as of that date. Therefore, a retrospective application of the 1996 amendment to KRS 403.190(4) would impair the vested rights of the parties. In summary, the amendment was not remedial, and, as there is no applicable exception, KRS 446.080(3) bars retroactive application of the July 1996 amendment to KRS 403.190(4).

For the foregoing reasons, the judgment of the Boyle Circuit Court is affirmed, and Cheryl's motion to dismiss Glyn's appeal is denied.

ALL CONCUR.

ENTERED: June 25, 1999

/s/ Daniel T. Guiduqli
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Ephraim Woods Helton
Danville, Kentucky

BRIEF FOR APPELLEE:

Deedra Benthall
Danville, Kentucky