

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-000544-MR

MICHAEL R. ROETHER

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE WILLIAM J. WEHR, JUDGE  
ACTION NO. 96-CI-00543

PATRICIA J. ROETHER (NOW DEHNER);  
W. ROBERT LOTZ

APPELLEES

OPINION  
AFFIRMING  
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BEFORE: DYCHE, EMBERTON, AND HUDDLESTON, JUDGES.

JUDGE, DYCHE: Michael R. Roether appeals from an order of the Campbell Circuit Court denying his motion to terminate his maintenance obligation to appellee, Patricia J. Roether (now Dehner). The maintenance obligation was in reality a distribution of marital property, but was structured as a maintenance obligation for tax purposes and to distribute the business risk associated with the asset.

The parties were married on October 27, 1978, and separated on May 21, 1996. On June 30, 1996, Michael filed a petition to terminate the marriage. Matters were referred to the

Master Commissioner of the Campbell Circuit Court (Commissioner). A final hearing was held on March 13, 1997. On April 15, 1997, the Commissioner filed his recommendations. Included in the report was a recommendation which has led to the present controversy. The recommendation concerned the disposition of a marital asset, a consulting agreement, which arose as a result of Michael's sell-out of his interest in the construction firm "Mike Roether and Son Construction, Inc." (the Company). The Commissioner's recommendation was as follows:

With respect to the monies due and owing to [Michael] by Mike Roether & Son Construction, Inc. under the "CONSULTING AGREEMENT" . . . ., according to the testimony of [Patricia's] expert witness an assignment could not be executed in favor of [Patricia] for one-half ( $\frac{1}{2}$ ) the monies due and owing to [Michael] without [Michael] still being responsible for all of the income tax liability associated therewith. This does not seem fair nor does it seem fair to make [Michael] assume all of the risk associated with Mike Roether & Son Construction, Inc. Therefore, even though [Patricia] might not otherwise be entitled to maintenance, it is recommended that [Michael] pay [Patricia] maintenance in the amount of \$1,057.00 per month through December 31, 2004 or until he ceases receiving payments from Mike Roether & Son Construction, Inc. under the "CONSULTING AGREEMENT". In this way, each of the parties also will equally assume the tax liability and the risk associated with the payments due and owing under the "CONSULTING AGREEMENT".

On May 7, 1997, the trial court entered an order substantially confirming the report, including the foregoing recommendation.

On May 8, 1997, the divorce decree was entered.

On May 27, 1997, Patricia filed a motion to hold Michael in contempt because, among other reasons, he had failed

to pay his maintenance obligation.<sup>1</sup> On August 15, Patricia supplemented her contempt motion and moved to, among other things, reduce the award to a lump sum judgment. Attached as an exhibit to the supplemental motion was a letter dated June 13, 1997, from the construction company signed by Michael's son, Richard Roether, the company president, informing Michael that the consulting contract was being canceled because the company was dissatisfied with Michael's work as a consultant.<sup>2</sup> Also attached was a letter from Michael to Patricia's counsel which stated, in part, "I will not be obligated to pay any monies [to Patricia after July 13, 1997] under the consulting agreement. I have been terminated [as a consultant]." Michael thereupon ceased making the maintenance payments to Patricia as required under the maintenance award.

On October 3, 1997, Michael filed a motion requesting that he be relieved of any obligation to make maintenance payments to Patricia because the agreement had been terminated. On October 14 a hearing was held on the pending motions. On December 3 the Commissioner issued his report. The Commissioner made a finding that immediately following the purported cancellation of the consultation agreement,

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<sup>1</sup>While this obligation was a "maintenance" obligation in name only, we will nevertheless refer to it by that designation. The obligation is more accurately described as a "distribution of marital property" obligation.

<sup>2</sup>Paragraph nine of the consulting contract permitted the company to cancel the agreement "in the event that the Consultant does not perform the services required under this agreement to the satisfaction of the Corporation."

[Michael's] new wife, Kim, incorporated a new business known as "K.M.R. Services" and entered into a contract whereunder her company would perform the same services which [Michael] had been performing under the old "CONSULTING AGREEMENT" for Richard. Kim is the sole shareholder of K.M.R. Services and she is its president. [Michael] is the sole employee of K.M.R. Services and he is providing the same services to Mike Roether & Son Construction, Inc. as he did under the old "CONSULTING AGREEMENT" at approximately the same salary.

Based upon this finding the Commissioner stated that

[i]t is ludicrous to think that this series of events whereby Richard terminated the old "CONSULTING AGREEMENT" between Mike Roether & Son Construction, Inc. and [Michael] and then immediately rehired [Michael] pursuant to a new agreement between Mike Roether & Son Construction, Inc. and [Michael's] new wife's new company is anything other than a complete sham transaction. It is a blatant attempt by [Michael] to perpetrate a fraud upon not only [Patricia] but also the Court. The "CONSULTING AGREEMENT" could only be terminated in the event that [Michael] did not perform the services required of him thereunder to Richard's satisfaction. In his letter of June 13, 1997, . . . Richard indicates that he is canceling [sic] the "CONSULTING AGREEMENT" due to his dissatisfaction with [Michael]. However, he then immediately turns around and rehires [Michael] to perform the same services under the new agreement with K.M.R. Services. [Michael] receives no salary from K.M.R. Services. Rather, all of the monies due and owing by Mike Roether & Son Construction, Inc. to K.M.R. Services are deposited directly into [Michael's] joint bank account with his new wife, Kim.

The report recommended that Michael be ordered to immediately pay all arrearages associated with this maintenance obligation and that he keep his obligation current else face incarceration. Patricia excepted to the report insofar as it did not recommend a modification to the language of the maintenance

award because, in her view, absent that, Michael would persist in avoiding his obligation. On December 24, 1997, the trial court entered an order accepting the Commissioner's recommendations in full, except that Patricia's exception was to remain under submission. On January 21, 1998, the trial court entered an order denying Patricia's exception.

Michael continued to refuse to pay his maintenance obligation, and on January 12, 1998, a bench warrant was issued for his arrest. On January 29, 1998, Michael filed a motion to terminate maintenance on the basis that he did not have the financial resources to pay the obligation and because "the order of maintenance should no longer have prospective application in that the award is not maintenance, but a property division." On February 25 the trial court entered an order denying Michael's motion.

Michael nevertheless continued to refuse to pay his maintenance obligation, and on June 2, 1998, Patricia filed a motion to reduce the arrearage to a lump sum judgment; on June 5 the trial court granted the motion and ordered that the arrest warrant against Michael should continue in full force and effect. Also on June 5, Michael filed another motion to terminate maintenance. On July 23, the trial court denied the motion. On August 12, Michael paid a portion of the outstanding arrearage sufficient to purge himself of contempt; however, on August 17, Patricia filed a motion to hold Michael in contempt for failure to pay more recent installments of the maintenance obligation.

On October 13, 1998, Michael filed yet another motion to terminate maintenance. Hearings before the Commissioner were conducted on October 23 and October 30. On December 4, 1998, the Commissioner entered his report. The Commissioner recommended that Michael's request to terminate maintenance be denied and that the future maintenance obligation be reduced to a lump sum judgment of \$79,275.00 based upon the remaining 75 month term of the award at \$1,057.00 per month. Both sides filed exceptions to the report. On January 13, 1999, the trial court entered an order adopting the Commissioner's report except as to the amount of the lump sum judgment. That issue was reserved for further argument. On January 22, Michael filed a motion to alter, amend, or vacate. On February 19, 1999, the trial court entered an order reducing the lump sum judgment award to \$71,000.00 and overruling Michael's motion to alter, amend, or vacate. This appeal followed.

Michael's brief is somewhat disorganized; however, he appears to make four arguments: (1) that Patricia was a third-party beneficiary of the consulting contract and, because the right of rescission was reserved in the contract, the contract could be canceled without Patricia's consent; (2) Michael was justified in canceling the contract because the annual cost of his liability insurance, which he was required to maintain under the contract, was greater than his compensation under the agreement; (3) the Commissioner improperly applied "dissipation of asset" principles to the cancellation of the consulting

agreement; and (4) the Commissioner should have disqualified himself.

Michael contends that pursuant to Rhodes v. Rhodes, Ky., 266 S.W.2d 790 (1953), the consulting agreement could be rescinded without the consent of Patricia because, though she was a third party beneficiary under the contract, the right of rescission had been reserved in the contract. Rhodes is not relevant to this situation. The consulting contract was not simply an arms length contract negotiated between Michael and the company. Rather, the consulting contract was an integral part of the compensation Michael was to receive for the sale of his stock in the company to his son Richard. Payment for the stock was structured as a consulting contract so the company could reflect a deduction for the payment as an expense and thereby lower its taxes. The stock was a marital asset subject to division and, it follows, the consulting contract was a marital asset. Hence Patricia had a fifty percent marital interest in the consulting contract and was not merely a third party beneficiary of the contract.

We further note that Patricia originally sought to have the consulting contract assigned exclusively to Michael and to be assigned other assets as an off-set. Michael objected to this and, because payments under the contract appeared to be earned income to Michael, he stood to be responsible for all of the taxes paid under the contract. Moreover, at the time of the property distribution the company was experiencing financial problems. With the agreement of Michael, the distribution of

Patricia's marital portion of the consulting contract was structured as maintenance, thereby distributing the tax burden equally between the parties and, similarly, distributing the risk of business failure. Michael agreed to the structuring of the distribution of this marital asset in this manner in the first place, and his Rhodes argument mischaracterizes the nature of the consulting agreement.

Next, Michael contends that he was justified in canceling the contract because the annual cost of his liability insurance, which he was required to maintain under the contract, was greater than his compensation under the agreement. Paragraph one of the contract provided that "[w]hile this Agreement is in effect, the Consultant shall maintain comprehensive general liability insurance...." At the October 1998 hearings, Michael presented the testimony of an insurance agent who testified that the minimum insurance premium available to Michael to meet the insurance standard under the contract was \$36,000.00 annually. Under the consulting contract Michael was to receive \$25,326.00 annually.

In his December 4, 1998, report, the Commissioner stated that he "does not believe [Michael] when he says that the 'CONSULTING AGREEMENT' was terminated because he could not afford to purchase liability insurance." We must accept this assessment of Michael's credibility unless it was clearly erroneous. CR 52.01; Reichle v. Reichle, Ky., 719 S.W.2d 442 (1986). The finding rejecting Michael's claim that he canceled the contract because of the cost of liability insurance was not clearly

erroneous. In the 1997 proceedings, the evidence was that the company terminated the consulting agreement because it was dissatisfied with Michael's performance as a consultant. Further, following the termination of the consulting contract, Michael and his new wife set up what the Commissioner characterized as a "dummy corporation" and continued to perform the same consulting services through that corporation. Considering these factors, the Commissioner, and the trial court, were justified in concluding that Michael had "very little credibility" and that "this latest scenario is . . . another attempt by [Michael] to sneak out from underneath his obligation to pay to [Patricia] one-half (½) the value of the monies which he received from the sale of [the company]."

Next, Michael contends that the Commissioner improperly applied "dissipation of asset" principles to the cancellation of the consulting agreement. In his December 4, 1998, report the Commissioner stated that "[i]n the mind of the Master Commissioner, [Michael] has 'dissipated' a substantial marital asset for which he can be held accountable," citing Robinette v. Robinette, Ky. App., 736 S.W.2d 351 (1987), and Barriger v. Barriger, Ky., 514 S.W.2d 114 (1974). Generally, a trial court may find dissipation when marital property is expended (1) during a period when there is a separation or dissolution impending; and (2) where there is a clear showing of intent to deprive one's spouse of her proportionate share of the marital property. Brosick v. Brosick, Ky. App., 974 S.W.2d 498, 500 (1998). Michael apparently objects to characterizing his actions as

"dissipation" because the termination of the contract did not occur "during a period when there was a separation or dissolution impending."

The trial court determined that Michael had fraudulently terminated the consulting contract, a marital asset, in an attempt to avoid paying Patricia her marital interest in the contract. There was a clear showing of intent to deprive Patricia of her proportionate share of the marital proceeds from the sale of the stock in the company. Though the divorce was final, and the cancellation of the contract did not occur during a period when there was a separation or dissolution impending, it was nevertheless appropriate, or else harmless error, for the Commissioner to refer to Michael's fraudulent termination of the contract as "dissipation."

In conjunction with his dissipation argument, Michael argues that it was improper to structure the property distribution as maintenance. However, this was done at Michael's instigation and, moreover, the order establishing that structure was entered on May 7, 1997. Michael did not appeal that order and we may not now review the merits of the structuring of the property distribution as maintenance. CR 73.02.

Finally, Michael contends that the Commissioner should have disqualified himself from hearing the case. Michael failed to raise this issue to the trial court and the issue is unreserved. Further, we discern no evidence of prejudice by the Commissioner.

The judgment of the Campbell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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