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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001055-MR
AND
NO. 2001-CA-001056-MR

WAYNE ASHBY

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE ELEANORE M. GARBER, JUDGE
ACTION NO. 97-FC-004268

TERESA ASHBY

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING
** **

BEFORE: COMBS, KNOPF, AND TACKETT, JUDGES.

TACKETT, JUDGE: Wayne Ashby and Teresa Ashby appeal and cross-appeal from portions of the decree of the Jefferson Circuit Court dissolving their marriage. The trial court's order restored Wayne's non-marital property, divided the marital estate between the parties, refused to find that Teresa dissipated marital assets, eliminated arrearages on spousal support, denied Teresa's request for an award of attorney's fees, and ordered the sale of the parties' business. After

careful consideration of the convoluted factual issues involved, we affirm.

Wayne and Teresa married on September 28, 1979, and are the parents of two children, a son born in 1980, and a daughter born in 1984. During the course of the marriage, the parties acquired multiple businesses, commercial real properties, rental income properties, two unimproved lots, and a newly constructed residence in Bullitt County. The residential rental properties consisted of houses on Petwood Drive, Nathan Hale Way, and Forge Circle. The parties also owned a commercial property, on which they operated Orell Liquors, which they purchased from Wayne's father. The property, located at 12821 Dixie Highway, consisted of the building where the store was located and a top-floor rental apartment. Just prior to their separation, the parties purchased two unimproved lots on Rough River and another piece of commercial property on which they began operating Orell Bar and Grill.

Wayne and Teresa separated on May 15, 1997, with Teresa continuing to occupy the marital residence in Bullitt County while Wayne moved into the house on Petwood Drive. Teresa filed a petition for dissolution on June 6, 1997, in the Jefferson Circuit Court and requested child support. Teresa testified at the hearing that Wayne was earning over \$3,000.00 per month at United Parcel Service while she was only able to

draw \$2,165.00 per month from the liquor store. The trial court ordered Wayne to pay \$710.00 per month in support for the parties' two children.

On July 4, 1997, Teresa filed a motion for temporary maintenance alleging that she was two months in arrears on the mortgage payments for the parties' residence and that Wayne had removed \$6,000.00 from the liquor store cash register. Wayne was neither present nor represented by counsel at the hearing; nevertheless, the trial court determined that Wayne received notice of the hearing and awarded Teresa \$2,400.00 per month for two months and \$1,600.00 per month thereafter. Unknown to the trial court or the Domestic Relations Commissioner (DRC), Wayne had been fired from his job at UPS in July of 1997 after being involved in a traffic accident in which he was at fault. His attorney filed a motion to stay enforcement of the orders; however, the motion was never ruled on.

On October 28, 1997, the trial court entered an order directing Teresa to run Orell Liquors and assigned her the responsibility of managing all of the parties' rental properties. Wayne was ordered not to be present on the premises of Orell Liquors. Furthermore, Teresa was to keep records of all payments she made towards outstanding mortgages on any of the properties. Meanwhile, Wayne was ordered to operate Orell Bar and Grill, but the venture was unsuccessful and he was

forced to sell it after about a year for less than half the purchase price.

During the parties' separation, all of the property they owned declined drastically in value. In 1997, the value of the liquor store as a going concern was \$86,000.00. In addition, Wayne and Teresa were operating a check cashing business on the premises which brought in \$3,000.00 per month. The top-floor apartment rented for \$350.00 per month. Shortly before their separation, Wayne and Teresa had paid his father \$130,000.00, which retired all of their debt on the Orell Liquors property. In April 1998, Teresa ceased the check cashing business and sales at the liquor store declined dramatically under her management.

In May 1998, Wayne retained a new attorney to represent him in the dissolution action and his counsel filed a motion to reduce the child support order. The following month, Wayne's second attorney withdrew and he retained his present counsel, Rocco Celebrezze. Mr. Celebrezze filed motions to terminate Teresa's maintenance and reduce Wayne's child support obligation since one of the children was no longer a minor. Prior to the scheduled hearing date on Wayne's motion, Teresa obtained an order holding Wayne in contempt of court for failure to pay his child support and maintenance obligations. On

July 27, 1998, Wayne paid Teresa \$7,500.00 in order to purge a 180 day jail sentence for contempt. Two months later, Wayne sold Orell Bar and Grill and paid Teresa an additional \$7,500.00.

On March 24, 1999, the DRC recommended that Teresa's maintenance award be terminated retroactively to June 1998 in light of Wayne's loss of employment at UPS. In January 2000, the original trial judge who had been presiding over the dissolution proceedings recused and the case was reassigned to another judge. On January 6, 2000, the DRC reviewed another of Teresa's motions to hold Wayne in contempt for failure to pay the arrearage on his child support and maintenance and recommended that he once again be found in contempt. A week later, Wayne filed his exceptions to the maintenance order. On June 27, 2000, the new judge conducted a partial trial to determine the primary residence for the parties' minor daughter. At the trial, it was decided by an oral order that the daughter would reside primarily with Wayne and Teresa would have liberal visitation. The remaining issues were tried by depositions which were filed in September 2000.

On February 6, 2001, the trial court entered an order dissolving the marriage. Wayne's child support obligation was reduced retroactively as of May 12, 1998, and eliminated as of June 27, 2000. Teresa was ordered to pay child support as of

January 2001. The residence on Petwood Drive which Wayne had inherited from a grandparent, and Orell Bar and Grill were restored to Wayne as his non-marital property. Although both these properties had been previously sold, the proceeds were placed in an escrow account until the trial court determined whether the property was marital or non-marital in nature. The marital property was divided between the parties, and the trial court ordered Orell Liquors sold. The trial court further denied Teresa's request to enforce the maintenance order and Wayne's request for a finding that Teresa dissipated marital assets. Teresa filed a motion to amend, alter, or vacate the judgment which was denied. Both parties appealed specific portions of the trial court's dissolution decree.

Wayne now argues that the trial court erred when it refused to find sufficient evidence that Teresa had dissipated marital assets while managing the liquor store and rental properties during the parties' separation. Prior to the final payment which retired all debt on the liquor store, the Ashbys were paying Wayne's father \$1529.00 per month as rent. In addition, they rented a truck for \$200.00 a month and paid employees' salaries totaling approximately \$2,000.00 per month. Under Teresa's management, the store had none of these expenses and, consequently, Wayne contends that the store should have produced an additional \$24,000.00 per year for which there is no

accounting. Teresa claims that sales at the liquor store declined drastically while she was in charge and that she was unable to maintain a checking account for the store because it was constantly being garnished to meet mortgage obligations on the parties' various properties.

As to the rental properties, Wayne points out that the three residential rental properties netted a total of \$501.00 per month after the mortgages were paid. Nevertheless, under Teresa's management all three were sold after foreclosure. The Petwood Drive residence, which had a value of \$55,000.00, was mortgaged for \$40,000.00 in order to purchase Orell Bar and Grill and to install \$15,000.00 worth of cabinets for the house in Bullitt County. Teresa made the last mortgage payment on June 1, 1997, and the property brought \$47,000.00 at the foreclosure sale. The residence on Forge Circle was valued at \$65,000.00, had a mortgage of \$19,000.00, and was also security for a Visa equity line of \$10,000.00. Teresa made the last mortgage payment on this property in September 1998, and it was sold for \$56,000.00 after foreclosure. The Nathan Hale Way residence which the parties had purchased from Wayne's mother was also valued at \$55,000.00 and had a \$27,000.00 mortgage. Teresa ceased making payments on that mortgage on October 10, 1998, and it was sold after foreclosure for \$37,000.00.

The standard of proof for dissipation of marital funds in a dissolution action is preponderance of the evidence. We have previously held that:

The party alleging dissipation must prove dissipation and the value of the property Once the party alleging dissipation establishes a prima facie case, the burden of proof shifts to the party charged with the dissipation to produce evidence sufficient to show that the expenditures were appropriate.

Brosick v. Brosick, Ky. App., 974 S.W.2d 498, 502 (1998)

(internal citations omitted). Wayne argues that the liquor store should have generated an additional \$24,000.00 per year under Teresa's management, based on the sales before the separation. Since Teresa failed to keep records in accordance with the trial court's October 1997 order, he contends that the only explanation for the decline in sales and the foreclosure on the rental properties is that Teresa managed them in less than a properly businesslike fashion or hid the parties' assets.

Teresa operated the liquor store on a cash basis occasionally depositing money in other people's checking accounts so that bills could be paid. She presented no records to document the income stream other than cash register receipts and a few expenses provided to Barbara Adams, the store's bookkeeper. With regard to the rental properties, Teresa maintains that a substantial portion of the rent money she collected was garnished by creditors. After the garnishment

began, some tenants refused to pay rent due to confusion over whether Teresa or her creditor was supposed to collect the payments. Consequently, she was forced to evict nonpaying tenants and was unable to make the mortgage payments.

The trial court conducted a careful analysis of the dissipation issue and concluded as follows:

Each party has pointed to the poor business practices and/or fraudulent conduct of the other. Following review of the testimony and the exhibits in this case, the Court finds that **both parties together** bit off more than they could chew acquiring two businesses and three encumbered rental properties when they had little cash, no business management training and little business experience. Even more problematical, while they were already overextended, they obtained a huge mortgage of \$328,000 to finance the payoff to Wayne's father of the liquor store and the construction of a 3,000 ft. residence in [Bullitt County]. Their combined incomes in the best of times did not enable them to make the monthly mortgage payments of \$2,350.00 on the [Bullitt County] property. The parties jointly got in way over their heads.

Wayne claims that Teresa dissipated or hid assets generated or expected to be generated by the liquor store and the rental properties. The Court finds that both parties, without ill intent, but because of lack of business skills and experience contributed to their joint losses. . . .

(Emphasis in original.) Moreover, the trial court determined that a finding that Teresa had dissipated marital assets would have been based on speculation rather than competent evidence.

Wayne cites Brosick, Barringer v. Barringer, Ky. App., 514 S.W.2d 114 (1974), and Bratcher v. Bratcher, Ky. App., 26 S.W.3d 797 (2000) in support of his argument that Teresa should be found to have dissipated assets in connection with their businesses. Brosick and Barringer both, however, involved husbands who spent marital funds on other women in contemplation of divorce. Further, in Bratcher we held that evidence of dissipation must show that "there was a clear intent on the part of the dissipator to deprive the spouse of marital assets." Id. at 800. The applicable standard of review requires that we uphold the trial court's factual determinations unless there was an abuse of discretion. Vanover-May v. Marsh, Ky. App., 793 S.W.2d 852 (1990). After a careful review, we believe that the trial court operated within its discretion in finding a lack of evidence that Teresa dissipated marital assets in an attempt to deprive Wayne of their value.

Teresa cross-appeals from the trial court's order alleging error in the elimination of arrearage on spousal support, the restoration of non-marital property to Wayne, the order for Orell Liquors to be sold, and the refusal to require Wayne to pay a portion of her attorney's fees. A trial court may award attorney's fees in a dissolution action only when there is an imbalance in the parties' financial resources. Lampton v. Lampton, Ky. App., 721 S.W.2d 736 (1986). At the

time their marriage was dissolved, the Ashbys owned the commercial property where the Orell Liquors was located and two unimproved lots on Rough River. In addition, there was the approximate amount of \$21,000.00 in Wayne's attorney's escrow account representing proceeds from the sales of the foreclosed marital properties. The trial court divided the marital property equally between the parties; thus, there was no imbalance between their resources which would have justified awarding Teresa a portion of her attorney's fees.

Without question, the parties' most valuable asset at the time of their divorce was Orell Liquors and the commercial property on which it was located. With regard to this property, the trial court determined the following:

The Court also determines that there is no way to award the liquor store and/or the liquor store property to either of the parties and accomplish an equitable division of marital assets. At the same time the Court is concerned that any divisions of these assets between the parties given the level of their mutual hostility and distrust, would be a recipe for disaster at worst, and unending continued litigation at best. The Court is further mindful of the substantial indebtedness of the parties, particularly with respect to the expected substantial deficiency judgment to result upon the foreclosure sale of the property in [Bullitt County].

. . .
The liquor store and the property on which the liquor store is located on Dixie Highway shall be listed for sale within 90 days. Of the proceeds of the sale of these two properties, the deficiency judgment on

the [Bullitt County] property shall be paid as well as any and all remaining property and/or income taxes. If there are any remaining proceeds, they shall be divided equally between the parties. Pending sale, [Teresa] shall be permitted to operate the liquor store, but she shall open a checking account within 7 days of this Order and maintain accurate accounting of all inventory, sales, costs and personal draw. She shall be permitted to draw up to \$750.00 per week for her own personal living expenses.

Teresa contends that the trial court erroneously ordered the sale of Orell Liquors in order to satisfy a prospective deficiency judgment. This ignores the reasoning expressed in plain language in the trial court's order which explained that the business would have to be sold in order to achieve an equitable division of marital property between the parties.

Teresa cites our decision in Goldstein v. Goldstein, Ky. App., 377 S.W.2d 52 (1964), in support of her argument that the trial court should have awarded Orell Liquors to her and directed her to pay Wayne the value of his interest in the business in cash. The distinction between the factual situation in Goldstein and the case here mitigates against this argument. In Goldstein, the trial court was only awarding the wife a fifteen percent interest in the marital business; in the case *sub judice*, the trial court divided the marital property evenly between the parties. Given the parties' inability to meet so many of their financial obligations and Teresa's evidenced lack

of success in operating Orell Liquors, we believe the court acted correctly by not awarding Teresa the business and then requiring her to buy Wayne's interest.

With regard to the trial court's restoration of Wayne's non-marital property, Teresa claims that either Petwood Drive or Orell Bar and Grill should have been assigned to him, but not both. Kentucky Revised Statute (KRS) 403.190(1) requires the trial court in a dissolution action to assign each party his or her non-marital property prior to dividing the marital estate. Wayne inherited the residence on Petwood Drive which made it his non-marital property pursuant to KRS 403.190(2)(b). Subsequently, the parties secured a mortgage in the amount of \$40,000.00 against the Petwood Drive property. Of this amount, \$25,000.00 was used to purchase Orell Bar and Grill and the balance was used to purchase cabinets for the Bullitt County residence. Consequently, when it was purchased, Orell Bar and Grill was Wayne's non-marital property because it was bought with funds traceable to the Petwood Drive property which he had inherited. Lampton at 738.

Less than a year after purchasing Orell Bar and Grill, Wayne was forced to sell it for only \$11,000.00. Thus, the trial court correctly found that the property did not appreciate in value due to any joint effort of the parties and thus remained Wayne's non-marital property. Although Teresa argues

that marital funds paid the mortgage payment on the Petwood Drive residence, we note this was a rental property which realized \$60.00 per month profit after the mortgage payments.

Finally, Teresa argues that the trial court erred by eliminating the arrearage on spousal support owed to her. As previously stated, the order for maintenance was entered on the DRC's recommendation, but without full knowledge of Wayne's employment status. As early as June 1998, Wayne's counsel filed a motion to terminate Teresa's maintenance; however, she preempted the scheduled hearing date on the motion by obtaining an order holding Wayne in contempt for failure to pay. In its final order dissolving their marriage, the trial court stated:

This is a court of equity. As the Court declines to find Teresa responsible for her poor business dealings and record keeping, the Court similarly declines to hold [Wayne] accountable for maintenance which never should have been awarded in the first place and which was impossible for [Wayne] to pay at any time during the lengthy pendency of these proceedings. Accordingly, [Teresa's] claims for maintenance arrearages or credits for arrearages shall be overruled as are [Wayne's] claims for credits for alleged dissipation of assets.

Here, the trial court's ruling is supported by our decision in Mudd v. Mudd, Ky. App., 903 S.W.2d 533 (1995) in which we stated that "our law does not prohibit a trial court from granting a retroactive reduction in maintenance for the period of time from

the filing of the motion to the entry of judgment." Supra at 534.

For the forgoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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