

RENDERED: March 26, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000462-MR

KIMBERLY L. ZAMBOS

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT  
HONORABLE LEWIS D. NICHOLLS, JUDGE  
ACTION NO. 00-CI-00245

PHILIP N. ZAMBOS

APPELLEE

AND CROSS-APPEAL NO. 2002-CA-000598-MR

PHILIP N. ZAMBOS

CROSS-APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT  
HONORABLE LEWIS D. NICHOLLS, JUDGE  
ACTION NO. 00-CI-00245

KIMBERLY L. ZAMBOS

CROSS-APPELLEE

AND NO. 2002-CA-001295-MR

PHILIP N. ZAMBOS

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT  
HONORABLE LEWIS D. NICHOLLS, JUDGE  
ACTION NO. 00-CI-00245

KIMBERLY L. ZAMBOS

APPELLEE

OPINION AND ORDER  
AFFIRMING IN PART  
REVERSING IN PART AND REMANDING WITH DIRECTIONS  
APPEAL NO. 2002-CA-000462-MR  
AFFIRMING CROSS-APPEAL NO. 2002-CA-000598-MR  
DISMISSING APPEAL NO. 2002-CA-001295-MR

\* \* \* \* \*

BEFORE: KNOFF, TACKETT AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Kimberly Zambos brings this appeal from an "Amended Decree Of Dissolution Of Marriage" entered on February 20, 2002, by the Greenup Circuit Court. Phillip Zambos brings a cross-appeal from the same order. We affirm in part, reverse in part and remand Appeal No. 2002-CA-000462-MR; affirm Appeal No. 2002-CA-000598-MR and dismiss Appeal No. 2002-CA-001295-MR.

Kimberly and Phillip Zambos were married at Wheeling, West Virginia, in June of 1988. Their marriage was dissolved by interlocutory decree entered by the Greenup Circuit Court on October 6, 2000. The matter was then referred to the Domestic Relations Commissioner ("Commissioner") pursuant to Ky. R. Civ. P. (CR) 53.03.

At the time the parties married, Phillip was a recent medical school graduate completing his residency in radiology and Kimberly was employed full-time as a radiology technician. Shortly after the parties married, they moved to Greenup County where Phillip began practicing with Northeast Kentucky Imaging, PSC. Kimberly continued to work as a radiology technician until the parties' son, Nicholas, was born in October of 1991. Nicholas was born with Down's Syndrome. It is undisputed that upon Nicholas's birth, the parties agreed Kimberly would not work outside the home. Thereafter, her only employment has been teaching an aerobics class. The parties' second son, Andreas, was born in 1994.

During the course of the marriage, Phillip fathered two illegitimate children. Pursuant to an order of the Greenup District Court, Phillip pays \$2,000.00 per month in child support for one of these children. He also pays all medical and dental insurance expenses, including insurance premiums. The second illegitimate child resides with Phillip and his girlfriend, the child's mother.

The parties stipulated to virtually all valuations of the marital property. They could not agree, however, to the value of Phillip's medical practice, Northeast Kentucky Imaging, PSC. Phillip owned fifty percent (50%) of the practice, a corporation holding an exclusive contract to provide radiology

services to a local hospital. Phillip's adjusted gross income for the year 2000 was \$952,000.00. He testified that he expected to earn approximately the same in 2001. Despite the large amount of income generated by Phillip during the marriage, the parties accumulated a significant amount of debt.

Pursuant to the Commissioner's report, Kimberly was awarded the following:

1. Household furnishings in her possession.
2. Checking account containing \$983.00.
3. Investment account containing \$2,000.00.
4. One-half of the pension plan or \$340,627.00.
5. Bellefonte Country Club Membership valued at \$7,500.00.
6. Cash equalization payment of \$105,340.00.

Kimberly was also awarded maintenance of \$4,000.00 per month and will receive \$3,000.00 per month in child support. She was also assigned debt totaling \$22,611.00.

The Commissioner's report, containing the above recommendations, was entered on January 28, 2002. Both parties filed exceptions thereto. The circuit court subsequently entered the Amended Decree of Dissolution of Marriage on February 20, 2002. The Court made two modifications to the report of the Commissioner, but otherwise incorporated the

findings of fact and conclusions of law contained therein. This appeal and cross-appeal follow.

**Appeal No. 2002-CA-000462-MR**

On appeal, Kimberly initially contends the circuit court erred in awarding her only \$4,000.00 per month in maintenance. Specifically, she contends the amount of maintenance was improper because the circuit court failed to make the necessary findings of fact under Kentucky Revised Statutes (KRS) 403.200(2). She further contends that such an award was an abuse of discretion.

When determining whether a party is entitled to maintenance, the circuit court must make the following findings:

- 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 himself 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.

KRS 403.200(1).

Upon review of the record, we are of the opinion that the circuit court's findings of fact were sufficient to support the conclusion that Kimberly was indeed entitled to maintenance pursuant to KRS 403.200(1).

Once a circuit court finds that a party is entitled to maintenance, it must then engage in an analysis of the relevant factors under KRS 403.200(2) to determine the amount and duration of the award.<sup>1</sup> A review of the record reveals, as Kimberly contends, that the circuit court did not set forth specific findings on each of these factors. However, the circuit court did consider the financial resources of Kimberly, including the marital property apportioned to her, as well as the high standard of living established during the marriage. The circuit court's analysis was sufficient to allow this Court to review and determine the appropriateness of the maintenance award. See Hollon v. Hollon, Ky., 623 S.W.2d 898 (1981). The determination of maintenance is within the sound discretion of the trial court. In Clark v. Clark, Ky. App., 782 S.W.2d 56, 60 (1990), this Court held that "unless absolute abuse is shown, the appellate court must maintain confidence in the trial court and not disturb the findings of the trial judge."

This Court is of the opinion that the circuit court made sufficient findings to support the amount of maintenance awarded. An award of maintenance that is sufficiently supported

---

<sup>1</sup> The circuit court awarded maintenance of "\$4,000.00 per month pending further Orders of the Court." This Court construes this as a permanent award of maintenance and conducts its analysis accordingly. See Combs v. Combs, Ky. App., 622 S.W.2d 679, 680 (1981).

by the record cannot be an abuse of discretion. This Court, therefore, will not disturb the circuit court's determination.

Kimberly next contends the circuit court erred by failing to award prejudgment interest on the cash equalization payment of \$105,340.00. Specifically, she contends entitlement to prejudgment interest from October 6, 2000, the date the interlocutory decree was entered, until February 20, 2002, the date the Amended Decree was entered.

Each party was assigned marital property having a total value of \$433,839.00. Of that amount, \$340,627.00 was attributed to each party for a pension plan that would not be available for distribution until age fifty-nine and one-half (59½) years. The only other significant asset, Northeast Kentucky Imaging, was valued at \$617,617.00. In an attempt to divide the marital property in just proportions, Phillip was ordered to pay Kimberly an equalization payment of \$105,340.00. He was permitted to pay that amount in three equal annual installments with interest at the rate of twelve (12) percent. No prejudgment interest was ordered.

Kimberly argues that pursuant to Fields v. Fields, Ky., 58 S.W.3d 464 (2001), she is entitled to prejudgment interest on the amount of the equalization payment. She asserts that during the fifteen (15) months between entry of the interlocutory decree and the Amended Decree, Phillip had

complete control over the parties' primary asset, Northeast Kentucky Imaging. She contends Phillip was able to utilize the asset to accumulate additional wealth and that she was precluded from sharing in that wealth. During this fifteen (15) month period, Phillip purchased a home and a second Mercedes sports utility vehicle. He also reduced outstanding debt by approximately \$300,000.00.

As noted by the Court in Fields, "[i]t is self-evident that equity and justice demand that one who uses the money or property of another for his own benefit, particularly in a business enterprise, should at least pay interest for its use in the absence of some agreement to the contrary." Id. at 466-67, citing Curtis v. Campbell, Ky., 336 S.W.2d 355, 361 (1960). In the case *sub judice*, as in Fields, a significant amount of time lapsed between entry of the interlocutory decree and division of the marital property. During this time, Phillip had control over the primary marital asset and was able to utilize it to accumulate additional wealth.

This Court is of the opinion the circuit court abused its discretion in not awarding prejudgment interest to Kimberly. However, prejudgment interest in this case is limited to the legal rate, eight percent (8%), as set forth in KRS 360.010. Upon remand, we direct the circuit court to award prejudgment interest on the cash equalization payment of \$105,340.00, at the



rate of eight percent (8%) per annum from October 6, 2000 until February 20, 2002, with interest thereafter at the judgment rate as ordered by the circuit court.

Kimberly next contends the circuit court erred in the amount of child support awarded. Specifically, she asserts that \$1,500.00 per month in child support, per child, is not sufficient. She further contends the circuit court made no findings regarding the actual needs of the children.

KRS 403.212(5) provides that the court may "use its judicial discretion in determining child support in circumstances where combined adjusted parental gross income exceeds the uppermost levels of the guideline table." Obviously, Phillip's income of \$952,000.00 per year exceeded the guideline table. Thus, the circuit court utilized its discretion in setting the amount of child support.

The circuit court obviously did not consider the factor that Nicholas suffers from Down's Syndrome.<sup>2</sup> This is apparent from the fact that Phillip was ordered to pay an equal amount of support for both children of this marriage. He also pays \$2,000.00 per month in support for an illegitimate child he fathered during the marriage; a child that does not have any special needs. This Court is of the opinion that \$1,500.00 per

---

<sup>2</sup>We observe that if the child support guidelines were applicable, consideration could be given to Nicholas's diagnosis of Down's Syndrome. KRS 403.211(3)(g).

month in child support is insufficient given Nicholas's condition. The two children of this marriage clearly have different needs and an equal award is clearly erroneous on its face. We, therefore, remand to the circuit court with directions that it reconsider the amount of child support awarded to Nicholas and to specifically consider Nicholas's unique medical condition when setting an appropriate amount of child support. We are of the opinion that the \$1,500.00 award of child support as to Andreas was within the circuit court's discretion. Having found no abuse of discretion, the award of child support as to Andreas will not be disturbed.

Kimberly next contends the circuit court erred in its valuation of Northeast Kentucky Imaging and that its valuation was clearly erroneous as a matter of law. The parties could not agree to the value of Phillip's medical practice; therefore, each presented extensive expert testimony on the issue.

Phillip's expert utilized a capitalization of excess earnings analysis and arrived at a value of \$1,960,689.00. The expert then applied a sixty percent (60%) discount for lack of marketability and a twenty percent (20%) discount for a minority interest. The expert arrived at a final value of \$240,000.00. He claimed the discounts were justified because the stock is not publicly traded, any prospective purchaser would be required to

hold a license to practice the profession and the contract held by the corporation with the hospital was pending renegotiation.

Kimberly's expert, on the other hand, utilized an income approach to value the practice and applied a capitalization rate, as well as other pre-tax adjustments. He arrived at a value of \$1,343,000.00. Kimberly asserts the Commissioner merely cut the expert's figure in half with no explanation. She further asserts that the determination was subjective and not supported by the evidence.

"[I]t has been the general principle in both Kentucky and other jurisdictions that the 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 the evidence." Clark v. Clark, 782 S.W.2d at 58 (1990) (internal citations omitted). In the case *sub judice*, a review of the record does not reveal that the circuit court's valuation of Phillip's medical practice was clearly contrary to the weight of the evidence. The court accepted the capitalization of excess earnings valuation set forth by Phillip's expert, but applied lesser discounts. The court reasoned that a thirty percent (30%) discount for lack of marketability would be more reasonable, based upon a lack of evidence the contract with the hospital would not be renewed. The court then applied a ten percent (10%) discount for the minority interest. The court

reasoned that although a fifty percent (50%) ownership interest is a minority interest, a gridlock is highly unlikely in a lucrative corporation such as this.

Kimberly has not convinced this Court that the valuation of the medical practice is clearly contrary to the weight of the evidence. Id. The circuit court made sufficient findings to support its valuation; therefore, this Court will not disturb the valuation on appeal.

Kimberly's final contention is that the circuit court erred when dividing the marital property. Specifically, she contends the court erred by not making specific findings of fact pursuant to KRS 403.190. She further contends it abused its discretion by ordering an equal division. She argues KRS 403.190 directs the Court to divide the marital estate in "just proportions" and that the statute does not create a presumption for an equal division. Kimberly also argues the facts of the case do not support an equal division given the "vast income during the recent years of their marriage which has been largely wasted. . . ." She asserts that if adequate consideration were given to the factors set forth in KRS 403.190(1), an equal division would not be justified.

KRS 403.190(1) requires the court to divide marital property in "just proportions" with consideration given to all relevant factors including:

- (a) Contribution of each spouse to acquisition of the marital property, including contributions of a spouse as homemaker;
- (b) Value of the property set apart to each spouse;
- (c) Duration of the marriage; and
- (d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

The record reflects the circuit court considered the value of the property set apart to each party and the economic circumstances of each spouse. This Court is of the opinion that consideration of these factors is sufficient to support the circuit court's division of the marital property. The circuit court satisfied the requirements of KRS 403.190(1) and divided the marital property in just proportions.

**Cross-Appeal No. 2002-CA-000598-MR**

On cross-appeal, Phillip contends the circuit court erred in its division of the pension plan. Specifically, he contends the court erred by valuing the plan as of the date of dissolution of marriage, October 6, 2000. He further alleges the court erred by awarding a specific dollar amount, rather than assigning a percentage of the plan. He complains that between October of 2000 and February of 2002 the stock market

went into a downward spiral and that Kimberly was insulated from the loss. His contention focuses on the fact that the pension plan's value dramatically decreased after the valuation date. He further contends that rather than a dollar amount being assigned to Kimberly's portion, a qualified domestic relations order ("QDRO") should have been entered.

The record reflects the parties agreed that October 6, 2000, would serve as the valuation date for the marital assets. Phillip does not contend the dollar amount assigned is mathematically incorrect if the October valuation date is applied. Phillip's contention that Kimberly should share in the loss suffered by the pension plan is misplaced. The correct date for valuing a pension plan is the date of the dissolution decree. KRS 403.190; Clark v. Clark, 782 S.W.2d at 62 (1990), citing Stallings v. Stallings, Ky., 606 S.W.2d 163 (1980). Given that the parties agreed to October 6, 2000, as the valuation date for all marital assets, and given the supporting case law, this Court will not disturb the circuit court's division of the pension plan.

**Appeal No. 2002-CA-001295-MR**

Phillip N. Zambos brings the above appeal from an order directing payment of Kimberly's costs and attorney's fees. Upon review of Phillip's appellate brief, it appears that Phillip

failed to raise any issues in the above appeal. Under CR 76.12(8)(b), we believe the appropriate remedy is to dismiss the appeal. The Court hereby, *sua sponte*, ORDERS Appeal No. 2002-CA-001295-MR, DISMISSED.

For the foregoing reasons, Appeal No. 2002-CA-000462-MR, is affirmed in part, reversed in part and remanded with directions (1) to award prejudgment interest on the cash equalization payment (\$105,340.00) at the rate of 8% per annum from October 6, 2000 to February 20, 2002 and (2) to reconsider the amount of child support awarded to Nicholas and to specifically consider Nicholas's medical condition when making such award; Appeal No. 2002-CA-000598-MR is affirmed, and Appeal No. 2002-CA-001295-MR is dismissed.

TACKETT, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPERATE OPINION.

ENTERED: March 26, 2004

\_/s/ Jeff S. Taylor  
JUDGE, COURT OF APPEALS

KNOPF, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I fully concur with the majority opinion except the

portion which reverses the trial court's child support order. The majority correctly notes that the trial court ordered Phillip to pay child support in the amount of \$1,500.00 per month per child. The majority states that this equal amount of support for each child demonstrates that the circuit court did not consider that Nicholas suffers from Down's Syndrome and obviously has exceptional special needs. Although I agree that Nicholas clearly has exceptional special needs, I disagree with the majority's conclusion that the trial court did not adequately consider them.

As noted by the domestic relations commissioner, when the combined gross income of divorced parents exceed the highest level set out in the child support guidelines, the court may not simply extrapolate the guidelines upward to calculate the amount of support owed. Downing v. Downing, Ky. App., 45 S.W.3d 449, 457 (2001). Rather, the court must look at the actual and reasonable needs of the children. Clearly, Nicholas's condition is a valid factor to consider in setting the amount of his support. KRS 403.211(3)(g). In addition, Phillip's income may be considered to determine whether any claimed expenses are reasonable under the circumstances. Downing, 45 S.W.3d at 457.

But in setting child support above the guidelines, the focus of the proof must be on a showing of what the children's reasonable needs and expenses are. In this case, Kimberly



introduced an exhibit concerning her expenses and the expenses of the children. The commissioner based his child support recommendation on those claimed expenses. Kimberly does not argue that the commissioner improperly disregarded any of the expenses which she claimed for Nicholas. Furthermore, the trial court also ordered Phillip to be responsible for the children's health insurance and unreimbursed medical expenses in addition to his child support obligation. Under these circumstances, I cannot agree with the majority that the trial court abused its discretion in setting the child support for Nicholas. Accordingly, I would affirm this aspect of the trial court's judgment.

BRIEFS FOR APPELLANT:

Gordon J. Dill, Jr.  
Ashland, Kentucky

BRIEF FOR APPELLEE:

Phillip Bruce Leslie  
Greenup, Kentucky