

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000802-MR

CHARLES A. DUVALL

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE PAUL W. ROSENBLUM, JUDGE
ACTION NO. 02-CI-00085

LISA A. MORETON-DUVALL AND
WYNTER RENEUX COLLINS

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND KNOFF, JUDGES.

COMBS, CHIEF JUDGE: Charles A. Duvall has appealed from orders of the Oldham Circuit Court granting in part the post-decree motion of his former-wife, Lisa A. Moreton-Duvall, for enforcement of the parties' property settlement agreement and awarding her attorneys' fees. Having concluded that the trial court correctly applied the law and that it did not abuse its discretion, we affirm.

Charles and Lisa were married on May 31, 1986. Three minor children were born of the marriage: Austin T. Duvall, born May 10, 1987; Stuart E. Duvall, born December 23, 1990; and Zachary M. Duvall, born October 19, 1994. At the time of the parties' separation, Charles was forty-one years of age and worked as a manager for United Parcel Service. He earned approximately \$115,000.00 per year. Lisa was thirty-eight years of age and was self-employed in a custom, executive-style home construction firm. Her annual earnings varied between \$25,000.00 and \$96,000.00.

Lisa filed a petition for dissolution of marriage on February 7, 2002. The parties agreed early in the proceedings that they would share physical and legal custody of their children. However, extensive discovery was undertaken with respect to establishing their net worth, annual income, financial needs, and child support obligations.

On January 2, 2003, following a thorough and prolonged evidentiary hearing, the court's Domestic Relations Commissioner (DRC) entered her recommendations with respect to Lisa's request for temporary maintenance, child support, and an advancement of attorneys' fees. The Oldham Circuit Court entered an order adopting those recommendations. It awarded Lisa \$1,500.00 per month in temporary maintenance but denied her request for temporary child support and attorneys' fees.

In late January 2003, the parties agreed to mediate the remaining issues. After several days of mediation failed to resolve the differences, Charles filed a motion for a trial date. Another evidentiary hearing was held, and a decree of dissolution was entered on June 2, 2003.

On June 27, 2003, without the direct participation of their attorneys, the parties entered into a lengthy property settlement agreement.¹ As to the custody of their children, the parties agreed to continue their 50/50 timeshare arrangement. They affirmed an equitable division of their real and personal property and agreed that Charles would pay monthly maintenance of \$600.00 to Lisa for a period of one year.

With respect to their income tax returns, they agreed to amend their separate 2001 returns in order to file a joint return for that year. They identified a mutually acceptable tax-preparer. They agreed to file separate income tax returns for the tax year 2002 and determined that Lisa would claim two of the children as dependents on her income tax return and that Charles would claim one on his. The agreement provided that "[t]hereafter, the parties will follow the dependency deduction schedule set forth herein." Finally, addressing their tax obligations, the parties agreed as follows:

¹Because Lisa had acted on her own, her attorneys immediately filed a motion for leave to withdraw as counsel. The motion was granted by order of the court entered July 21, 2003.

The parties each agree to pay taxes on and accept liability for one-half (1/2) of the sale of all UPS stock in 2002 equaling 10,488 shares. The parties each agree to pay taxes on and accept liability for one-half (1/2) on all of the dividends paid in 2002 from the UPS stock.

Property Settlement Agreement Section V, paragraph D.

The court entered an amended decree of dissolution incorporating the provisions of the property settlement agreement on July 21, 2003. Lisa remarried on September 22, 2003, and Charles's maintenance obligation was terminated by the court's order of October 10, 2003.

On January 14, 2004, Lisa filed a motion requesting that Charles be ordered to comply with specific portions of the parties' property settlement agreement.² In her motion, Lisa noted that 10,488 shares of UPS stock had been sold by the parties during 2002. The anticipated tax liability on the sale had totaled \$123,000.00. Two estimated tax payments totaling \$60,000.00 were made from the sale of the stock. The first installment of \$30,000 had been paid on March 24, 2002, and the second \$30,000 on June 14, 2002. Court Order of April 6, 2004, p.6. (Appendix C of Appellant's brief.) While both the tax liability and the pre-payment of tax had been equally divided between the parties under the terms of their property settlement agreement, Lisa complained that Charles had taken credit for the

² Lisa was represented in this motion by her former attorneys.

entire \$60,000.00 tax pre-payment on his separate 2002 tax return. As a result, Lisa had received a notice from the Internal Revenue Service of an underpayment of taxes totaling \$30,000.00. In addition, she had been assessed penalties and interest in the amount of \$2,354.88.

Lisa requested that Charles be required to execute an IRS Form 2848 in order to re-allocate to her tax return one-half of the \$60,000.00 pre-payment. Lisa also petitioned that she be reimbursed for one-half of the fees incurred for preparation of the couple's QDRO (pertaining to the distribution of Charles's UPS retirement benefits); that she be awarded one-half of the value of a liquidating distribution paid to Charles as a shareholder in Overseas Partners, LTD ("OPL"), a Bermuda company; and that she be awarded attorneys' fees and costs.

Charles argued that each provision of the property settlement agreement had been meticulously negotiated and that the omission of terms relating to the tax pre-payment was intentional. He denied that the funds derived from OPL were secreted or mishandled in any way or that he was responsible for any part of the fees incurred for preparation of the QDRO. Finally, Charles argued that an award of attorneys' fees to Lisa would be unjust in light of her separate estate of more than one million dollars.

In its order entered February 10, 2004, the court concluded as follows:

This Court finds that the respondent [Charles] was not entitled to claim the entire \$60,000.00 tax prepayment on his separate 2002 tax return. The Property Settlement Agreement clearly provides that each party agrees to pay taxes on and accept liability for one-half (1/2) of the sale of all UPS stock in 2002 for these 10,488 shares.

* * * * *

The Court finds that the petitioner [Lisa] is entitled to recover one-half (1/2) of the OPL check in the sum of \$6,562.00. This Court specifically finds that [Charles] violated the Order entered by this Court on February 20, 2002 by negotiating this check without obtaining Court permission to do so. The Court further finds that [Charles] failed to disclose the receipt of this check. . . . In addition, the Property Settlement Agreement executed by the parties provides that the parties have equally divided the OPL stock. In fact, [Lisa] did not receive one-half (1/2) of the \$6,562.00 representing liquidation of a portion of this OPL stock.

(Appendix A of Appellant brief, pp. 2-3) Although the Court denied Lisa's request to charge Charles for one-half of the costs associated with the preparation of the QDRO, it awarded her \$1,000.00 toward payment of her attorneys' fees.

Charles then filed a motion to alter, amend, or vacate the court's order pursuant to the provisions of CR³ 59.05. In an

³ Kentucky Rules of Civil Procedure.

order entered March 8, 2004, the court directed the parties to answer a series of specific questions pertaining to the sale of the UPS stock in 2002. They responded by way of extensive memoranda and exhibits.

In an order entered April 7, 2004, the Oldham Circuit court modified its previous findings of fact but essentially reiterated its initial conclusions of law. The court noted as follows:

. . . [T]he source of the \$60,000.00 paid as estimated tax payments came from the sale of the 10,488 shares of UPS stock, clearly a marital asset. The Court further notes that in construing contracts, the Courts must attempt to arrive at the intention of the parties as expressed in the instrument as a whole and in so doing consider the subject matter of the contract, the situation of the parties and the conditions under which the agreement is written. See LaFevers v. LaFevers, Ky. App., 255 S.W.2d 985 (1953). This Court further notes that an estimated tax, like taxes that are withheld from wage employees, are payments made to the Federal government pursuant to the Internal Revenue Code in fulfillment of an individual's tax liability. They are both methods of collecting the income tax. The payment of estimated income taxes is considered payment to an account to be used toward the income tax liability imposed by federal statute. Unlike a tax refund, the parties are not entitled to the use and benefit of the money as the money belongs to the United States Treasury.

This Court finds that the respondent was not entitled to claim the entire \$60,000.00 tax prepayment on his separate 2002 tax return. It is abundantly clear that each party to

the marriage would incur tax liability based on the sale of the stock in 2002 when they filed their separate tax returns for 2002. The Court rejects the respondent's attempt to draw a distinction between the allocation of "tax payment" and "tax liability." The "liability" referenced in the Property Settlement Agreement and to be shared equally is the tax liability for the 2002 sale of the stock. To the extent the payment of the estimated taxes arising from the sale of the UPS stock in 2002 is considered payment to an account to be used toward the income tax "liability" imposed by federal statute, then the property Settlement Agreement in this case which specifically provides that the parties accept the tax liability equally must be construed to allow the credit for those estimated taxes to be shared equally. [Charles] cannot deny that [Lisa] would incur tax liability resulting from the sale of the 10,488 shares of UPS stock in the calendar year 2002. It logically follows that the parties must share equally in the credit for the estimated taxes which were paid from proceeds of the sale of the 10,488 share of UPS stock, a marital asset of the parties.

(Appendix C of Appellant's brief, pp. 3-4.) In light of the additional work occasioned by Charles's motion to amend or vacate, the court increased the award of fees to Lisa's attorneys to \$2,000.00. This appeal followed.

Charles argues that the trial court erred by modifying the terms of the couple's property settlement agreement and that the error resulted in an inequitable distribution of the marital assets. He also claims that the court erred by granting Lisa's attorneys' fees. We shall address each contention in turn.

Charles contends that the trial court erred by construing the terms of the couple's property settlement agreement so that his pre-payment of the federal income taxes associated with the sale of the UPS stock in 2002 inured disproportionately to Lisa's benefit. In essence, Charles argues that while the parties agreed to accept liability for their share of the taxes on the sale of the stock in 2002, his share was the **pre-paid share**. He maintains that:

The Property Settlement Agreement did not allocate Chuck's pre-settlement estimated tax payment - only the tax liability. Elsewhere in the settlement, Lisa was awarded other assets which adequately compensated her for the fact that Chuck received the tax prepayment as part of his share of the marital estate.

(Appellant's brief, p. 3.)

The interpretation of this settlement agreement presents a question of law. First Commonwealth Bank of Prestonsburg v. West, 55 S.W.3d 829 (Ky.App. 2000). Therefore, we review this issue *de novo*.

In their agreement, the parties agreed to divide evenly the tax liability incurred as a result of the sale of the UPS stock in 2002. If they had intended to divide between them the balance of the outstanding tax liability associated with the sale of the stock, the agreement could have so stated explicitly. If they had intended that Lisa alone would pay

taxes on the remaining tax bill -- with Charles alone to receive the benefit of the pre-payment, the agreement could have reflected that intention. The trial court interpreted the agreement to mean that the parties expressly intended to accept the tax liability in even proportions and to divide between them the \$60,000.00 in pre-payment toward the total liability of \$123,000. We agree. In unambiguous language, their property settlement agreement provided as follows:

The parties each agree to pay taxes on and accept liability for one-half (1/2) of the sale of all UPS stock in 2002 equaling 10,488 shares. The parties each agree to pay taxes on and accept liability for one-half (1/2) on all of the dividends paid in 2002 from the UPS stock.

(Appendix D of Appellant's brief, p. 16.)

We shall next consider the trial court's findings of fact with respect to the liquidating distribution of the OPL stock. We review factual findings under the clearly erroneous standard. As we stated in Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky. App. 2002):

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." A factual finding is not clearly erroneous if it is supported by substantial evidence. "Substantial evidence" is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. [Footnotes omitted].

If the court's factual findings are supported by substantial evidence, they must be affirmed.

In her motion, Lisa contended that Charles had failed to disclose his receipt of a liquidating distribution of OPL stock in April 2003 in the amount of \$6,562.00. She indicated that Charles had negotiated the check on or about June 25, 2003, and that he had deposited it into the Republic Bank account.

The court made the following findings:

The respondent's [Charles's] affidavit executed herein on March 23, 2004 addressed the issue of the OPL check in the sum of \$6,562.00. With respect to this OPL check, respondent's affidavit states as follows: "I cannot remember whether I told her I deposited it into my Republic Bank account, but that is what I had been instructed to do for safekeeping and for keeping a paper trail."

The check for \$6,562.00 represented a liquidating distribution in the amount of \$2.00 per share, which OPL paid on April 9, 2003 to shareholders of record on March 28, 2003. The distribution arose from the ownership by the parties of OPL stock, which the parties divided equally under the property settlement agreement. Allowing the Respondent to claim the entire distribution would violate the clear intention of the agreement.

This Court concludes that the petitioner [Lisa] was not advised by the respondent that the OPL check in the sum of \$6562.00 was deposited into the Republic Bank account. This Court further finds that the petitioner is entitled to recover one-half (1/2) of the OPL check in the sum of

\$6,562.00. This court further finds that the respondent violated the Order entered by this Court on February 20, 2002 by negotiating this check without obtaining court permission to do so. In addition, it is most significant that the Property Settlement Agreement executed by the parties contains the following language regarding the OPL stock:

OPL STOCK - The parties have equally divided the husband's OPL stock between them, by receipt number, from the most recent statement available on the date of implementation. Should any dividends have been paid on this stock from the date of the parties filing for divorce, said dividends will also be divided equally. This transaction has been implemented pursuant to the Order of the Court. **Each party shall be solely responsible for any taxes associated with their respective dividends.**

The Court concludes that [Lisa] did not receive one-half (1/2) of the \$6,562.00 representing a portion of this OPL stock. Accordingly, the Court orders that the respondent shall pay the petitioner the sum of \$3,281.00 plus interest ...

Order of April 6, 2004, pp. 4-6. (Appendix C of Appellant's brief.) (Emphasis added). Based upon the express provisions of the parties' property settlement agreement and the evidence of record, we hold that the factual findings of the trial court were supported by substantial evidence and that it correctly interpreted the agreement.

Finally, Charles claims that the court erred by granting Lisa's attorneys' fees. KRS⁴ 402.220 provides as follows:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceedings under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceedings or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

In determining that Charles should pay Lisa's attorneys' fees, the court expressly stated that it had considered the provisions of KRS 403.220. The court's award of attorneys' fees was supported by the law and the facts, and we find no abuse of discretion. Sexton v. Sexton, 125 S.W.3d 258 (Ky. 2004). In Gentry v. Gentry, 798 S.W.2d 928, 938 (Ky. 1990), the Supreme Court summarized succinctly the rationale for providing relief on this point: "[O]bstructive tactics and conduct, which multiplied the record and the proceedings," are proper considerations justifying "both the fact and the amount of the award."

The order of the Oldham Circuit Court is affirmed in all respects.

⁴ Kentucky Revised Statutes.

ALL CONCUR.

BRIEF FOR APPELLANT:

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