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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001691-MR

JAMES A. BERGER APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, SPECIAL JUDGE
ACTION NO. 99-CI-00930

DENISE R. BERGER (N/K/A MENKE)
AND ROBERT W. CARRAN, HER ATTORNEY APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; PAISLEY, SENIOR JUDGE.[1]

McANULTY, JUDGE: In this dissolution of marriage case, James A. Berger (Jimmy) claims that the trial court erred in (1) valuing certain assets and (2) awarding attorney's fees and costs. Because we conclude that the trial court's valuation was not clearly contrary to the weight of the evidence, and the trial court did not abuse its discretion in ordering Jimmy to pay a

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

portion of his former wife’s attorney’s fees and costs, we affirm.

Jimmy and Denise Menke (formerly Denise Berger) (Denise) married on December 15, 1990. The marriage was Jimmy’s second and Denise’s first. Jimmy and Denise had no children together, but Jimmy did have children from his previous marriage.

During the marriage, Denise worked as a self-employed interior designer, and Jimmy was the part owner/agent of an insurance business. Specifically, he owned one-fifth of the shares of the Chas. H. Bilz Insurance Agency, Inc. (the Bilz Agency). And he worked for the Bilz Agency as an insurance agent, although Jimmy, as opposed to the Bilz Agency, owned his book of business. A book of business is the industry term for the customer list served by the agency or, in Jimmy’s case, the agent, and consists of the customer name and contracts and expiration dates that are the source of the commissions received by the agents. In its early findings, the trial court found that Jimmy’s earning capacity was $260,000 per year, and Denise’s earning capacity was $60,000 per year. These findings are not challenged in these proceedings.

Jimmy and Denise separated on May 5, 1999, and Denise filed a petition for dissolution one week after the separation. At the time, Denise was 32 years of age and Jimmy was 41. Four months after she filed her petition, Denise made a motion for a bifurcated divorce. The trial court issued the decree of dissolution on October 20, 1999, but reserved all issues of property distribution and debt division.

Over four years after the decree was issued, the trial court heard in two hearings conducted on December 5, 2003, and January 8, 2004, the issues of property distribution and debt division. After hearing the evidence of both parties, including the testimony from five experts as to the valuation of Jimmy's book of business, the trial court made preliminary findings of fact and conclusions of law and issued a post-decree judgment on January 23, 2004. Four months later, on May 24, 2004, the trial court rendered its final judgment and decree of dissolution, from which Denise filed a motion to amend and Jimmy filed a motion for a new trial, to alter, amend or vacate the decree and judgment, or alternatively, to amend the findings or make additional findings.

Jimmy's motion pertained primarily to the trial court's valuation of his book of business and the award of attorney's fees and costs to Denise. In response to the motions, the trial court issued an order denying Jimmy's motion and granting Denise's motion by amending its final judgment and decree of dissolution to specify that Jimmy was solely responsible for any debt related to the valuation of his insurance business. Consequently, on appeal, the issues raised by Jimmy pertain to the valuation of his insurance business, the business debt and the award of Denise's attorney's fees and costs.

At this point, we turn to the testimony of the experts called by Jimmy and Denise to value Jimmy's book of business. By agreement of the parties, the marital increase in the fair market value of Jimmy's book of business was measured from December 31, 1990, to June 30, 1999.

We begin with Jimmy's experts -– Anna Shuherk, Charles Berger and Mark Wilcox. Anna Shuherk is the Vice President of Fament, Inc., a consulting service that specializes is servicing the insurance industry. She had particular experience with the Bilz Agency as it had hired her in 1998 to conduct an appraisal of the value of its stock. To determine the value of the agency's stock, she valued the Bilz Agency's book of business by multiplying the agency's annual premiums by one, then adding a nominal amount for hard assets.

Consistent with her 1998 appraisal of the Bilz Agency, as to the value of Jimmy's individual book of business, Shuherk opined that it had a value of one times annual premiums. In addition, Shuherk considered a clause in Jimmy's employment contract with the Bilz Agency that stated that Jimmy would not be able to sell his book of business unless and until he settled his account receivables. (Jimmy refers to his account receivables as his “bad debt” or unpaid premiums). In other words, in order for Jimmy to actually own his book of business, he must pay to the agency any unpaid premiums owed by his customers.

Shuherk valued Jimmy’s book of business in 1990 at $187,928.82, which number reflects a reduction of $471.18 to account for Jimmy’s bad debts in that year. Shuherk valued Jimmy’s book of business in 1999 at $258,365.47, which number reflects a reduction of $118,534.53 to account for Jimmy’s bad debts in that year. The difference in the 1990 and 1999 valuations is $70,436.65, which is the marital value of Jimmy’s book of business.

Charles Berger is Jimmy’s brother and president of the Bilz Agency. He testified by deposition that a book of business is typically sold for a price equal to one to one and a half times annual commission.

Mark Wilcox is married to Jimmy’s sister, and also worked at the Bilz Agency at one point. At the time of hearings, however, he had sold his book of business to another local insurance agency and was currently working for that agency as an agent. He testified by deposition that the sale took place in 1999, and the terms of the sale were that Wilcox was paid one times his retained commissions from his book of business. In addition, Wilcox retained the right to service that book of business and receive commissions, as well as the right to receive commissions from any new policies that he wrote. And he was given the opportunity to buy agency stock at a discount.

In turn, Denise called two experts to value Jimmy's book of business -- Ariye Ginzburg and Steve Santen. Ginzburg used a multiple of Jimmy's pre-tax income as reported on his tax returns. He then used both a market and income approach to determine the increase in value. In his market approach, due to characteristics of Jimmy's agency as compared to the four similar companies selected for the appraisal, Ginzburg used a multiple of 6.8 and then applied a 20 percent premium to arrive at a 1999 value. As for the 1990 value, he used a multiple of 2.4 and then applied a 35 percent premium. Ginzburg's market approach yielded an increased value of $1,352,000.00, and income approach yielded an increased value of $725,000.00.

Denise's second expert was Steve Santen. He calculated the value of the Jimmy's book of business using a multiplier of 3.2 times earnings.

A couple of weeks after the hearings concluded, the trial court made written preliminary findings and conclusions. As to the value of Jimmy's book of business, the trial court found as follows:

As suggested by the court to the parties and counsel, on the record of the January 8, 2004 hearing, with respect to establishing a value for the husband’s individual books of business, the court was not persuaded by the calculations and testimony of the experts. The court finds and concludes from the evidence that the sale by Mr. Wilcox, while not identical to the question of evaluation herein, offers the best guidance for valuing the husband’s books of business. And, the value of those books of business is greater than Mr. Wilcox’s sale price, because Mr. Wilcox retained value in his business and received compensation in other forms. Further, the testimony indicates that such sales, similar to Mr. Wilcox’s, in this area, are typically for 1 to 1 ½ times net commissions.

With the above in mind, the court has concluded that the marital value of the husband’s books of business is arrived at by multiplying the difference between the husband’s earnings at the beginning of the marriage ($69,549.00) and the husband’s earnings at the end of the marriage ($212,469.00), for a difference of $142,920.00, by 3, which produces a value of the marital interest in this asset of $428,760.00. The court further concludes that all the rest and remainder of the interest in, and value of, the husband’s individual books of business is the husband’s non-marital property.

Based upon the court’s findings of fact and conclusions of law, as well as the entire record of this case, the court enters the following Judgment resolving all remaining issues herein

. . .

8. The marital portion or value of the husband’s individual books of business, with a value of $428,760.00, is awarded equally to the husband and the wife, and all the rest and remainder of the husband’s individual books of business shall be

> restored to the husband as his non-marital property.

In the May 24, 2004 final judgment and decree of dissolution, the trial court ordered Jimmy to pay Denise the sum of $214,380.00, which was one-half the value of the book of business. Later, in response to Denise's motion to amend, the trial court further ordered as follows:

> With respect to the Petitioner's request regarding any debt related to Respondent's book of business, it is the judgment of the Court that such debt, if any, is the sole responsibility of the Respondent. The Court has previously made a part of the record of this case, the Court's Findings of Fact and Conclusions of Law with respect to those debts or bad debts, if any, and same shall not be repeated herein. Simply stated, the Respondent's repeated failure to provide court-ordered discovery regarding those bad debts precludes him from now claiming any benefit or value in an allocation of the marital estate. Additionally, these debts are under the control and management of Respondent, and Petitioner has no ability to protect her interest with respect to those debts, if any.
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> . . .
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> IT IS THEREFORE ORDERED AND ADJUDGED as follows:
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> 1. The Court's Final Judgment and Decree of Dissolution is amended to the extent that Respondent, James A. Berger, shall be solely responsible for, and hold Petitioner harmless therefrom, any debt related to his book of business . . .

Jimmy argues in this appeal that the trial court committed three errors in arriving at the value of Jimmy's book of business. First, Jimmy contends that the trial court's finding of an increase in value during the marriage of Jimmy's individual book of business as $142,920.00 based upon earnings was inconsistent with the evidence presented at the hearings because Jimmy had earnings unrelated to his commissions in the form of officer compensation and bonuses. Second, Jimmy believes that the trial court's use of the multiplier of three times his earnings was without any evidentiary basis and was, therefore, arbitrary. Third, Jimmy asserts that the trial court erred in failing to reduce the marital value of Jimmy's book of business by his bad debts. In the alternative, Jimmy argues that the trial court erred in failing to give him a credit and offset in the final division of marital assets for his bad debt since it represented marital debt that had been accumulated over the term of the marriage and which was paid by him with post-decree non-marital funds.

In addition to the arguments pertaining to the trial court's valuation of the book of business, Jimmy argues that the trial court erred in awarding Denise $25,000.00 in attorney's fees and costs. Finally, Jimmy contends that the trial court failed to re-open the proof to hear evidence concerning the tax consequences associated with the sale of an asset, which according to the trial court's decision, appreciated in eight years by $428,760.00.

We begin our analysis of the issues raised by Jimmy by addressing his arguments pertaining to the trial court's method of calculating his book of business. Jimmy argues that the trial court's use of the multiplier of three times Jimmy's earnings was without any evidentiary basis and was, therefore, arbitrary. To the contrary, the record shows that the parties, through expert testimony, adduced substantial conflicting evidence as to valuation of the book of business, and the trial court assigned a value within the parameters of this evidence. A trial court's valuation of marital property in a divorce action will not be disturbed on appeal unless it is clearly contrary to the weight of the evidence. See Underwood v. Underwood, 836 S.W.2d 439, 444 (Ky. App. 1992), *overruled in part on other grounds by* Neidlinger v. Neidlinger, 52 S.W.3d 513 (Ky. 2001). In this case, we cannot conclude that it was, especially when we consider the fact that Shuherk, Jimmy's own expert, acknowledged in her report that appraisals of this type are recognized for being "more of an art than science."

Having concluded that the multiplier of 3 selected by the trial court fell within the range of competent testimony, we will not further evaluate the earnings figures selected by the trial court in its valuation. After reviewing Jimmy's motion filed after the trial court made its findings and conclusions, we conclude that this argument is unpreserved. Notwithstanding the preservation issue, the trial court took the 1990 and 1999 earnings figures from supporting documentation in Shuherk's report. The numbers ($212,469.00 in 1999) and ($69,549.00 in 1990) represent 50 percent of the actual commission generated from the accounts owned and controlled by Jimmy in the respective years. To the extent the figures were calculated by Jimmy's expert, they cannot be contrary to the evidence.

We move to the issues pertaining to the bad debt. Jimmy failed to produce -- in spite of several court orders -- any documents in support of his bad debt claim until December 11, 2003, when all opportunity had passed for Denise to cross-examine Jimmy's witnesses. Consequently, the trial court decided that it would consider Jimmy's bad debt claims only as his bare, unsupported assertions that he had bad debt from his business and that he repaid the debt after the divorce. In this appeal, Jimmy does not defend his inaction or even acknowledge his responsibility for the trial court's rulings pertaining to the bad debt.

Rulings regarding evidentiary matters are within the sound discretion of the trial court. Accordingly, our standard of review is abuse of discretion. See Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 577 (Ky. 2000). Under the circumstances of this case, the trial court did not abuse its discretion in issuing an order refusing to allow Jimmy to support his bad debt claim. See CR 37.02(2)(b). Moreover, the trial court did not err, under the circumstances, in refusing to give Jimmy a credit and offset in the final division of marital assets for his bad debt. See id.

We now turn to the award of attorney's fees and costs. In the post-decree judgment issued January 23, 2004, the trial court ordered as follows:

> Because of the disparity in income of the parties, and because of the difficulty of discovering all of the husband's financial information, which the court found was principally a result of the husband's lack of effort, the husband shall pay to the wife the sum of $25,000.00 as a partial contribution to the wife's attorney fees and expenses, and the husband shall be entitled to a credit or set-off against this amount for the $10,000.00 he has previously advanced for the wife's expert witness fees.

Jimmy contends that the trial court erred in awarding Denise $25,000.00 in attorney's fees and costs because (1) Denise's income and resources were adequate to pay for her litigation expenses; (2) Denise's huge expenditure of costs was unnecessary and wasteful; and (3) the trial court had also awarded Denise approximately $12,000.00 in temporary maintenance and health insurance.

In assessing attorney's fees and costs against Jimmy, the trial court found disparity in the incomes of Jimmy and Denise. Under KRS 403.220, no more is required. See Gentry v.

Gentry, 798 S.W.2d 928, 937 (Ky. 1990). Clearly, the trial court had the authority to award reasonable attorney's fees and costs to Denise.

In addition to the disparity in income, however, the trial court considered the difficulty that Denise encountered in obtaining Jimmy's financial information and awarded attorney's fees and costs based in part on Jimmy's conduct and tactics. The amount of an award of attorney's fees is committed to the sound discretion of the trial court, which is in the best position to observe obstructive conduct and which must be given wide latitude to sanction or discourage such conduct. See id. at 938. There is no abuse of discretion in requiring Jimmy, the party whose conduct caused the unnecessary expense, to pay for it. See id.

Finally, Jimmy argues -- with no statement of where and how this issue was preserved for review or citation of authority -- that the trial court erred in failing to re-open the proof to receive evidence concerning the tax consequences of the sale of an asset. Consequently, his unpreserved and unsupported argument merits no consideration by this Court.

For the foregoing reasons, the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Beverly R. Storm Robert L. Raper Arnzen, Wentz, Molloy, Laber & Storm, P.S.C. Covington, Kentucky	Robert W. Carran Taliaferro, Mehling, Shirooni, Carran & Keys, PLLC Covington, Kentucky