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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002188-MR

LINDA PEGRAM HELTON — APPELLANT

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE JEFFREY M. WALSON, JUDGE
ACTION NO. 06-CI-00120

EPHRAIM WOODS HELTON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND MOORE, JUDGES, AND GUIDUGLI,[1] SENIOR JUDGE.

MOORE, JUDGE: Linda Pegram Helton appeals from a decree of dissolution of marriage entered by the Boyle Circuit Court in which the trial court made a distribution of marital property and ordered maintenance. On appeal, Linda argues that the trial court failed to (1) correctly value the goodwill of Ephraim Woods

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

Helton's law practice; (2) determine that Ephraim dissipated marital assets; (3) adhere to the parties' joint stipulations; (4) determine an appropriate maintenance award; and (5) properly grant Linda's request for attorney's fees. After a careful review of the record, we affirm

I. FACTUAL AND PROCEDURAL BACKGROUND

In this dissolution action between Linda Pegram Helton and Ephraim Woods Helton, the Boyle Circuit Court, after considering all evidence and testimony, ordered distribution of certain marital property and maintenance. Thereafter, the trial court issued a decree of dissolution of the marriage.

Ephraim owned a successful law practice, and the trial court concluded his income allowed the parties to enjoy a luxurious lifestyle. Linda did not have any significant employment during the duration of the marriage but contributed to the marriage by assisting in caring for Ephraim's children from a previous marriage. While Linda owned significant property, was educated, and was also highly employable, the trial court found that her lack of significant employment during the marriage warranted maintenance for three years.

The trial court found that the amount of Linda's reasonable monthly expenses was $5,362. At the time of trial, Linda generated a monthly income of $1,277 from employment and at least $1,000 per month from other assets; therefore, the trial court awarded her $3,085 per month in maintenance to meet her reasonable needs. The trial court, however, provided a $12,780 credit for the last year of the maintenance obligation because Linda received $25,560 more marital

property than Ephraim in their joint stipulations. The trial court denied Linda's request for retroactive maintenance because Ephraim financially provided for Linda and maintained all marital debts during the separation.

Linda claimed that Ephraim dissipated marital assets after the parties separated because he traveled extensively with other women during the parties' separation. However, the trial court found that no specific marital asset was significantly diminished to support the claim of dissipation because Ephraim continued to work, spent funds from assets that were previously liquidated by the parties' agreement, and incurred credit card debt for which he agreed to be solely responsible.

The trial court also considered whether any goodwill existed in Ephraim's law practice. While Linda's expert witness testified that the fair market value of the goodwill of the law practice was $161,000, Ephraim's accountant witness, and Ephraim himself, testified that the practice did not have valuable goodwill. The trial court considered testimony from attorneys who shared expenses and office space with Ephraim.

An attorney who shared expenses at Ephraim's office at the time of the hearing testified that the only money that he paid to Ephraim to join the firm was representative of the tangible assets of the practice. Another attorney, who had likewise shared expenses with Ephraim prior to becoming a judge, testified in his deposition that when the he left Ephraim's firm, he was not compensated for

any amount of goodwill. Furthermore, a veteran practitioner in the Danville area testified in his deposition that a law practice in that area could not have goodwill.

The trial court found that the law practice had no goodwill that increased its value to more than the worth of its tangible assets and receivables. The court further concluded that even if goodwill did exist in the practice, it was a non-marital asset that was built solely by Ephraim's efforts occurring almost entirely before the marriage.

Linda also sought an award of attorney's fees and presented evidence regarding the amount of these fees. Ephraim did not present any evidence regarding his attorney's fees. The trial court ordered that each party would be responsible for his/her own attorney's fees.

II. ANALYSIS

A. Whether the trial court erred in valuing Ephraim's law practice

Linda's first assignment of error regards the trial court's valuation of Ephraim's law practice by assigning the value of goodwill to it at zero or as having existed prior to the parties' marriage. Because substantial evidence exists to support the trial court's decision, we affirm.

Our analysis begins with *Heller v. Heller*, 672 S.W.2d 945, 947 (Ky. App. 1984), wherein the Court held that the goodwill contained in a business should be considered when arriving at the value of a professional practice. After *Heller*, the Court in *Clark v. Clark*, 782 S.W.2d 56, 59 (Ky. App. 1990), defined goodwill as "in essence . . . the expectation that patrons or patients will return

because of the reputation of the business or firm. . . . Goodwill has also been defined as the excess of return in a given business over the average or norm that could be expected for that business." (Citations omitted). While courts have accepted different methods or reasoning for valuing goodwill, "[t]here is no definitive rule or best method for valuing [it]." *Id*. at 60 (citing *Poore v. Poore*, 331 S.E.2d 266 (N.C. App. 1985); *Hurley v. Hurley*, 615 P.2d 256, 259 (N.M. 1980)). "The determination of goodwill is a question of fact rather than law, and each case must be determined on its own facts and circumstances." *Id.* Our Court will not set aside the valuation and findings of fact of the trial court unless they are clearly contrary to the weight of the evidence. *Id.* at 58 (citations omitted).

To prove that Ephraim's law practice had goodwill value, Linda called Calvin D. Cranfill, a Certified Public Accountant, to testify as an expert. Cranfill used the capitalization of excess earnings approach and valued Ephraim's practice at $161,000. His data was based on information sources from the Southern United States area and did not include data from the Danville area. The trial court recognized the capitalization of excess earnings approach method as acceptable in Kentucky but did not rely on it to value Ephraim's practice nor the goodwill associated with it.

For his case, Ephraim called Glyn D. Kerbaugh, Jr., a Certified Public Accountant, to testify regarding the value of the law practice. Kerbaugh testified that the practice did not have valuable goodwill. He placed a value on the practice of $37,026, based on its tangible assets and receivables.

In addition to Kerbaugh, Ephraim testified and submitted the deposition testimony of several attorneys regarding the value of his law practice. Two attorneys, who had practiced in the firm with Ephraim and shared expenses with him, testified that they were not partners with him but only shared office space and expenses with Ephraim. Although Ephraim had the practice set up before either attorney worked out of his office, neither paid for any goodwill. One attorney, who had left the firm, testified that he was not compensated for goodwill when he left. The other attorney testified that he did not expect to receive any compensation if he leaves. This attorney also testified that he did not believe that any attorneys in firms similar to Ephraim's in a small town like Danville had goodwill. Rather, the clients followed a particular attorney, not a firm. Additionally, these attorneys testified that Ephraim's practice was made up of criminal defense, domestic and personal injury, areas of law that traditionally do not have repeat clients. Ephraim testified that he never considered the practice to have goodwill.

Beyond Ephraim and the attorneys who had practiced out of his office, another attorney testified; he had been in practice in the Danville area for nearly forty years. He did not believe that in a small town like Danville firms could have goodwill. Rather, he believed that individual clients followed particular attorneys, not firms. He was not aware of any firms in the Danville area that had goodwill value.

Ephraim's testimony and the witnesses he presented on his behalf regarding the value of the goodwill in a small town law practice and the historical way in which the practice valued itself was not rebutted by Linda. Her expert's calculations were based on data from the Southern United States. Consequently, the trial court was in the position to make a factual finding regarding the testimony it found more credible based on the circumstances surrounding this case. The trial court found that "substantial evidence has shown [that the business has not historically assigned any goodwill value to Ephraim's] law practice and the Court concludes that the practice therefore has no goodwill." This finding regarding the manner in which a practice has historically viewed itself is supported by *Gomez v. Gomez*, 168 S.W.3d 51, 56-57 (Ky. App. 2005). Accordingly, the trial court's determination that goodwill did not exist due to the historical way in which the practice valued itself is supported by substantial evidence and case law; consequently, we cannot disturb this factual finding on appeal.

B. Whether the trial court erred in determining that Ephraim did not dissipate marital assets

Linda next contends that the trial court erred in determining that Ephraim did not dissipate marital assets to fund vacations he took after the parties' separation. At trial, Linda offered proof that Ephraim traveled extensively without her during their separation. Ephraim failed to present proof regarding the expenses associated with these travels in response to Linda's interrogatories. At trial, Linda testified that she researched the costs of these trips and produced a spreadsheet

identifying the median range of hotel costs and travel expenses. According to her research, the total hotel costs for the trips ranged from $119,215 to $175,263, and Ephraim's travel expenses were $26,885. These costs did not include meals, recreation or other amenities. Because Ephraim (1) failed to answer Linda's interrogatories regarding his travel after the separation; (2) failed to produce any documentation at trial; and (3) agreed with several of Linda's estimates, the trial court ruled that in the absence of competing documentation, it would use Linda's figures to determine the amounts Ephraim spent on travel post separation.[2]

In the trial court's finding of fact on dissipation, it found

> [t]he total cost of the accommodations for these trips, says the Petitioner, was between $119,215 and $175,263. Despite his extravagant post-separation travel, the Respondent not only continued to work and use funds from assets previously liquidated by agreement of the parties and credit cards for which the Decree makes him solely responsible, he has continued, through his work, to fund a quite comfortable lifestyle for the Petitioner. The Court can find no specific marital asset that was significant diminished so as to support the claim of dissipation.

"The 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*, 974 S.W.2d 498, 500 (Ky. App. 1998) (citing *Robinette v. Robinette*, 736 S.W.2d 351, 354 (Ky. App. 1987)). As the Court in *Brosick* held:

[2] Ephraim did not cross appeal this finding.

> We recognize that KRS 403.190(3) creates a presumption that all property acquired during the marriage is marital. This presumption must be rebutted by clear and convincing evidence. *Browning v. Browning*, Ky.App., 551 S.W.2d 823, 825 (1977); *But see, Underwood v. Underwood*, Ky., 836 S.W.2d 439, 441-42 (1992). However, we do not believe that the clear and convincing evidence standard is necessary in dissipation cases. The concept of dissipation requires that a party used marital assets for a non-marital purpose. The spouse alleging dissipation should be required to present evidence establishing that the dissipation occurred. Once the dissipation is shown, placing the burden of going forward with the evidence on the spouse charged with the dissipation is reasonable because that spouse is in a better position to account for these assets. This analysis pertaining to the shifting of the burden of going forward with the evidence, using the preponderance of the evidence standard, is in accord with the practice implicitly followed in *Barriger v. Barriger*, [514 S.W.2d 114 (Ky. 1974)].

974 S.W.2d at 502.

As the trial court in the case at hand found, Linda presented evidence that Ephraim spent a large sum of money in travel post separation. While this may be sufficient to raise a reasonable inference regarding the first *Robinette* standard,[3] the trial court failed to make a factual finding regarding the second standard in *Robinette, i.e.,* a clear showing of Ephraim's intent to deprive Linda of her proportionate share of the marital property.

Linda did not request a ruling from the trial court on this factual issue in compliance with Civil Rule (CR) 52.04. Consequently, there being no request for a ruling regarding the second standard of *Robinette*, we cannot remand for such

[3] Kentucky Revised Statute 403.190(3) creates a presumption that all property acquired during the marriage is marital.

a finding. Absent both standards in *Robinette* being met, Linda did not meet her burden of proving that a dissipation had occurred. *See Brosick*, 974 S.W.2d at 502 ("The spouse alleging dissipation should be required to present evidence establishing that the dissipation occurred.").

Alternatively, notwithstanding the CR 52.04 hurdle, Linda has not pointed this Court to evidence that Ephraim's travel was clearly intended to deprive her of her proportionate share of marital property, *i.e.*, in this case his income earned after the parties separated. Further, the trial court found that Ephraim paid substantial sums to Linda during the parties' separation; that a good portion of the funds spent on Ephraim's travel was paid by assets the parties previously agreed to split and by the credit card debt he accepted; and that while the parties were still living together, they both lived a luxurious lifestyle, including expansive travel. In light of these findings, we cannot find error with the trial court's ruling even if the CR 52.04 obstacle did not exist.

C. Whether the trial court erred by taking into account property and funds the parties divided pursuant to joint stipulations and whether it abused its discretion regarding its maintenance award

Linda next contends that the trial court erred because the findings, conclusions and decree it entered modified the parties' stipulations entered into the record without a finding that the agreement was unconscionable. She contends this was an abuse of discretion and should be overturned.

Linda complains that the parties' joint stipulations did not provide for the property valuation and maintenance adjustment by the trial court. In sum, the trial court selected "the assets not equally divided by the parties' stipulation" and concluded that Linda's portion exceeded Ehphraim's by $25,560.00. The trial court thereafter credited Ephraim for half of this amount, reducing Linda's award of maintenance by $12,780.

We disagree that the trial court's action amounted to a recalculation of the parties' agreement. Kentucky Revised Statute 403.200(a) allows the trial court, in making an award of maintenance to consider "[t]he financial resources of the party seeking maintenance, including marital property apportioned to him." Issues relating to maintenance are delegated to the sound discretion of the trial court. We will not disturb the trial court's determination on maintenance absent an abuse of discretion. *Bickel v. Bickel*, 95 S.W.3d 925 (Ky. App. 2002). Finding none regarding the trial court's reliance on property Linda received from the parties' joint stipulations in its maintenance determination, we affirm the trial court's decision on this matter.

Linda next argues that the trial court erred in its maintenance award in both amount and duration and by failing to award retroactive maintenance. The trial court found Linda's reasonable expenses to be $5,362 per month and that she generates a net monthly income of $1,277 from her current employment. Additionally, she generates at least $1,000 per month from her other assets, was

awarded significant marital property, and has a non-marital investment account totaling approximately $366,000.

Finding that Linda's income and assets left a deficiency in meeting her reasonable needs of $3,085 per month, the trial court ordered Ephraim to pay Linda $3,085 per month for three years. However, because Linda received more marital property than Ephraim, the trial court gave him a credit of $12,780 during the last year of the maintenance obligation. Accordingly, for the last twelve months of the obligation, Ephraim is to pay $2,020, rather than $3,085. The trial court did not award retroactive maintenance, finding that Ephraim paid substantial amounts to Linda during the parties' separation.

The trial court found that Linda "has significant property resources, is well educated, and is highly employable (and employed). . . ." She is a college graduate and had worked in marketing. She asked the trial court for $6,195 per month until she reaches the age of 62. She was 51 at the time the decree of divorce was entered and had substantial assets from the marriage, as well as non-marital assets.

An award of maintenance requires a showing that one spouse is unable to properly support herself or to maintain a similar standard of living to that which he or she enjoyed prior to the dissolution. *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003). It is well-settled in the Commonwealth that both the amount and duration of maintenance is within the sound discretion of the family court. *Russell v. Russell,* 878 S.W.2d 24, 26 (Ky. App. 1994); *see also Gentry v. Gentry,*

798 S.W.2d 928, 937 (Ky. 1990). We will not substitute our judgment for the trial court's and will not reverse absent an abuse of discretion by the trial court.

Based on the specific findings of the trial court, including the assets Linda received from the marriage, her considerable non-marital assets, her education level and background, we cannot find an abuse of discretion by the trial court regarding maintenance. Moreover, it is not our province to substitute our judgment for the trial court with regard to maintenance absent an abuse of discretion. Given the facts at hand, we find no error and affirm.

D. Whether the trial court erred in its decision regarding attorney's fees

Linda next assigns error to the trial court because it failed to award her over $60,000 in attorney's and expert's fees. Rather, the trial court held that each party was responsible for his or her own attorney's fees.

Kentucky Revised Statute 403.220 permits a family court to order one party in a dissolution proceeding to pay a reasonable amount for the attorney's fees of the other party "but only if there exists a disparity in the relative financial resources of the parties in favor of the payor." *Neidlinger v. Neidlinger,* 52 S.W.3d 513, 519 (Ky. 2001). We will not disturb the family court's decision concerning attorney's fees absent an abuse of the court's sound discretion. *Id*. A trial court has abused its discretion when it has acted arbitrarily, unreasonably or unfairly or if its decision was unsupported by sound legal principles. *Sexton v. Sexton,* 125 S.W.3d 258, 272 (Ky. 2004).

Linda actually received $25,560 more in marital assets than Ephraim, which the court ultimately offset in the maintenance award. Nonetheless, it awarded Linda over $100,000 in maintenance, and she had substantial non-marital assets and marital assets. It is probable that Ephraim has the ability to earn more money in the future than Linda. However, at the time the dissolution was entered, there was no showing that the relative assets of the parties were not similar and, to the contrary, may have even weighed in favor of Linda. Accordingly, we cannot find an abuse of discretion in the trial court's order regarding attorneys' fees.

ALL CONCUR.

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