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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001515-MR

RANDY DEAN STROUP

APPELLANT

v. APPEAL FROM HANCOCK CIRCUIT COURT
HONORABLE MIKE L. MCKOWN, JUDGE
ACTION NO. 07-CI-00085

CATHY DAWN STROUP

APPELLEE

OPINION
REVERSING, VACATING AND REMANDING

** ** * ** * ** *

BEFORE: CAPERTON, LAMBERT, AND NICKELL, JUDGES.

CAPERTON, JUDGE: Randy Dean Stroup appeals from the order and judgment of the Hancock Circuit Court wherein the court awarded forty-five percent of the parties' stock in their trucking business, First Class Services ("FCS"), to Cathy Dawn Stroup and awarded Cathy maintenance in the amount of \$3,800.00 per month for life or until she remarries or cohabitates. We agree with Randy that the

court erred in failing to find a value of the trucking company, FCS, prior to determining Cathy's award of maintenance, that an award of maintenance without valuing all the assets exceeded the trial court's discretion, and that the trial court erred in placing restrictions on the management of the corporation. Accordingly, we reverse, vacate and remand for further consideration by the trial court.

The facts that are relevant to this case may be briefly summarized.

The parties were married for over twenty years when Cathy filed for dissolution of the marriage in August of 2007. During the early years of the parties' marriage, both spouses drove tractor-trailers. In the late 1980s, Randy and his brother, Willie, formed and operated FCS.¹ The closely-held corporation was very successful in the 1990s and the parties lived exceptionally well. In the late 1990s, Randy and Willie began another joint venture, a river terminal, with the assets of FCS as collateral. Beginning in 2001, Randy and Willie began having conflicts. The tension culminated when Randy discovered that Willie had been mismanaging FCS. In March 2004, Randy sued Willie seeking, among other things, the appointment of a receiver.

Thereafter, Jim King, CPA, was appointed as receiver for FCS. In order to satisfy the creditors, Randy sold the river terminal, purchased the stock of FCS owned by Willie,² sold some assets of FCS, and borrowed the remaining funds from King Southern Bank. Thus, in 2005, Randy became the sole owner of

¹ Cathy has not worked meaningfully outside the home after the birth of the parties' children nineteen years ago.

² Willie had filed for bankruptcy.

FCS, which was heavily debt-laden, but still generating sufficient cash flow to pay its creditors on a current basis.

Throughout the next few years, FCS recovered. Then in 2008, the overall economic downturn of the economy and the loss of a large account caused FCS to lay off nineteen employees in 2008, all resulting in economic loss to FCS.³

At the hearing concerning the parties' marital estate, the court was presented four different expert valuations for FCS by King, David York, Terry Walker, and Dr. Shannon Pratt. Based on these facts and the evidence presented, the court found in its order and judgment of March 23, 2009, substantial problems with each expert's valuation. The court found that the probable value of FCS was somewhere between York's value of \$2,720,000 and Walker's value of \$1,256,000 and noted that when capital gains tax and the amount of the Shareholder's Accounts Receivable was factored in, FCS had minimal value. Thus, it concluded that the only method to ensure that both Randy and Cathy shared in the risk and potential profitability of FCS required the court to award Cathy a percentage of the FCS stock. The court noted that to order Randy to pay Cathy for the stock, given his and FCS's current financial difficulties, would push either FCS or Randy into insolvency. As such, the court declined to find a value on FCS.⁴

The court then proceeded to find that FCS was a marital asset and divided it in just proportions, with Randy awarded 55% and Cathy 45% of the FCS

³ In 2007 there were approximately 145 employees.

⁴ Randy made a motion for more definite findings concerning the value of the corporation, the court again declined to find the value of FCS.

stock. The court placed certain restrictions on Randy and FCS to protect Cathy. These restrictions required FCS to be audited by a CPA each year and for the report to be furnished to Cathy; that any dividends FCS paid be proportionately divided between the shareholders; that Randy cannot borrow money from FCS without loaning a proportionate amount to Cathy or obtaining her consent; that Randy's salary remain at its current rate unless Cathy approves an increase in writing; that the employee benefits Randy receives from FCS cannot exceed their current amount; and in the event that FCS has taxable income that flows to the shareholders, FCS will in some manner provide income to the parties with which to pay the income taxes on such income. After setting the restrictions, the court then turned to the issue of maintenance.

The court assessed Cathy's property as insufficient to support her needs, and found it uncertain whether the FCS stock will provide her with future income. The court determined that maintenance for life⁵ was appropriate in the amount of \$3,800, as the marriage was a long-term one and that Cathy had not worked beyond minimum wage in years. It is from this order and judgment that Randy now appeals.

⁵ Unless Cathy remarries or cohabitates with another adult not related to her by blood.

On appeal Randy makes numerous arguments⁶ which we believe to be more concisely presented as: 1) the trial court erred by not placing a value on the FCS stock and denying the motion for more definite findings concerning said value; 2) without a value placed on the FCS stock the trial court erred in its award of maintenance as it did not fully undertake the necessary assessment of the parties' respective assets; 3) the court erred by dividing the FCS stock without permitting Randy to pay Cathy for her share of the stock.

At the outset we note that a family court's findings of fact will not be set aside unless they are clearly erroneous. *See Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky.App. 2003). A factual finding is not clearly erroneous if it is supported by substantial evidence. Substantial evidence is evidence, when taken alone or in light of all the evidence, which has sufficient probative value to induce conviction in the mind of a reasonable person. *Id.* (Internal citations omitted). Questions of law are reviewed de novo. *See Western Ky. Coca-Cola Bottling Co. v. Revenue Cabinet*, 80 S.W.3d 787, 790 (Ky.App. 2001).

⁶ Randy specifically argues: 1) the family court erred by failing to find the value of FCS; 2) the family court should be instructed to consider the valuation testimony of King; 3) the failure of the family court to permit Randy to purchase 45% of FCS was an abuse of discretion; 4) this Court should remand this case to the family court for a determination of the expenses of the parties upon which the award of maintenance was based; 5) this Court should reverse the amount and duration of maintenance. Cathy counter-argues: 1) that the family court correctly awarded FCS to the parties by dividing the stock, the marital asset, in just proportions; 2) the court correctly rejected use of King's valuation; 3) the court properly placed restrictions on Randy's majority interest to protect Cathy's minority interest; and 4) the award of maintenance to Cathy is appropriate in terms of amount and duration. As we find dispositive the issue concerning the valuation of the FCS stock and the corresponding award of maintenance and are remanding this matter to the trial court for further proceedings, we decline to address Randy's remaining issues.

In addition, we note that in dividing marital property and debt equitably, a trial court has wide latitude, and absent an abuse of discretion we shall not disturb the trial court's ruling. *See Smith v. Smith*, 235 S.W.3d 1 (Ky.App. 2006), and *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001). Similarly, in maintenance awards, the trial court is afforded a wide range of discretion, which is reviewed under an abuse of discretion standard. *See Platt v. Platt*, 728 S.W.2d 542, 543 (Ky.App. 1987). Abuse of discretion implies arbitrary or capricious action or at least an unreasonable and unfair decision. *See Sherfey v. Sherfey*, 74 S.W.3d 777, 783 (Ky.App. 2002). With these standards in mind, we turn to the parties' arguments.

Randy first argues that the trial court erred by not placing a value on the FCS stock and denying the motion for more definite findings concerning said value. As the trial court repeatedly declined to assign a value to the FCS stock, the question before this Court is whether such an "omitted finding involves a matter which was essential to the trial court's judgment. As this involves a question of law, we need not defer to the trial court's conclusion that its findings were sufficient." *McKinney v. McKinney*, 257 S.W.3d 130, 134 (Ky.App. 2008) citing *Jarrett v. Jarrett*, 2006-CA-001557-MR, 2007 WL 2460730 (August 31, 2007). With this in mind we look to our jurisprudence.

KRS 403.190 requires the trial court to value the property of spouses in determining the disposition of property. Specifically, KRS 403.190 states:

(1) In a proceeding for dissolution of the marriage or for legal separation, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's property to him. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:

(a) Contribution of each spouse to acquisition of the marital property, including contribution 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.

Id. (emphasis added).

Moreover, in *Gaskill v. Robbins*, 282 S.W.3d 306 (Ky. 2009), our Supreme Court was presented the issue of valuation of a business; specifically, how to value goodwill of the business. In remanding the case back to the trial court to determine the value of Gaskill's business in light of its decision the Court noted:

The valuation of a business is complicated, often speculative or assumptive, and at best subjective.... Nonetheless, when a business is established during a marriage and is thus marital property, the trial court is required to fix a value and divide it between the spouses. To do this, a trial court must hear factual evidence, which generally will include expert testimony. If a court is to

arrive at a fair market value of a business, often stated as what a willing buyer will pay a willing seller, the court must have the means to answer at least the following questions a willing buyer would ask:

1. What can be earned from the business over a reasonable period of time? This value must then be reduced to present value, and includes the concept of transferable goodwill.

2. What is the value of the hard assets? This includes real estate, equipment, client lists, cash accounts or anything else the business may own or control.

3. What is the value of the accounts receivable? This has a potential discount because all the accounts may not be collectible.

4. What is the value of the training of the personnel who will remain with the practice, or what is the cost to train new personnel?

5. What are the liabilities that will remain after the purchase? This includes personnel salaries, taxes, debt service, and other costs of doing business.

While some of these questions are comparatively easy to answer, some of them are complex and require application of accounting and business valuation methods.

Gaskill at 311-312.⁷

⁷ *Gaskill* requires that a trial court arrive at a value based on the evidence presented: Using an average to obtain a value, without some basis other than an inability to choose between conflicting and competing valuation methods, is nothing more than making up a number, for there is no evidentiary basis to support that specific number. Employing all four methods, then averaging them, is tantamount to no method at all. If an expert believes four methods are valid, yet each produces a different number, this provides little or no help to the trial court. The trial court must fix a value, and there should be an evidence-based articulation for why that is the value used.

Gaskill at 315.

Given *Gaskill* and KRS 403.190, the trial court was required to undertake an assessment of the value of the property in the marital estate, which included the FCS stock. This omitted finding was a matter essential to the judgment. Therefore we vacate the award of maintenance and remand to the trial court to make a determination of the value of FCS.

On remand, if the trial court is dissatisfied again with the expert opinions proffered by the parties concerning the valuation of the FCS stock,⁸ the court has discretion to order additional experts. *See Robinson v. Robinson*, 569 S.W.2d 178, 180 (Ky.App. 1978) overruled on other grounds by *Brandenburg v. Brandenburg*, 617 S.W.2d 871 (Ky.App. 1981) (“If the parties come to the end of their proof with grossly insufficient evidence on the value of the [real] property involved, the trial court should either order this proof to be obtained, appoint his own experts to furnish this value, at the cost of the parties, or direct that the property be sold.”).

As to Randy’s second argument that without a value placed on the FCS stock the trial court erred in its award of maintenance as it did not fully undertake the necessary assessment of the parties’ respective assets, we agree.

KRS 403.200 requires the court to assess the parties’ assets prior to an award of maintenance:

(1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following

⁸ We note that “A family court operating as finder of fact has extremely broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it.” *Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky.App. 2007)

dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that 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.

(2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:

(a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(c) The standard of living established during the marriage;

(d) The duration of the marriage;

(e) The age, and the physical and emotional condition of the spouse seeking maintenance; and

(f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

Without a proper valuation of the parties' assets, the court is unable to undertake the statutory considerations prior to awarding maintenance. In the case *sub judice* the court exceeded its discretion by awarding permanent maintenance without assigning a value to the FCS stock. Thus, we remand for reconsideration of the award and amount of maintenance after a value has been assigned to the FCS stock.

Last, we address Randy's arguments that the court erred by dividing the FCS stock without permitting Randy to pay Cathy for her share of the stock and, alternatively, that if the trial court did not err in preventing Randy from purchasing Cathy's stock, then it erred by placing a cap on Randy's salary. We note that our jurisprudence favors protection of the spouse with the minority interest in the business which often requires the purchase of that minority stock by the other spouse. In *Goldstein v. Goldstein*, 377 S.W.2d 52 (Ky. 1964), the Supreme Court of Kentucky held:

Accepting the valuation of the drug store as a going business at \$45,000, it is quite a different thing to say that a minority share of its capital stock has a proportionate value. A small business being very much like a cow, not divisible in kind, it was necessary to give control of the store to one or the other of the parties. The chancellor gave it to J. I., and in that we concur. But 15% of the stock in a business run by someone with whom the minority shareholder is incompatible and at odds is a thing of dubious value if indeed it has any value at all. It cannot be eaten and ordinarily it cannot be sold. Whether it bears dividends is largely subject to the will of the controlling party. We feel therefore that instead of leaving Beatrice an interest in the corporation the judgment should have directed the payment of its

equivalent in money, either in a lump sum or installments secured by a pledge of J. I.'s stock.

Goldstein at 56.

In *McGinnis v. McGinnis*, 920 S.W.2d 68 (Ky.App. 1995), this Court addressed a situation where the appellee was awarded one-half of all financial benefit of appellant's stock, which was required to be divided within seven years. Therein, the court noted the essential differences between the situation presented and that of *Goldstein, supra*:

[H]ere the parties are not majority shareholders in the corporation and there is nothing to indicate that appellee either was involved in, or could assert a right to participate in any way in, the corporation's management or functioning. *See, e.g., Clark v. Clark*, Ky., 487 S.W.2d 272 (1972); *Goldstein v. Goldstein*, Ky., 377 S.W.2d 52 (1964). Indeed, not only did the vested and nonvested HRI stock together constitute less than nine percent of the total stock issued and outstanding, but here the trial court specifically directed that appellant would retain "full control over the stock." Hence, any potential right of appellee to interfere in the corporation's affairs, or to become embroiled in disputes with appellant concerning the management of the corporation, were essentially negated.

McGinnis, 920 S.W.2d at 72.

The facts of the case *sub judice* are more akin to *Goldstein* than to *McGinnis*. With only two shareholders in FCS, Cathy is disadvantaged as a minority shareholder. To award her a larger share, however, strengthens her potential for creating issues with management of the company. Regardless, both *McGinnis* and *Goldstein* make clear that joint control of a business between two

such parties is not an acceptable resolution. The trial court *sub judice* was faced with the unenviable position of making a decision that may bankrupt FCS or Randy on one hand, or that would limit the control of FCS on the other hand.⁹ While the trial court's decision may be difficult, a decision must be made commensurate with the applicable law. We reverse the decision of the trial court which allowed both parties control over the management of the corporation, including the limiting of Randy's salary, all of which interfered with the management of the corporation. We remand for consideration of an appropriate remedy for under *McGinnis* and *Goldstein* and any other applicable law.

In light of the aforementioned, we reverse, vacate and remand to the trial court for proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Frank Stainback
Owensboro, Kentucky

BRIEF FOR APPELLEE:

Candy Yarbray Englebert
Owensboro, Kentucky

⁹ Given *Goldstein*, the trial court could have exercised its discretion and divided the stock and then directed Randy to pay Cathy its equivalent in money, either in a lump sum or installments, over a definite period of time, to avoid the issues of bankruptcy, management concerns, and minority shareholder protection, which the trial court can address on remand.