RENDERED: AUGUST 10, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001950-ME
AND
NO. 2016-CA-001951-ME

BRIAN WILBUR VAN HORN APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE ROBERT D. MATTINGLY, JR., JUDGE
ACTION NO. 15-CI-00290

LAUREL VAN HORN APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART,
REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: D. LAMBERT, MAZE, AND NICKELL, JUDGES.

LAMBERT, D., JUDGE: The Van Horns filed cross appeals contesting different aspects of the judgment which dissolved their marriage. Brian Van Horn's appeal challenges the trial court's valuation of a commercial building co-owned by himself, Laurel Van Horn (his former wife), Laurel's business partner, and the

business partner's wife. Meanwhile, Laurel's appeal challenges the trial court's valuation of her half interest in the business and the calculation and amount of the child support award. As it relates to Brian's appeal, we affirm the ruling of the trial court. As it relates to Laurel's appeal, we affirm on the issue of valuation of the business, but as to the issue of child support, we reverse and remand the matter to the trial court for further proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

Brian and Laurel married in 1995 and the marriage ended with the issuance of an interlocutory decree on December 17, 2015. The couple had two children during the marriage,[1] and both the interlocutory decree and the eventual judgment named Laurel the primary residential custodian.

The Van Horns have higher than average incomes. Brian holds a Ph.D. and works as an assistant provost at Murray State University. Laurel is engaged in the practice of optometry. Their combined monthly income exceeds $23,000. They also have significant assets, though only two of those assets are at issue before this Court: Laurel's optometry practice and the building in which it is located.

Laurel began her career as an associate of optometrist, Dr. Joseph Ellis. After working for Dr. Ellis in that capacity for several months, Laurel

[1] The children were ages 6 years and 12 years at the time the decree was issued.

purchased a partnership interest in the practice. She and Dr. Ellis continued to practice together, with each partner owning a 50% share of the business and the office building. Laurel and Dr. Ellis' practice was part of Eye Care Associates, a larger entity composed of similarly-situated private optometry practices across western Kentucky. The owners of each individual practice were equal shareholders in Eye Care Associates.

The partners and their spouses jointly owned the building in which Laurel's practice operated, meaning Laurel and Brian jointly owned a 50% interest in the building and Dr. Ellis and his wife jointly owned a 50% interest. The business leased the building from its co-owners and paid monthly rent to the parties.

Prior to filing for divorce, Brian and Laurel retained an appraiser, Thomas Waldrop, to value the building. Waldrop rendered an appraisal on January 29, 2013, of $650,000. After the petition for divorce was filed in the summer of 2015, the parties entered into a mediated agreement that included a provision to have Waldrop appraise the building again, and to abide by his valuation. Waldrop did so, and using a valuation date of November 30, 2015, arrived at the at the same value as before.

As the divorce progressed, Laurel also retained Jason Anderson, CPA, to determine the value of her interest in the optometry practice as a business. Anderson placed a value of $475,000 on Laurel's half of the practice.

Shortly after the execution of the mediated agreement, Laurel notified the trial court of the possibility that Eye Care Associates might be sold. To avoid litigation with the other owners of Eye Care Associates in the event her divorce proceedings thwarted the sale, Laurel agreed to amend the mediated agreement to remove the building from its terms. This amendment placed the building in dispute in the divorce proceedings. When the shareholders of Eye Care Associates voted on whether to accept the offer to sell, Laurel's dissenting vote was in the minority. The sale went forward on June 29, 2016, six months after the entry of the divorce decree.

Laurel received $493,000 from Eye Care Associates for her interest in the practice. Because she intended to continue working, and the purchase agreement contained a 5-year anti-competitive provision, she became an employee of the practice group. This new arrangement also resulted a significant reduction in Laurel's annual income. On the other hand, Laurel did remain the co-owner of the building and became entitled to receive monthly rent from her new employer under what Laurel contends were the same terms as the previous lease. Brian argued that her rental income increased significantly according to the new lease.

The trial court conducted a final hearing on September 27, 2016, before issuing its final judgment on October 10, 2016. Laurel presented evidence of the valuation of the building (Waldrop's appraisal), evidence of the valuation of the business (Anderson's report), and evidence of her expenses related to the children (which totaled $2,849.12). Brian presented no evidence of his own as to the valuation of the building. Brian offered evidence of the actual price received by Laurel for her interest in her optometry practice, arguing the actual proceeds of the sale supplanted Anderson's appraisal. As it related to child support, Brian argued that the trial court should follow the statutory guidelines set forth in KRS 403.212, and not extrapolate above chart for their higher incomes.

The trial court awarded the undisputed property according to the mediated settlement. As for the property which was not subject to the agreement, the trial court issued specific findings and conclusions. The trial court found Laurel's interest in the building was worth $325,000, per Waldrop's appraisal, and—because the acrimony exhibited by the parties would not be lessened by Brian becoming a landlord to Laurel's business—awarded Brian's share of the building to Laurel and awarded Brian a judgment for the cash value of his marital interest. The trial court further found that Laurel now owned no business to which to assign a value after the sale but awarded Brian a 50% share of the proceeds of the sale of the practice.

Laurel's appeal stems from the findings and conclusions related to child support. The trial court made the factual finding that Laurel's monthly income was $12,628, which included the $4,295[2] she receives in monthly rental income. Brian's monthly income was $10,804.58. The trial court noted that their combined monthly income exceeded the $15,000 limit contemplated in the statutory child support guidelines. The trial court initially established the payment amount by extrapolating from the current guidelines, which permit a per-child increase of $7.00 for every $100.00 in income above $11,400, though it instead applied a per-child increase of $8.00 found in a proposed amendment to KRS 403.212 from 2004 that failed to pass in the legislature. The trial court opined that using this approach in calculating child support liabilities "is reasonable and [m]ore accurately addresses the needs of the children under the current circumstances[,]" ordering Brian to pay monthly child support in the amount of $1,315.86.

Brian moved to alter, amend, or vacate the judgment. The trial court granted the motion as it related to the child support payments, reducing the

[2] This rental income is approximately half of the $8,589.58 received each month by Laurel and Dr. Ellis under the terms of the new lease to the purchaser of the optometry practice. Waldrop used a different value for the rental income in evaluating the building.

monthly payment to $848.24.[3] This ruling abandoned the increase in child support for above-the-guidelines income altogether.

Both parties appealed.

II. ANALYSIS

A. STANDARD OF REVIEW

Kentucky law vests trial courts with broad discretion on the issue of property division in divorce cases. "[A] trial court has wide discretion in dividing marital property; and we may not disturb the trial court's rulings on property-division issues unless the trial court has abused its discretion." *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006).

Appellate courts also afford trial courts the same deference on issues relating to "'the establishment, enforcement, and modification of child support.'" *Bell v. Bell*, 423 S.W.3d 219, 222 (Ky. 2014) (quoting *Commonwealth, Cab. for Health and Family Serv. v. Ivy*, 353 S.W.3d 324 (Ky. 2011)). "Accordingly, we review a trial court's decision in this context for an abuse of discretion." *Id.*

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS RULINGS RELATED TO THE BUILDING

[3] The amount constitutes the amount Brian's payment would be under the guidelines if the monthly combined parental income was exactly $15,000.

Brian argues that the trial court erred in two ways in its ruling related to the building: its valuation of the building and by extinguishing his one-half interest in the building.

The first alleged error lies in the valuation of the building. Brian contends that the trial court improperly relied on Waldrop's November 2015 appraisal, which took place before the sale of the business, and did not reflect an accurate valuation. We reject this position. In *Clark v. Clark*, 236 S.W.3d 616 (Ky. App. 2007), this Court upheld the trial court's acceptance of one party's valuation of a vehicle when the opposing party, who had notice of the valuation, argued the non-marital nature of the property without offering competing proof of value. Similarly, Brian offered no other expert appraisal. Brian opted instead to apply one cherry-picked aspect of Waldrop's calculation formula to the rental agreement after the sale. He argued that such application would result in a higher value than Waldrop's appraisal, yet he never called Waldrop as a witness to testify to verify that assertion. The trial court's discretion includes the freedom to believe Laurel's expert valuation over Brian's valuation. *See Muir v. Muir*, 406 S.W.3d 31, 34 (Ky. App. 2013) ("A family court has broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it."). The trial court thus did not abuse its discretion in using Waldrop's appraisal for the building's value.

Brian's second allegation of error stems from the trial court's award of his marital share of the building to Laurel. He argues that *McGinnis v. McGinnis*, 920 S.W.2d 68 (Ky. App. 1995), required the trial court to allow Brian to maintain his ownership interest in the property because, like the appellant in *McGinnis*, he could not exercise control to such a degree that he could manipulate the value of the other's interest. However, the facts underlying the Court's holding in *McGinnis* were not so simple. The appellant in *McGinnis* was president and a major shareholder in a closely-held corporation, holding both vested and non-vested shares. The trial court held that the non-vested shares comprised marital property as well as the vested shares. Due to restrictive agreements regarding transfer of shares, the other shareholders could thwart any transfer of shares the appellant might have attempted. Moreover, evidence in the record indicated that the non-vested shares would not reach their full value until several years in the future. The Court allowed the appellee to retain a marital interest in the shares due to the possibility that this combination of factors could deprive her of any real value of those assets, thereby making it an inequitable division of the marital property.

The facts here have very little in common with the facts in *McGinnis*, which itself represents a very narrow exception to the general rule regarding

division of marital property. Moreover, the exception does not require the outcome Brian asserts; it merely permits it.

The trial court, after weighing the statutory factors, determined that Laurel was entitled to an undivided 50% interest in the building which houses her business, and ordered Brian to convey his marital interest to her. To offset that award, the trial court also entered judgment in favor of Brian in the amount of $209,868.63. Both the valuation of the asset and the division of the asset fall within the trial court's discretion, and we find no abuse.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS RULINGS RELATED TO THE BUSINESS

In its final judgment, the trial court concluded that "[t]here no longer exists an optometric practice for this court to value and divide in that the practice was sold[.]". The trial court went on to divide the $493,000 in sale proceeds equally between Brian and Laurel. In her appeal, Laurel contends that the trial court erred in so ruling. She argues instead that the proper valuation of the business should have been its value as of the date of the entry of the decree, and that Anderson's appraisal established that value at $475,000.

KRS 403.190(1)(d) requires the court to consider the economic circumstances of the parties at the time the division is to become effective. Courts have interpreted that provision by treating post-decree property divisions as though

they were included in the dissolution decree. In *Kidwell v. Mason,* 564 S.W.2d 534, 536 (Ky. 1978), the Court reversed the Court of Appeals' ruling that the former wife had no interest in the proceeds of a sale of marital property two years after the entry of the divorce decree that failed to mention that marital property. "'Any interest that either [party] may have had in or to any property, estate or interest of the other, which remained undisposed of by the trial judge, is in the posture as if the court had so adjudged their respective interests.'" *Kidwell* at 535 (quoting *Ping v. Denton*, 562 S.W.2d 314 (Ky. 1978)). In *Rayborn v. Rayborn*, 185 S.W.3d 641 (Ky. 2006), the Supreme Court held, citing *Kidwell,* "Indeed, Kentucky law treats marital property not disposed of in the divorce decree as though it had already been distributed." (*Rayborn*, 185 S.W.3d at 644) (holding that even though decree dissolving marriage made no provision for assignment of marital property, decree has same effect as if trial judge had specifically written therein that husband and wife each owned an undivided one-half interest in marital property.).

A crucial distinction between these cases and the instant appeal however, is that the parties' marriage was dissolved by interlocutory order and the disputed issues as to the business and child support were litigated a few months later. In *Kidwell*, *Ping*, and *Rayborn*, the decrees were final orders. Here, the decree was interlocutory, in both title and in function. It did not resolve all issues

pending before the trial court. The trial court resolved the remaining issues, particularly the disputed property division, in its final judgment issued a few months after the consummation of the sale of Laurel's practice. Laurel and Brian both anticipated that this sale would take place and that the Court would have benefit of the actual sale price of the practice. We hold that the Court did not abuse its discretion in using the post decree sale price for the valuation of the practice.

Having determined that the date of the final order controls, we may now move on to determining which valuation was most appropriate. "Kentucky courts have not specifically adopted an approach in valuing [business] assets." *Clark v. Clark*, 782 S.W.2d 56, 59 (Ky. App. 1990). Indeed, other courts have called business appraisal "as much an art as it is a science." *Blackstone v. Blackstone*, 288 Ill. App.3d 905, 681 N.E.2d 72, 78 (Ill. App. 1997). The goal of business appraisal is, of course, to approximate a price that a willing buyer would pay a motivated seller for the business. Anderson capably provided such an approximation for the trial court. On the other hand, an estimated value serves only as a substitute in the absence of a concrete price. Hence, the actual, realized, sale price obviated Anderson's hypothetical approximation of value and usurped it as the best evidence of the value of the business. The trial court, in ordering the

sale proceeds divided between the parties, utilized the best evidence available to it to reach a just division. This was not an abuse of discretion.

D. THE TRIAL COURT ABUSED ITS DISCRETION IN SETTING THE CHILD SUPPORT AWARD

Parents have a universal and moral duty to support and maintain their minor children, in addition to the statutory duties do so imposed by KRS 405.020(2) and 530.050. Making child support payments as ordered by a court inures primarily to the benefit of the children, not to the custodial parent. *Ciampa v. Ciampa*, 415 S.W.3d 97, 101 (Ky. App. 2013) (citing *Clay v. Clay*, 707 S.W.2d 352 (Ky. App. 1986)).

Courts use the provisions of KRS 403.212 to calculate the monthly child support payments for the non-custodial parent. The statute contemplates payments using the relative ability of each parent to pay, as reflected by the proportion of their combined monthly income. However, because these guidelines only account for combined monthly parental incomes of up to $15,000, KRS 403.212(5) provides that "[t]he 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." Appellate courts will affirm such upward departures, if the trial court's written order provides adequate findings justifying the deviation. *McCarty v. Faried*, 499 S.W.3d 266, 271 (Ky.

2016) (quoting *Van Meter v. Smith*, 14 S.W.3d 569, 572 (Ky. App. 2000)). These cases reflect the idea, succinctly stated by the Kentucky Supreme Court in *Carver v. Carver*, 488 S.W.3d 585, 590 (Ky. 2016), that "the guidelines amounts specified in KRS 403.212 are just that—guides—and not black letter law." The *Carver* Court further opined that the discretion of the trial courts in child support matters is "limited only by reasonableness and actually making a record of the reason for deviation." *Id.*

Borrowing from an opinion of this Court, the Kentucky Supreme Court mandated that trial courts consider a non-exhaustive set of factors in determining whether the circumstances in a case merits an above-the-guidelines award. *McCarty*, 499 S.W.3d at 272 (citing *Downing v. Downing*, 45 S.W.3d 449, 456-57 (Ky. App. 2001)). Such factors include: "the standard of living which the children enjoyed during and after the marriage; the parents' financial ability to meet that lifestyle; the parents' financial circumstances, station in life, age, and physical condition." *Id.* *McCarty* adapted the *Downing* factors however, requiring a consideration of "the needs of the child, the financial circumstances of the parents, and the reasonable lifestyle the child may have been accustomed to before or after the parents separated." *Id.* at 273.

Neither of the trial court's orders regarding child support offered any discussion of the children's expenses or needs. The initial order setting the award

merely detailed the methodology used for the calculation and the order amending the award did not discuss the needs of the children, merely noting that the trial court could not determine whether the lifestyles and standard of living of the parents would warrant deviating from the guidelines.

Laurel submitted documentation into the record reflecting the expenses she incurs on behalf of the children, yet these expenses are not addressed in the trial court's findings of fact. The trial court did not make findings as to how much of the claimed $2,849.12 in expenses were reasonable; nor did it include them in any way in either child support calculation.

While the trial court noted in its order amending that it considered each of the factors, its discussion only addresses the lifestyle factor, noting that the *Downing* Court rejected a purely mathematical approach to determining child support—like the method applied in arriving at the initial award here—because it can lead to "an unwarranted transfer of wealth." *Downing*, at 456. However, the *Downing* Court rejected such methodologies precisely because such calculations do not take into account the children's actual needs. *Id.* at 455.

> We hold that a trial court's decision, when setting child support over and above the guidelines, must be based on the best interests of the child. When making that determination, a trial court may use its judicial discretion with regard to weighing factors such as: the needs of the child, the financial circumstances of the parents, and the reasonable lifestyle the child may

> have become accustomed to before or after the parents separated. [footnote 8 "This is not an exclusive list."]

McCarty at page 273.

Because the trial court here did not include such findings, we remand the matter to the trial court for consideration of the needs of the children under *McCarty*.

III. CONCLUSION

Having reviewed the record and for the reasons set forth herein, we find no abuse of discretion by the trial court in awarding the building to Laurel, in valuing the building at its appraised value, or in valuing Laurel's optometry practice at its actual sale price, which was realized post-decree. We therefore affirm the trial court's rulings as it relates to the property division.

However, as it relates to the child support calculation, because neither of the trial court orders contain findings addressing the reasonable needs of the children which might justify an above-the-guidelines award, we must reverse and remand the matter to the Marshall Circuit Court for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
John T. Reed Paducah, Kentucky	Michael M. Pitman Murray, Kentucky