

RENDERED: JUNE 3, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001878-MR
AND
NO. 2003-CA-001950-MR

JANICE N. REYNOLDS

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM LETCHER CIRCUIT COURT
v. HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 00-CI-00301

CHARLES P. REYNOLDS

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KNOPF AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.¹

TACKETT, JUDGE: Janice and Charles Reynolds cross-appeal from the judgment of the Letcher Circuit Court dissolving their marriage. Janice contends that the trial court erroneously declined to accept the Domestic Relations Commissioner's (DRC) finding that Charles had dissipated marital assets and

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

improperly reduced that amount of attorney's fees awarded by the DRC. Charles' cross-appeal claims that the trial court erred in awarding attorney's fees and maintenance to his former spouse. After a careful review, we conclude that the trial court acted properly and affirm its judgment.

Janice and Charles were married on October 21, 1967. They had one child during the course of their marriage who was an adult at the time of their separation. The parties were separated on July 25, 2000 and a Petition for Dissolution was filed in Letcher Circuit Court on August 2, 2000. A partial decree of dissolution was entered on December 4, 2001 dissolving the parties' marriage but reserving other issues to be settled. After a hearing on these reserved issues, the Letcher County Domestic Relations Commissioner (DRC) entered Findings of Fact, Conclusions of Law and Recommendations on May 16, 2002. At the time of this hearing, Janice was sixty-three (63) years of age while Charles was sixty-two (62) years of age. The trial court rejected the DRC's finding that Charles had dissipated the parties' marital assets and reduced the amount of attorney's fees awarded to Janice. This appeal and cross-appeal followed.

First, Janice argues that the trial court's refusal to find dissipation was an abuse of discretion absent a finding that the DRC's report was clearly erroneous. Next, Janice alleges that the trial court's decision is not supported by the

evidence either from the hearings between the parties or from the record. Janice also contends that the attorney's fees awarded by the trial court were not enough and should be raised to the amount recommended by the DRC. Charles filed a cross-appeal arguing that the trial court committed reversible error in awarding attorney's fees and maintenance to Janice.

The parties owned and operated a business called 23 Mine Electric Supply, Inc., which refurbished used mining equipment and sold it on a consignment basis. The business had been appraised at \$235,000.00 on the day it ceased operating. This appraisal did not take into account an indebtedness of \$12,400.00. The company's assets were later sold for \$19,300.00 at a court-ordered auction in December 2001, and neither party moved to set aside the sale. The DRC found that Janice was entitled to maintenance and recommended that the trial court assign her the proceeds of the sale, minus any related expenses, as maintenance. In addition, the DRC recommended that Janice be awarded \$25,000.00 in attorney's fees. The trial court overruled all of the parties' exceptions to the DRC's report with one exception: the amount of attorney's fees awarded to Janice was reduced to an amount equal to what Charles was paying his own attorney.

The trial court properly found Janice was not entitled to repayment for dissipation of marital assets, even though this

finding was in conflict with the findings of the DRC. We note that, while the DRC did make a finding that Charles had dissipated marital assets, the DRC did not award any type of repayment to Janice for what the DRC found to be dissipation. During their marriage, Janice, who has a college degree, worked sporadically while Charles, who has only a high school diploma, provided the main source of income. When Mine Electric Supply was formed in 1994, it had three shareholders: Charles, Janice and their son. Due to the company's financial losses, the son's shares were transferred to Janice, who handled payroll, bookkeeping and accounts payable. Charles' duties included contacting customers and obtaining parts for the equipment. In May 2001, Charles unilaterally decided to close the parties' business and lay off its employees without Janice's knowledge or consent. Janice asked the court to order the business sold and even selected the broker. She now wishes to hold Charles responsible for dissipation for the difference between the business' value as a going concern and the amount received from the court-ordered sale.

This court previously held that a court may find "dissipation of marital assets when 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 (Ky.App. 1998), citing Robinette v. Robinette, 736 S.W.2d 351, 354 (Ky.App. 1987). As noted by the trial court, nothing in the record establishes that Charles acted in a way to intentionally deprive Janice of marital property. While it may be true that Charles' decision to close the family business was unfavorable to Janice, she cites no authority to support her position that his actions constituted dissipation of marital assets.

With regard to the awarding of attorney's fees, we find that again the trial court was not acting in a manner inconsistent with its authority or in relation to the facts of the case. It is firmly embedded in our law that the awarding of attorney's fees is within the "sound discretion" of the trial court. Gentry v. Gentry, 798 S.W.2d 928 (Ky.App. 1990). For the same reason, Charles' cross-appeal of the trial court's decision fails as he has made no showing that the trial court abused its discretion in awarding Janice attorney's fees in an amount equal to what he paid his attorney.

Finally, Charles argues that the trial court erred in awarding Janice the proceeds from the sale of their business as lump sum maintenance. However, he did not file an exception to the DRC's finding that Janice was entitled to maintenance and recommendation of the lump sum award of the money from the sale of their business. Thus, the trial court had no opportunity to

consider his argument that Charles is unable to meet his needs while meeting those of his former spouse as required by Kentucky Revised Statute 403.200(2), and this issue is unpreserved for appellate review.

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

EMBERTON, SENIOR JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS WITH SEPARATE OPINION

KNOPF, JUDGE, CONCURRING: I fully concur with the reasoning and the result of the majority opinion, but I write separately to raise an additional point about the alleged dissipation of assets in this case. As noted by the majority, Charles unilaterally decided to close the parties' business without Janice's knowledge or consent. The DRC regarded this conduct as suspicious because Charles took this action while the dissolution proceedings were pending and because this action had the effect of destroying most of the value of the marital asset. Under Brosick v. Brosick, 974 S.W.2d 498 (Ky.App. 1998), once the spouse alleging dissipation presents evidence establishing that the dissipation occurred, the burden of going forward shifts to the other spouse to account for the assets. Id. at 502. In this case, Janice had made a *prima facie* showing that Charles dissipated the value of the marital business. However, the trial court noted that the business had been losing money

for some time and the parties had been using their own funds to keep the business operating. Furthermore, Charles did not close the business until he had consulted with an attorney. The trial court concluded that Charles's decision to close the business was reasonable under the circumstances and was not calculated to deprive Janice of her share of the marital property. Thus, the trial court found that Charles had rebutted the inference of dissipation. Although a different fact-finder might have agreed with the DRC's contrary finding, I agree with the majority that the trial court's conclusion was supported by substantial evidence and should not be disturbed on appeal.

BRIEF FOR APPELLANT/CROSS-
APPELLEE:

James W. Craft, II
Whitesburg, Kentucky

BRIEF FOR APPELLEE/CROSS-
APPELLANT:

Darrell Hall
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