

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000422-MR

TAMURA DUNGAN

APPELLANT

v. APPEAL FROM NICHOLAS CIRCUIT COURT
HONORABLE ROBERT MCGINNIS, JUDGE
ACTION NO. 02-CI-00054

CLAUDE DUNGAN, JR.

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: BARBER, MINTON, AND TACKETT, JUDGES.

BARBER, JUDGE: Appellant, Tamura Dungan (Tamura), appeals the valuation of her husband's business by the Nicholas Circuit Court, and the court's denial of her request for a maintenance award. Appellee, Claude Dungan (Claude), argues, pursuant to CR 52.01, that the trial court's rulings should not be set aside as they are not clearly erroneous. This Court finds no evidence showing the court's rulings to be clearly erroneous. We affirm the trial court's ruling.

Tamura and Claude were married in 1990. The parties have one child. Claude filed for dissolution in 2002. Two

weeks prior to trial the circuit court directed the parties to document their incomes for the record. Tamura contends that Claude failed to provide any evidence showing his income. At trial, Claude admitted that he had not paid taxes for 2000, 2001 or 2002. He claimed to be the bookkeeper for his business using a program called Keep Straight Accounting. Tamura provided a gross income summary created by Claude using the Keep Straight Accounting program for the years 2000 and 2001. These documents show gross income from the business for 2000 as being \$159,090 and for 2001 as being \$111,227.

Tamura claims that the veterinary practice is subject to a full marital interest, and that she should have been awarded a percentage of its valuation of \$100,000. The record shows that Claude earned his veterinary doctor degree and established his practice before marrying Tamura. The record also shows that Tamura took no part in the business and provided nothing to it. There is no evidence to support Tamura's claim that she was entitled to a share of the business.

The veterinary business was valued by Tamura's expert witness at \$100,000 at the time of the dissolution. Claude did not object to the valuation of \$100,000 provided by Tamura's expert witness. As mentioned above, the veterinary business was owned and operated by Claude prior to his marriage to Tamura. Tamura did not provide any assistance with the business and was

not involved with the business in any way. A business cannot be considered marital property without a showing of involvement or support by the spouse claiming an interest in it. Travis v. Travis, 59 S.W.3d 904, 910 (Ky. 2001). Tamura was unable to make such a showing.

The court did not address Tamura's claims as to the value of the veterinary practice but rather, elected to use the income figures provided by Claude as proof of income. The record shows that the practice is a large animal practice and that Claude is the only person who operates that business. A business is not valued for its "goodwill" unless the evidence shows that the business brought in an above average income range as compared to similar businesses. A specific showing of the special nature of the business is required. Clark v. Clark, 782 S.W.2d 56, 59 (Ky.App. 1990). No such specific showing was made by Tamura in this case. The trial court found that the practice had no marital value due to limited assets and lack of goodwill value. The court held that:

The value of the practice depends solely upon the husband's abilities as a veterinarian to produce income. It does not possess any appreciable goodwill. Effectively, without the husband, the practice ceases to exist. Whatever value exists, it is non-marital.

We find no error in the trial court's ruling.

Tamura asserts that Claude failed to provide evidence of his income. She contends that KRS 403.211(5) requires the court to order child support based on the needs of the child or the previous standard of living of the child. Tamura contends that evidence she presented to the court shows the needs of the child to be \$2000 per month. Claude was ordered to pay child support in the sum of \$627 per month. Tamura argues that the court should use the documents showing gross income that she provided, rather than the tax returns Claude provided, to establish an appropriate sum of child support.

Tamura provided the court with the parties' 1999 tax return. Claude provided prepared, but unfiled tax returns for 2000, 2001 and 2002 to the trial court prior to a determination of child support, along with an affidavit claiming that the returns were accurate and would be filed. The court held that "for purposes of child support, the tax returns for 1999, 2000 and 2001 will be utilized since these were available to the wife's financial expert." These tax returns show an average annual income of \$66,783.67. That income average was used by the court in setting child support. Tamura argues that these documents are not valid evidence upon which an income determination may be made. She claims, based upon computer records which she supports show gross income, that Claude has a monthly income of \$11,000. Those records, which may or may not

be accurate, reflect only gross income, and therefore cannot be used to show the actual income available to Claude. Tamura has shown no error in the court's use of tax returns to determine actual income.

Tamura claims that the trial court was in error when it denied her request for a maintenance award. In the dissolution award, the Court found that Tamura had non-marital property valued in excess of \$107,079. She received marital property valued at \$12,815. Claude was ordered to pay an equalization to Tamura of \$87,784. She was also awarded a half-interest in the value of the marital home, which was to be sold. That home was valued at \$400,000, with Tamura's share worth approximately \$200,000. The court held that this property, along with the fact that she has a degree as a psychiatric registered nurse, was in good health and was only 38 years old, showed that an award of maintenance was unnecessary.

Tamura contends that she has not, and will never, receive an equalization payment from Claude, and that such a payment was improperly considered part of her assets. Claude contends that Tamura was provided with that "cash award." Claude also contends that the house has been sold, and that Tamura has received her share of the proceeds from that sale. Tamura does not address whether she received that payment of \$200,000.00, but does not rebut that statement on appeal. While

the record does not contain evidence as to whether Tamura received her share of the cash equalization or profits from the sale of the home, there is no doubt that she has a legal right to those sums. Failure of Claude to provide them would entitle Tamura to a judgment against him. For that reason, the court may properly consider Tamura as the owner of such assets.

An award of maintenance requires a showing that the wife is unable to properly support herself or to maintain a similar standard of living to that which she enjoyed before the dissolution. Powell v. Powell, 107 S.W.3d 222, 224 (Ky. 2003). Tamura is young and in good health. She has a degree which enables her to work at a well-paying job. The minor child is older than 12, and there is no evidence suggesting that she requires special care or attention that would prevent her mother's employment. Tamura has substantial assets awarded to her in the dissolution. An award of maintenance may be made in the sound discretion of the trial court. Clark v. Clark, 782 S.W.2d 56, 59 (Ky.App. 1990). To reverse an award or denial of maintenance, the complaining party must show an "absolute abuse" of this discretion by the trial court. Id., 782 S.W.2d at 60. Tamura has failed to show such an abuse of discretion. Thus we find that Tamura has failed to show that the trial court's denial of the maintenance request is in error.

For the foregoing reasons, the rulings of the Nicholas Circuit Court are affirmed.

ALL CONCUR.

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