

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001110-MR

EDDIE L. LUELLEN

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN III, JUDGE
ACTION NO. 02-CI-00756

BARBARA A. LUELLEN

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

BARBER, JUDGE: This appeal stems from a dissolution of marriage proceeding originating in Daviess County, Kentucky. On June 10, 2002, Appellant, Eddie L. Luellen, (hereinafter referred to as Eddie) filed for a dissolution of marriage from Appellee, Barbara A. Luellen (hereinafter referred to as Barbara). The parties had been married almost thirty years. A lengthy final hearing was held before Hon. Ronald L. Presser, Circuit Commissioner, (hereinafter referred to as Commissioner) on May 22, 2003; September 4, 2003; and September 15, 2003. The

Commissioner issued his report on January 22, 2004. Eddie filed his exceptions to the report on February 2, 2004. Barbara filed her response to those exceptions on April 9, 2004.

Subsequently, Judge Henry M. Griffin, III, held a hearing on Eddie's exceptions on April 12, 2004. From that hearing, on April 27, 2004, an order was issued adopting the Commissioner's report in all respects. On May 5, 2004, Judge Griffin issued a decree of dissolution of marriage to the parties which incorporated by reference the Commissioner's report. Eddie appeals the Commissioner's valuation of the parties' business, Russell's Water Truck Service, which was incorporated into the decree.

Kentucky Rule of Civil Procedure 52.01 states in pertinent part, for actions tried without a jury, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court." As a result, when the trial court adopts the recommendations of the Commissioner, those recommendations fall under the same standard of review as applied to a trial court's findings. See Greater Cincinnati Marine Service, Inc. v. City of Ludlow, 602 S.W.2d 427, 429, (Ky. 1980) and Wells v. Sanor, 151 S.W.3d 819, 822 (Ky.App.

2004). The first step is to determine the appropriate standard of review.

The appellate court cannot disturb the findings of a trial court in a case involving dissolution of marriage unless those findings are clearly erroneous. Cochran v. Cochran, 746 S.W.2d 568, 569-570, (Ky.App. 1988), (citing Johnson v. Johnson, 564 S.W.2d 221 (Ky.App. 1978)), see also Rife v. Fleming, 339 S.W.2d 650, 652, (Ky. 1960). Findings of fact are not clearly erroneous if supported by substantial evidence. Black Motor Company v. Greene, 385 S.W.2d 954 (Ky.App. 1964), (citing Massachusetts Bonding & Insurance Co. v. Huffman, 340 S.W.2d 447 (Ky. 1960)). The test of substantiality of evidence is whether when taken alone or in the light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men. Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298, 308, (Ky.App. 1972), (citing Blankenship v. Lloyd Blankenship Coal Company, Inc., 463 S.W.2d 62 (Ky. 1970)), see also Secretary, Labor Cabinet v. Boston Gear, Inc., a Div. of IMO Industries, Inc., 25 S.W.3d 130, 134, (Ky. 2000). Further, the property may be divided or valued differently; however, how it actually is divided and valued is within the sound discretion of the trial court. Cochran supra 746 S.W.2d at 570.

We now turn to the Commissioner's report. The Commissioner stated the following in his report:

"RUSSELL'S WATER TRUCK SERVICE. This business was originally owned by [Barbara's] parents. [Eddie] and [Barbara] purchased it from [Barbara's] parents thirteen years ago for \$100,000.00. They were able to pay the debt off over a period of 2 ½ years. This business is not currently operating. There was no proof as to the value of this business or its assets. [Eddie] requests that the business and its assets be sold. [Barbara] requests the court to assign this marital asset to [Eddie] at a value of \$100,000.00. The reasons that she offers to support this request are (a) [Eddie] has removed, hidden and/or sold some of the business assets, i.e. water truck he sold for \$8,000.00, and (b) there was no way to fairly value the business because of [Eddie's] actions of removing property and it is not now available for appraisal. It is clear from a review of prior orders entered by the Judge of this Court and from testimony offered this Commissioner during final proof hearings that [Eddie] has a history from the beginning of this case of overreaching and non-cooperation in the marshalling of assets. The Commissioner finds those same actions to be present as regards the water trucking business. The parties, including [Eddie], placed a value of \$100,000.00 on this business a couple months prior to their separation. The Commissioner adopts [Barbara's] proposal and awards this business and its assets to

[Eddie] at a value of \$100,000.00. This award includes the water truck that was previously sold by [Eddie] for \$8,000.00”

Based on the trial transcript, testimony was received from Barbara, Eddie, and Barbara Russell¹ regarding the water truck service company. Testimony was received from Barbara that Eddie disposed of company assets making an appraisal impossible and Mrs. Russell testified that she witnessed some of the company asset dispersal.

Additionally, testimony from Eddie was received disputing the alleged dispersal. The Commissioner found the testimony on this matter by and on behalf of Barbara to be more trustworthy than that provided by Eddie. The Commissioner had the opportunity to judge the credibility of all witnesses in relation to this issue and this court shall give his findings due regard. CR 52.01. In circumstances of conflicting testimony, a reviewing court may not and will not disturb the findings of the Commissioner so long as it is supported by substantial evidence. Bentley v. Bentley, 500 S.W.2d 411, 412, (Ky.App. 1973), (citing Sharp v. Sharp, 491 S.W.2d 639 (Ky. 1973) and Adams v. Adams, 412 S.W.2d 857 (Ky. 1967)), see also Ori v. Steele, 399 S.W.2d 727, 728, (Ky.App. 1966).

Following a review of the record, we believe the Commissioner’s finding in relation to the water truck service is

¹ Barbara Luellen’s mother.

supported by substantial evidence. In other words, the evidence presented related to the business when taken alone and in light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable men to choose Barbara's argument over Eddie's. Because the Commissioner's findings related to the water truck service company are supported by substantial evidence, the findings fail to satisfy the clearly erroneous standard and must be affirmed.

Eddie relies solely upon Robinson v. Robinson, 569 S.W.2d 178 (Ky.App. 1978) to require a reversal and remand related to the valuation of the water truck company. However, Eddie's reliance is misplaced because Robinson did not deal with an allegation of disposal of assets of a business rendering an accurate appraisal impossible. The Commissioner found Barbara's and Mrs. Russell's testimony to be more trustworthy than Eddie's and adopted a finding of fact reflecting the same. We believe that Robinson cannot be applied to the instant case due to the factual dissimilarities. Therefore, we reject Eddie's argument requiring reversal and remand based upon Robinson.

For the reasons set forth above, we believe the finding of fact by the Commissioner related to the valuation of the Russell Water Truck Service Company is supported by substantial evidence and not clearly erroneous. Therefore, we affirm the Daviess Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Evan Taylor
Owensboro, Kentucky

BRIEF FOR APPELLEE:

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