

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002129-MR

PAULA K. ANDERSON (NOW EADES)

APPELLANT

v.

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 04-CI-00460

JEFFREY D. ANDERSON

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: NICKELL, STUMBO, AND THOMPSON, JUDGES.

STUMBO, JUDGE: Paula K. Anderson (now Eades) appeals from an opinion and order of the Shelby Circuit Court arising from her petition to dissolve her marriage with Jeff D. Anderson (“Jeff”). Paula claims that the court erred in 1) denying her claim that Jeff dissipated marital assets, 2) its valuation of a business asset, and 3) denying her claim for attorney fees and costs. For the reasons stated below, we affirm the opinion and order.

Paula and Jeff were married on April 8, 1978, in Gatlinburg, Tennessee. Sometime thereafter, they moved to Shelby County, Kentucky. The marriage produced four children, each of whom has reached the age of majority.

In approximately 1989, Jeff opened an airplane repair and service business known as Flight Fixins. The business was successfully operated for several years, and was generating gross income to Jeff of approximately \$10,833 monthly over the last three years of the marriage. Paula earned approximately \$1,561 per month cleaning houses and commercial buildings.

In 1984, Jeff fathered a child with a person other than Paula. Over the years that followed, Jeff used marital assets to pay approximately \$25,000 in court ordered child support and health insurance premiums to the child's mother.

On August 25, 2004, Paula filed a petition for dissolution of marriage in Shelby Circuit Court. Various motions were heard, and the proceeding was bifurcated over Paula's objection. A decree of dissolution subsequently was rendered, and proof was heard on the matters in controversy. On June 9, 2006, the Domestic Relations Commissioner rendered recommended findings of fact, conclusions of law, and order which resolved all remaining claims. Of relevance to the instant appeal, the Commissioner recommended that the Circuit Court deny Paula's claim that the \$25,000 spent by Jeff on the support and insurance for the out-of-wedlock child constituted a dissipation of marital assets.

The Commissioner went on to recommend that the Court find that Flight Fixins was worth \$37,632, all of which was marital property and which included the finding that the business's equipment was valued at \$16,669. It rejected Paula's assertion that the business had "good will" valued at \$159,294 representing Jeff's

reputation, and her claim that the valuation should include more than \$1,800,000 in retained earnings and accounts receivable.

And lastly of relevance, the Commissioner recommended denying Paula's request for an award of attorney fees and costs. In so doing, the Commissioner noted that the "case would have been resolved much more simply had the Petitioner [Paula] not pursued her claim for the good will value of Flight Fixins and her dissipation claim."

The recommendations went before the Circuit Court, whereupon Paula filed certain exceptions thereto. The Court accepted the recommendations in their entirety, noting that 1) there was no dissipation of assets as defined by Kentucky case law; 2) there are numerous methods to value a business asset and the method relied upon by the Commissioner was reasonable; and 3) that the award of attorney fees and costs is completely within the discretion of the trial court, and the division of assets and liabilities supported a denial of Paula's request for same.

An opinion and order reflecting these findings and conclusions was rendered on August 1, 2006. Paula filed a motion to alter, amend or vacate the order on August 10, 2006, which was denied. This appeal followed.

Paula first argues that the Circuit Court committed reversible error in failing to hold that the child support paid to the mother of the out-of-wedlock child constituted a dissipation of marital assets. She maintains that these payments, which were the subject matter of a court order, were made without her agreement and were certainly not for a marital purpose. In the alternative, she claims that these payments

“negatively contributed to the marital estate” by depleting assets of the parties by the same \$25,000. In sum, she argues that the court abused its discretion in failing to find a dissipation, and she seeks an order reversing on this issue.

The Circuit Court cited *Brosick v. Brosick*, 974 S.W.2d 498 (Ky.App. 1998) in support of its finding that the child support payments did not constitute a dissipation of marital assets. *Brosick* states at page 500 that,

The court may find dissipation when marital 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.

There is no evidence in the record that the child support payments were expended during a period of impending separation or dissolution, nor that they were made with the intent to deprive Paula of her proportionate share of the marital property. To the contrary, the parties remained together (i.e., not separated) and married for the 18-year pendency of the child support payments, and the instant dissolution proceeding was not initiated until some two years after the payments ceased. Furthermore, the payments were made pursuant to a child support order, and cannot properly be characterized either as voluntary nor made with the intent of depriving Paula of marital property. The Circuit Court properly so ruled, and we find no error on this issue.

Paula next argues that the trial court erred in its valuation of the Flight Fixins business. The corpus of this argument is that the court improperly failed to account for the “good will” that Jeff accrued in the business, and that this good will

should have increased Flight Fixins' marital value by \$159,294. She also maintains that the court improperly failed to account for retained earnings of \$779,768.61 and accounts receivable of \$1,162,085.92. She claims that the the court should have utilized the excess earnings methodology approved in *Clark v. Clark*, 782 S.W.2d 56 (Ky.App. 1990), which would recognize that Jeff could either sell the good will along with the business, or that he could hire someone to perform the work allowing him to retain the excess sum as profit.

We find no error on this issue. Jeff argued, and the court so found, that Jeff, in essence, *was* the Flight Fixins business. That is to say, the court determined that Flight Fixins was a service business and that Jeff was the service provider. As such, if Jeff sold the business, the purchaser would receive no "good will" because Jeff's services would not be part of the "new" Flight Fixins. It also noted that while Flight Fixins was a stable business enterprise, it was susceptible to outside events which could seriously harm it or put it out of business. For example, 90% of Flight Fixins' revenue derived from a single customer. If that customer ceased doing business with Flight Fixins, the enterprise might not survive. Furthermore, Flight Fixins leased an airplane hanger at Capital City Airport in Frankfort, Kentucky, which could be terminated on 60 days written notice. The court found that there was no other location in Frankfort or the surrounding area sufficient for Flight Fixins' purposes. It concluded that since Jeff himself was the "good will" of Flight Fixins, and because any sale of the business could not include that good will, it provided no value for purposes of calculating marital assets.

Citing *Clark, supra*, the court properly noted that there was no single best methodology for valuing such assets. Rather, one must look to all of the facts specific to the case, and the duty of the appellate court is to determine whether the trial court's approach reasonably approximated the net value of the interest. *Id.* The record, taken as a whole, reasonably supports the trial court's conclusion that Jeff's personal involvement in Flight Fixins was so essential to its ongoing success that there was no pecuniary value in good will if the business were sold. We find no error.

As for Paula's contention that the court improperly failed to consider Flight Fixins' retained earnings of \$779,768.61 and accounts receivable of \$1,162,085.92 in the valuation of the business, we also find no error. In support of this argument, Paula relies on a printout from a Quick Books computer program used by Jeff to track business income. Jeff, however, maintained below that this information was completely erroneous because he did not reset the data at the beginning of each fiscal year. As such, he notes that the numbers relied on by Paula are specious and represent many years of accumulated earnings and receivables. We are in no position to undertake a *de novo* review of Jeff's accounting system, and must rely on Paula to meet the burden of demonstrating that the court abused its discretion on this issue. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Id.* Paula does not direct our attention to any expert testimony or other evidence sufficient to demonstrate that Flight Fixins' retained earnings and

accounts receivable were improperly excluded from the valuation of the business, and we have no basis for finding abuse of discretion in the trial court's denial of same. We find no error.

Lastly, Paula argues that the court erred in denying her request for attorney fees and costs. She notes the disparity between her annual income and that of Jeff, and maintains that the court abused its discretion by basing the denial of her request for fees and costs on her alleged litigious nature rather than the financial resources of the parties as KRS 403.220 requires.

KRS 403.220 states,

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

Though KRS 403.220 requires the court to consider the parties' financial resources for purposes of allocating costs and fees, we have previously noted that the statute does not require it to make specific findings on them or in fact even to mention them in the order. *Hollingsworth v. Hollingsworth*, 798 S.W.2d 145 (Ky.App. 1990). Furthermore, and as the parties are well aware, the trial court has "great discretionary power" in considering this issue. *Id.* Though the record would have supported an award of costs and fees to Paula, there is no basis for concluding that its failure to do so

constituted an abuse of discretion. Accordingly, we find no error.

For the foregoing reasons, we affirm the opinion and order of the Shelby Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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