

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-000055-MR (Direct Appeal)

AND

NO. 1998-CA-000176-MR Cross-Appeal)

WILLIAM R. WOODS

APPELLANT/  
CROSS-APPELLEE

v. APPEAL AND CROSS-APPEAL FROM CARTER CIRCUIT COURT  
HONORABLE JAMES A. KNIGHT, SPECIAL JUDGE  
ACTION NO. 90-CI-00219

DELORES K. WOODS BAKER

APPELLEE/  
CROSS-APPELLANT

### OPINION

AFFIRMING IN PART, REVERSING IN PART,  
VACATING IN PART, AND REMANDING

\* \* \* \* \*

BEFORE: BUCKINGHAM, JOHNSON, and TACKETT, Judges.

BUCKINGHAM, JUDGE. William R. Woods appeals from a judgment and orders of the Carter Circuit Court resolving various issues resulting from a divorce between him and Delores K. Woods Baker. Having reviewed the record, the arguments of counsel, and the applicable law, we affirm in part, reverse in part, vacate in part, and remand.

William and Delores were married on May 5, 1984, and they separated on October 1, 1990. They have one child,

Christopher Raymond Woods, who was born on May 3, 1986. William instituted the divorce action by filing a petition for dissolution of marriage in the Carter Circuit Court on October 5, 1990. Because William served as a district judge in Carter County at the time, the circuit judge of Carter County recused from the case, and the chief regional judge assigned Judge James A. Knight, judge of the 24<sup>th</sup> judicial circuit, as a special judge to hear the case. On February 6, 1991, a partial decree of dissolution was entered whereby the parties were divorced but all other issues were reserved for a later determination. On July 2, 1991, Judge Knight referred the case to the domestic relations commissioner (DRC) serving under him in the 24<sup>th</sup> judicial circuit.

Many months passed before a final hearing was held, and the DRC entered detailed and lengthy findings and conclusions as well as a proposed order and judgment on August 11, 1993. Both parties filed exceptions to the DRC's recommendations, and on September 2, 1993, Judge Knight entered an order granting custody of the child to Delores. The order also reserved ruling on the remaining issues raised by the parties' exceptions. On September 10, 1993, Woods filed a motion to alter, amend, or vacate that order.

On October 3, 1996, nearly six years after the partial decree had been entered, an order was entered submitting the case for ruling. The trial court's order and final judgment was rendered on May 21, 1997. William's motion to alter, amend, or

vacate was eventually denied by the trial court, and he subsequently filed this appeal and Delores filed a cross-appeal.

We first address William's argument that neither Judge Knight nor the DRC had the authority or jurisdiction to hear this case.<sup>1</sup> William never contested the authority of Judge Knight or the DRC until his motion to alter, amend, or vacate, which was filed after judgment had been entered by the trial court. William argues that all special judge appointments must be made by the Chief Justice of the Kentucky Supreme Court and that the chief regional judge, acting under the authority of the Regional Administration Program Charter, was without the authority to appoint Judge Knight. In Jacobs v. Commonwealth, Ky. App., 947 S.W.2d 416 (1997), this court held that "the Chief Regional Circuit Judge has authority to appoint special judges pursuant to the Supreme Court's Regional Administration Program Charter[.]" Id. at 418. See also Huntzinger v. McCrae, Ky. App., 818 S.W.2d 613, 615 (1990). Judge Knight clearly had the authority to preside in this case, and William's argument that Judge Knight lacked jurisdiction is without merit.

William raises a different argument in connection with the assignment of the case to the DRC from the 24<sup>th</sup> judicial circuit rather than the DRC from the Carter Circuit Court. As we have noted, Judge Knight entered an order referring this matter to the DRC in his judicial circuit. William argues that

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<sup>1</sup> If William is correct, then all judgments and orders entered by Judge Knight and the DRC would be void. As this would include the partial decree that was entered divorcing the parties in 1991, then the validity and legality of William's subsequent marriage might be subject to question.

CR<sup>2</sup> 53.03(1) requires Judge Knight to utilize the DRC from the Carter Circuit Court or a special commissioner appointed by the Chief Justice of the Kentucky Supreme Court. He maintains that, since the DRC who heard this case did not meet either of these criteria, the DRC's recommendations and the evidence given before the DRC should not have been relied upon by Judge Knight in rendering his judgment.

The text of CR 53.03(1), which was in effect when the DRC was appointed and his recommendations in this case were entered, provided that "[c]ivil matters pertaining to domestic relations may be referred to a commissioner . . . . A commissioner performing any of these functions shall be qualified as an attorney." We see nothing in this rule that would have required Judge Knight to assign this case to the DRC of the Carter Circuit Court.<sup>3</sup> Furthermore, we do not believe any error in this regard was jurisdictional or "inconsistent with substantial justice,"<sup>4</sup> especially since William failed to object until after the DRC entered his recommendations and the trial court entered its judgment.

William's next argument is that the trial court erred in determining that the bank stock was marital property for which William owed Delores her one-half interest. In early 1989, William, his father, and several other persons began forming a

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<sup>2</sup> Kentucky Rules of Civil Procedure.

<sup>3</sup> Even if this matter had been assigned to the DRC of the Carter Circuit Court, we believe it is likely the DRC would have recused as did the circuit judge.

<sup>4</sup> See CR 61.01.

bank called Citizens National Bank (CNB). On April 14, 1989, William and Delores borrowed \$100,000 from the First National Bank of Lewis County for a stock subscription for 4,000 shares of the CNB's stock. The loan was secured by William's stock in Ralph's Supermarket, which was owned by William, his parents, and his brothers.

A reorganization of Ralph's Supermarket in early 1990 led to William's father borrowing \$100,000 from the First National Bank of Lewis County to pay the \$100,000 note given by William and Delores to the same bank for the stock subscription. This event occurred on or about January 30, 1990. From the date the note was executed by William and Delores until it was paid by William's father, interest on the note was paid from marital funds.

The DRC determined that the bank stock was nonmarital property belonging to William and that its value at the time of the divorce was \$130,000. The DRC further found that the \$30,000 increase in value of the stock was marital property. Delores filed exceptions to this ruling, and the trial judge overruled the DRC by determining that the stock was marital property and that Delores should be paid her one-half interest in it. William argues the trial court erred in determining that the stock was marital property.

KRS 403.190 defines "marital property" as including property acquired by the parties or either of them subsequent to the marriage, with various exceptions, including property acquired by gift. KRS 403.190(2)(a). The statute also states

that property acquired by either spouse after the marriage is presumed to be marital property, even though title to it may be held individually. KRS 403.190(3). The presumption that such property is marital property may be "overcome by a showing that the property was acquired by a method listed in subsection (2) of this section." Id. Under these definitions, we conclude that the trial court properly overruled the DRC and determined the bank stock to be marital property. Although the stock was ultimately issued in William's name approximately one year after William and Delores borrowed the money for the stock subscription, it was clearly purchased during the marriage and with funds the parties borrowed from the First National Bank of Lewis County. Furthermore, the stock was not encumbered by a lien of any sort either at the time William's father paid the loan or when the parties were divorced.

Although the court did not explicitly address it, the more precise issue is whether the \$100,000 loan payoff by William's father was a gift to William and Delores or to William only. We believe the loan payoff was a gift to both of them. William and Delores each signed the note to borrow the money to buy the stock, and each was liable in the event of its nonpayment. When William's father paid off the loan, he did so for the purpose of releasing William's shares of Ralph's Supermarket as collateral on the loan. The loan payoff also had the effect of releasing William and Delores from liability on the note. Since Delores was a comaker on the note, its gratuitous payoff by William's father likewise resulted in a gift to her.

Because this gift was to both parties, it is treated as marital property. Calloway v. Calloway, Ky. App., 832 S.W.2d 890, 893 (1992).

William also contends that the trial court's rejection of the bank stock as nonmarital property means that the disposition of all marital property "should have been done over" because the division of marital property and debts could have been different had the DRC determined the stock to be marital property. As William asserts, the DRC stated in his recommendations that his determination that the bank stock was nonmarital "was considered . . . when allocating the division of marital property." Nevertheless, William did not raise this issue before the trial court in his motion to alter, amend, or vacate and did not ask for a new trial in that regard. Because of his failure to request relief from the trial court in light of the ruling that the bank stock was marital property, the issue has not been preserved for our review. See Kentucky & Indiana Terminal R.R. Co. v. Martin, Ky., 437 S.W.2d 944, 950 (1969), and CR 59.06.

William's next argument is that the trial court erred when it failed to give him a credit for his alleged nonmarital equity in the marital residence. The DRC found that the marital residence was marital property with a value of \$100,000 but that it was encumbered by a debt of \$62,350. Thus, the DRC determined the marital equity in the residence to be \$37,650. The DRC further found that the parties had put a \$15,965.34 down payment on the residence at the time of its purchase. William contends

this down payment was nonmarital property which resulted from the sale of ICH stock in a Thompson-McCenna account. The DRC rejected William's argument that the down payment was his nonmarital equity in the residence. Specifically, the DRC determined that William did not adequately trace the down payment to the sale of ICH stock. Thus, the DRC found no nonmarital interest in the residence.

The trial court was ambiguous in the manner in which it addressed William's exceptions on this issue. The court, which entered its judgment nearly four years after the DRC entered his recommendations, found that the ICH stock was William's nonmarital property and that the stock was used for the down payment on the marital residence. However, the court directed William to pay Delores one-half of the equity in the residence without crediting William for such nonmarital interest.

We have a problem with the trial court's ruling on this issue. First, the ruling is ambiguous in that it appears to agree with William but does not grant him appropriate relief. Second, and more importantly, we question whether the trial court properly reviewed this issue. Although the court found the ICH stock to be nonmarital property, that was not dispositive of the issue. The issue was whether this nonmarital property was used as a down payment and whether William adequately traced the down payment to the stock. In light of the ambiguity in the trial court's ruling, we vacate that portion of the judgment and remand it to the trial court for clarification or for revisiting the issue, if necessary.

William's final argument is that the trial court erred in awarding prejudgment interest to Delores. The trial court's ruling in this regard was that "[t]he disputed issues between the parties were regarding various sums. The Respondent's [Delores's] request for prejudgment interest is therefore **SUSTAINED** and that amount is eight (8%) percent per annum."

Presumably, the award of prejudgment interest is to be computed from the time of the partial decree in 1991 until the final judgment was entered in 1997.

In support of his argument that the court erred in allowing prejudgment interest, William cites Johnson v. Johnson, Ky. App., 564 S.W.2d 221 (1978), wherein the court stated that "the value of a wife's share of a joint-effort estate exists at the time of final judgment." Id. at 223. We also note that in Clark v. Clark, Ky., 487 S.W.2d 272 (1972), the court held that until an adjudication as to property rights is made, a wife's share of the marital estate is "nothing more than an unliquidated claim[.]" Id. at 274.

In the Clark case, the court appeared to hold that interest should only be allowed on the wife's share of the marital estate from the date of judgment because her interest was merely an "unliquidated claim" and that there is no discretion in the trial court to allow interest. Id. at 274. We feel constrained to follow Clark as binding precedent.

SCR<sup>5</sup> 1.030(8)(a). However, in Dalton v. Mullins, Ky., 293 S.W.2d 470 (1956), the court held that an allowance of prejudgment

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<sup>5</sup> Supreme Court Rules.

interest on an unliquidated claim should be determined by whether justice and equity demanded it. Id. at 477. See also Friction Materials Co. v. Stinson, Ky. App., 833 S.W.2d 388, 392 (1992), and Murray v. McCoy, Ky. App., 949 S.W.2d 613, 615 (1996). While these cases and Nucor Corporation v. General Electric Company, Ky., 812 S.W.2d 136 (1991), suggest that an award of prejudgment interest may be made in the discretion of the court on even an unliquidated claim, and while we perceive no reason why this logic should not equally apply in divorce cases such as this where one party has held control of much of the marital estate during the years of prolonged litigation, we nonetheless must follow Clark and reverse the trial court's award of prejudgment interest to Delores.

Finally, we turn to Delores's cross-appeal wherein she argues that the trial court erred in awarding joint custody of the child to the parties. As we have stated, the commissioner recommended in his August 19, 1993, report that Delores be granted sole custody of the child. After exceptions were taken by the parties to the DRC's recommendations, including William's exception to the sole custody ruling, the trial court entered an order awarding custody of the child to Delores. (See the August 31, 1993, order.) The order also stated that all other issues raised by the parties' exceptions would remain pending until a hearing. Nevertheless, when the trial court entered its judgment over three and one-half years later, it awarded joint custody of the child to the parties.

We agree with Delores that the September 2, 1993, order awarding custody of the child to her rejected William's exceptions and decided the issue of custody. It was, however, not a final order but was an interlocutory order that was subject to change. Nevertheless, we believe the trial court abused its discretion when it changed the custody arrangement from one of sole custody to Delores to one of joint custody.

When the DRC entered his recommendation three and one-half years earlier, he specifically found that "these parties are unable to agree upon any course of action for this child, and joint custody would serve no purpose, and would definitely not be in the child's best interests." Following the filing of exceptions by the parties, including William's exception to the custody recommendation, the trial court awarded sole custody to Delores. Then, three and one-half years later, the trial court modified the custody arrangement to joint custody without hearing or considering other evidence and without making any fact findings. We believe this to be a clear abuse of discretion and reverse this portion of the trial court's order.

The judgment of the Carter Circuit Court is therefore affirmed in part, reversed in part, vacated in part, and remanded.

TACKETT, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN PART, DISSENTS IN PART AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the Majority Opinion on all issues except the

award of prejudgment interest to Delores. As to that issue, I respectfully dissent.

I do not believe that Clark, supra, is binding precedent. Nucor, supra, clearly stands for the proposition that an allowance of prejudgment interest on an unliquidated claim rests in the discretion of the trial court. Id. at 143. See also Middleton v. Middleton, 287 Ky. 1, 152 S.W.2d 266 (1941). While Clark recognized the wife's interest in marital property as an unliquidated claim, it appeared to hold that interest should only be allowed from the date of judgment and that there is no discretion in the trial court to allow interest. However, in light of Nucor, I believe that a trial court has such discretion.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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