

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-001833-MR

JEAN ALISA ELDER

APPELLANT

v. APPEAL FROM UNION FAMILY COURT  
HONORABLE WILLIAM E. MITCHELL, JUDGE  
ACTION NO. 00-CI-00089

THOMAS DAMIEN ELDER, JR.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DYCHE AND SCHRODER, JUDGES; ROSENBLUM, SENIOR JUDGE.<sup>1</sup>

ROSENBLUM, SENIOR JUDGE: This appeal arises out of an interlocutory decree of dissolution of marriage between Jean Alisa Elder (Jean) and Thomas Damien Elder, Jr. (Tommy), entered July 14, 2003. Jean brings this appeal from a judgment<sup>2</sup> of the Union Family Court, entered September 1, 2004, dividing marital

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<sup>1</sup> Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

<sup>2</sup> The appeal is taken from a "corrected judgment." The original judgment was entered May 21, 2004. Thomas and Jean filed separate motions to alter, amend, or vacate, which were overruled by order entered August 4, 2004. Thomas filed a motion to reconsider and Jean filed a motion to alter, amend, or vacate, both of which were overruled by order entered September 1, 2004. A corrected judgment, which is the basis for this appeal, was entered September 1, 2004.

and non-marital property; assigning marital and non-marital debt; and awarding maintenance. We affirm.

The parties were married on August 8, 1980. At the time of the marriage, Tommy was almost twenty-three and Jean was nineteen. A daughter was born in 1987 and a son in 1990. Tommy, a self-employed farmer, is a member of a family farming operation. Tommy is the owner of a one-third interest in Elder Brothers, LLC, (Elder Brothers), a partnership that owns farms in Livingston, Crittenden, and Webster Counties; and a shop and grain bin complex in Union County. He is also the owner of a one-fourth interest in Damien Elder & Sons, (DE&S), a partnership that owns farm equipment and vehicles.

Just short of twenty years of marriage, the parties separated on March 15, 2000, and Jean filed a petition for dissolution of marriage on April 6, 2000. Three years later, an interlocutory decree of dissolution was entered on July 14, 2003, reserving for future rulings all issues relative to the division of property, assumption of debt, establishment of child support and the request for an award of maintenance.<sup>3</sup> On July 18, 2003, an agreed order was entered granting sole custody of the minor children to Jean and which set forth specific visitation periods for Thomas. Following hearings in August and

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<sup>3</sup> Jean's appeal of the interlocutory decree was dismissed by this Court by opinion and order rendered January 28, 2005. Elder v. Elder, 2003-CA-001904-MR.

September, 2003, the circuit court entered its judgment on May 21, 2004, which culminated in the corrected judgment entered September 1, 2004. This appeal followed.

Before us, Jean argues that the family court erred with regard to 1) the value of "goodwill" and Tommy's income; 2) the value assigned to assets and debts; and 3) twenty other specific rulings. We review questions of fact under the clearly erroneous standard of Kentucky Rules of Civil Procedure (CR) 52.01, and applications of law *de novo*. See generally Combs v. Combs, 622 S.W.2d 679 (Ky.App. 1981); Perrine v. Christine, 833 S.W.2d 825 (Ky. 1992); Bob Hook Chevrolet Isuzu, Inc. v. Transportation Cabinet, 983 S.W.2d 488, 490 (Ky. 1998). As we conclude that the findings of the family court are supported by substantial evidence and are not an abuse of discretion, and that the family court correctly applied the law, we affirm.

Jean first argues that the family court's finding that there was no "goodwill" was erroneous. As to this issue, the family court stated:

[Jean] argues that [Tommy] failed to show any value for the partnership and the LLC. She cites Clark v. Clark, Ky.App., 782 S.W.2d 56 (1990), in support of her argument. In that case, the Court states "Goodwill of a business or professional organization is a factor to be considered in arriving at the value of the practice for purposes of dividing marital assets, and a Court's adoption of a capitalization of excess earnings method for evaluating the

goodwill of a medical professional corporation, based in part on the amount . . . is correct . . ." She also refers to Rupley v. Rupley, Ky.App., 776 S.W.2d 849 (1989), where the Court stated "in a divorce action, the Court's evaluation of the husband's corporation at the net asset value as shown on the corporate books is error where . . . the book value is further deceptive in reflecting no value for goodwill . . ." In support of her argument, [Jean] presented the testimony of Robert Wayne Stratton. Mr. Stratton was asked to value a one-fourth interest in Damien Elder & Sons partnership and a one-third interest in Elder Brothers, LLC. Mr. Stratton testified that he was provided tax returns of both the partnership and the LLC and a compact disc of all transactions during the period of time that supported the tax returns. Mr. Stratton valued both business entities based upon what he refers to as the capitalization method. Based upon his analysis, Mr. Stratton values the interest of [Tommy] in Damien Elder & Sons partnership at \$196,800.00 and [Tommy's] interest in Elder Brothers, LLC at \$47,500.00. On cross-examination, Mr. Stratton states that he values the operating entity and not the value of any of the assets. He stated that he did not take into consideration the mortgage indebtedness against the real estate except only to the extent there were interest deductions that may have shown up on the tax return but not to the extent that there were mortgages outside of there. He stated that he does not know the entities' ability to repay the loans that are mortgage indebtednesses against the property and does not know anything about the value of the land owned by the LLC. He testified that he does not know what the partnership owns or the age of the equipment and has not had any experience with anyone buying a minority interest in a row crop farm partnership located in western Kentucky. In response to the testimony of

Mr. Stratton, [Tommy] presented the testimony of Ben Campbell. Ben Campbell is a local Certified Public Accountant and testified that he has a substantial number of farm clients in the immediate area and is very familiar with Damien Elder & Sons partnership and Elder Brothers, LLC as he has completed their taxes for ten plus years. He testified that Mr. Stratton was attempting to put a going concern/goodwill valuation to an operation that does not have any goodwill and would not be properly valued by this method. Mr. Campbell noted, that in this particular operation, the partnership does not own any real estate, instead it rents and the contracts are non-assignable, and since they are non-assignable you could not use the going concern approach because an outsider could not buy the operation and have the contracts go with the business.

[Tommy] also presented evidence from his real estate appraiser, Tom Duncan, to the effect that due to the fact that [Tommy] owned a minority interest, i.e., one-third interest, in the real estate that the value of [Tommy's] interest should be discounted by 15%. It is his position that the sale of a minority interest in this real estate would not bring its full value and therefore should be reduced.

The Court rejects both of these testimonies as a basis for determining the value of the assets and adopts the value of the assets, set forth above, and the outstanding liabilities as the true value of [Tommy's] interest in both the partnership and the LLC.

\* \* \*

It is Ordered, Adjudged and Decreed as follows:

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19. [Tommy] shall be awarded all real estate titled in the name of Elder Brothers, LLC at a value of \$472,833.33. He shall also assume the obligations owed to Integra Bank, Fifth Third Bank and Commodity Credit

Corporation associated with this real estate at a value of \$641,532.30.

20. [Tommy] shall be awarded all farm equipment and vehicles, except otherwise specifically allotted, at a value of \$120,015.65. He shall assume the indebtedness owed the Deere & Company in the amount of \$20,805.88.

Jean also argues that the court erred in the valuation of Tommy's income, underestimating his monthly income by \$17,912.33. With regard to this issue, the court found as follows:

[Tommy] has a monthly cash draw of \$1,600.00. His 2002 income tax return shows a total taxable income of \$10,808.00. This income is based upon accelerated depreciation on the Schedule F return. [Tommy] recomputed his Schedule F return claiming only straight-line depreciation and increased the income on Schedule F from \$4,511.00 to \$19,360.00. [Tommy's] income for 2002, when adjusted for straight-line depreciation, is \$25,657.00. The partnership furnishes health insurance for [Tommy] and the parties' two minor children at a cost of \$457.48 per month. The cost of the insurance of \$457.48 when added to the monthly average income of \$2,138.08 creates a total average income of \$2,595.56 per month. [Jean] argues that a number of other expenses are paid for [Tommy] by the partnership and should be added to his income. KRS 403.212(2)(b) would include any benefits furnished him by the partnership in his income. [Jean], however, failed to prove the value of any of these additional benefits except for the value of the insurance, which is furnished [Tommy] and the parties' children. [Tommy] did not introduce evidence as to the cost of the insurance for the children alone.

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It is Ordered, Adjudged and Decreed as follows:

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25. The Court has found that [Tommy's] interest in the growing crops and government payments when the 2002 crop received in 2003 is \$246,142.52. In addition, there is an interest in a growing wheat crop which was found to be \$1,873.40 for a total interest in crops and government payments of \$248,015.92. This has found to be marital property. The Court is to make an equitable division of this marital asset.

[Tommy] has been paying and continues to pay child support based upon a gross monthly income of \$1,766.67. The income from the crops is the source of the funds available to [Tommy] to pay this child support. The Court is deducting \$21,200.04 (yearly income based upon \$1,766.67 per month) from the value of the crops of \$248,015.92 leaving a net value of \$226,815.88. [Jean] did not provide any labor in the production of the crops nor did she assume any financial risk associated with the crop. The Court finds that an allocation of 40% of this figure is an equitable distribution of these assets or the sum of \$90,726.35.

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29. [Jean's] income has been determined to be \$1,257.00 per month. To this sum the amount of \$200.00 for maintenance is to be added for a monthly gross income of \$1,457.00. [Tommy's] income has been determined to be \$2,596.00. The sum of \$200.00 being paid by him to [Jean] for maintenance is deducted from this sum for an adjusted monthly of \$2396.00. Based upon these adjusted monthly income amounts, [Tommy] shall pay child support to [Jean] in the amount of \$514.00 per month.

As indicated above, we review Jean's arguments as to the court's factual findings under the clearly erroneous

standard. Findings of fact of the circuit court shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the court to judge the credibility of the witnesses. CR 52.01. Findings of fact are not clearly erroneous if supported by substantial evidence, the test of which is, whether when taken alone, or in the light of all the evidence, the findings have 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. 1972).

With regard to Jean's contentions that the family court's findings are erroneous, we are, however, bound to assume that the family court's factual findings are supported by substantial evidence because the record on appeal does not contain the testimony or evidence which formed the basis for the court's alleged erroneous findings. Briefs for both parties cite us to hearing tapes from August 21, 2003, and August 22, 2003, but we do not find them in the appellate record. A review of the record indicates that the tapes were not in the record on appeal. CR 98; 75.01. When the complete record is not before the appellate court, we are bound to assume that the omitted record supports the decision of the trial court. Commonwealth v. Thompson, 697 S.W.2d 143, 145 (Ky. 1985); Burberry v. Bridges, 427 S.W.2d 583, 585 (Ky. 1968). As noted by the court in Burberry, *supra*, "[i]t is also reasonable to place upon

appellant the duty to designate and file a record sufficient to enable the court to pass on the alleged errors." We must conclude, therefore, that the findings of the family court are supported by substantial evidence contained in the record and are clearly not erroneous, and that the family court correctly applied the law.

Jean also alleges 1) twenty specific errors by the family court which amount to allegations of differences between the findings of the court and the actual testimony or evidence; and 2) numerous errors in the valuation of assets and debt. Again, because the record on appeal does not contain the testimony or evidence, we must assume that the omitted record supports the findings of the family court. We therefore conclude that the court's findings are not erroneous and that the family court correctly applied the law. Burberry, *supra*.

For the foregoing reasons, the judgment of the Union Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Amealia R. Zachary  
Dixon, Kentucky

BRIEF FOR APPELLEE:

Sidney H. Hulette  
Morganfield, Kentucky