

RENDERED: SEPTEMBER 30, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-002144-MR

DENA R. YOUNG

APPELLANT

v. APPEAL FROM GREEN CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 04-CI-00016

TIMOTHY W. YOUNG

APPELLEE

OPINION AFFIRMING IN PART
AND REMANDING IN PART

** ** *

BEFORE: DYCHE AND SCHRODER, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

ROSENBLUM, SENIOR JUDGE: Dena R. Young appeals from the Findings of Fact, Conclusions of Law, and Decree of Dissolution of Marriage entered by the Green Circuit Court on October 8, 2004. Dena alleges that the circuit court erred in its distribution of a 1994 Chevrolet truck and in its failure to distribute a Chevrolet Beretta; in its calculation of appellee Timothy Young's child support obligation; by failing to award

¹ 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 KRS 21.580.

her maintenance; and in its distribution of a personal injury award awarded to Timothy during the marriage. For the reasons stated below, we affirm in part and remand in part.

Dena and Timothy were married on April 13, 1999. One child was born during the marriage, Stanley Wayne Young, born November 1, 1999. On January 21, 2004, Timothy filed a petition for dissolution of the marriage.

A hearing on the outstanding issues relating to the divorce was held on August 10, 2004. On October 8, 2004, the circuit court entered its Findings of Fact, Conclusions of Law, and Decree. This appeal followed.

We begin with a general statement of our standard of review. Under CR² 52.01, in an action tried without a jury, "[f]indings 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. A factual finding is not clearly erroneous if it is supported by substantial evidence. Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998); Uninsured Employers' Fund v. Garland, 805 S.W.2d 116, 117 (Ky. 1991). Substantial evidence is evidence, when taken alone or in light of all the evidence, which has sufficient probative value to induce conviction in the mind of a reasonable person. Golightly, 976

² Kentucky Rules of Civil Procedure.

S.W.2d at 414; Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky.App. 2002). An appellate court, however, reviews legal issues de novo. See, e.g., Carroll v. Meredith, 59 S.W.3d 484, 489 (Ky.App. 2001); Hunter v. Hunter, 127 S.W.3d 656 (Ky.App. 2003)

First, Dena contends that the trial court erred by determining that a 1994 Chevrolet truck was owned by Timothy's sister, Peach Rainwater, rather than marital property purchased and owned by Timothy and subject to distribution. Dena also contends that the circuit court failed to provide for the distribution of a Chevrolet Beretta automobile.

KRS 403.190 provides, in relevant part, as follows:

- (1) In a proceeding for dissolution of the marriage or for legal separation, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's property to him. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:
 - (a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
 - (b) Value of the property set apart to each spouse;
 - (c) Duration of the marriage; and
 - (d) Economic circumstances of each spouse when the division of property is to become effective, including the

desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

- (2) For the purpose of this chapter, "marital property" means all property acquired by either spouse subsequent to the marriage except:
 - (a) Property acquired by gift, bequest, devise, or descent during the marriage and the income derived therefrom unless there are significant activities of either spouse which contributed to the increase in value of said property and the income earned therefrom;
 - (b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
 - (c) Property acquired by a spouse after a decree of legal separation;
 - (d) Property excluded by valid agreement of the parties; and
 - (e) The increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during marriage.
- (3) All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section.

"It is well settled that issues pertaining to the division of marital property upon divorce are reviewed under an abuse of discretion standard. An abuse of discretion exists when the reviewing court is firmly convinced that a mistake has been made. A [] court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an[] erroneous legal standard."

Overstreet v. Overstreet, 144 S.W.3d 834, 838 (Ky.App. 2003) (citations and internal quotes omitted).

In its October 8, 2004, Findings of Fact, Conclusions of Law, and Decree of Dissolution of Marriage, the trial court made the following findings of fact and conclusions of law regarding the Chevrolet truck:

FINDINGS OF FACT:

. . . .

15. That the 1994 Chevrolet truck, 1500 Series, Vehicle Identification Number 2GCEK19K9R1119127 is currently titled in the name of the Petitioner's sister, Peach Rainwater.

16. That the testimony of the Petitioner and Peach Rainwater is that said vehicle was purchased for Peach Rainwater, and that the Petitioner loaned her money to purchase said truck.

17. That there has been no evidence submitted by the Respondent in this action to overcome the presumption that Peach Rainwater is the owner of the 1994 Chevrolet truck set forth hereinabove.

. . . .

IN ACCORDANCE WITH THE FOREGOING FINDINGS OF
FACT, THE COURT REACHES THE FOLLOWING
CONCLUSIONS OF LAW:

. . . .

10. That the 1994 truck is titled in the name of Peach Rainwater, and based upon the testimony of the Petitioner and Peach Rainwater, along with no persuasive evidence being presented by the Respondent to the contrary, this Court finds that Peach Rainwater is the owner of the 1994 truck, and that said vehicle is not a marital asset.

In support of her position that the Chevrolet truck was purchased, and is owned, by Timothy, Dena refers us to the deposition of Alvin Spoon of Spoon Auto Sales, the lot where the truck was purchased. In his deposition, Spoon testified that Timothy told him that "he was going through a divorce and wanted to put the truck in his sister's name." It is undisputed that the truck was placed in Rainwater's name.

First, the testimony of Spoon is ambiguous. The testimony does not demonstrate that the purchase of the truck was a fraudulent transaction in which Timothy was to be the actual owner of the truck but was surreptitiously titling it in his sister's name in order to defraud his wife. The testimony could also be interpreted as Timothy having told Spoon that he was going through a divorce, and, as an unrelated matter, the

truck was going to be placed in his sister's name because the truck was to be hers and he was lending her the money to buy it.

Further, Timothy and Peach Rainwater testified that Timothy loaned Rainwater the money to purchase the truck, that their intent was that Rainwater was to be the owner of the truck, and that the truck was titled in Rainwater's name for that reason. To the extent this testimony conflicts with Spoon's testimony, it was for the circuit court, not this court, to resolve the discrepancy. The testimony of Timothy and Rainwater is substantial evidence supporting the decision of the circuit court. We accordingly affirm its determination that the vehicle is the property of Rainwater and is not a marital asset.³

Dena also argues that the circuit court failed to distribute a Chevrolet Berretta automobile. The trial court made no findings of fact regarding this vehicle and Timothy does not mention it in his brief. Dena provides no information other than that there was such an automobile owned by the parties. Without the circuit court's findings concerning this vehicle we are unable to undertake a meaningful review of this alleged marital asset. We accordingly remand for additional findings concerning the Berretta automobile. Upon remand, in the event

³ We note that the loan Timothy made to Rainwater could be construed as marital property in the nature of an account receivable. However, Dena does not argue this and the issue is not properly before us.

there is an undistributed Chevrolet Beretta, the circuit court should make a distribution in accordance with KRS 403.190.

Next, Dena, who was designated as primary residential custodian of the parties' child, contends that the circuit court erroneously calculated Timothy's child support obligation.

With regard to this issue the circuit court made the following findings of fact and conclusions of law:

FINDINGS OF FACT:

. . . .

7. That the Petitioner is currently employed for Jerry Hall and earns the sum of \$6.00 an hour and works an average of 40 hours a week.

. . . .

8. That the Petitioner has worked various jobs during the course of his life, including employment at Cox Interior.

IN ACCORDANCE WITH THE FOREGOING FINDINGS OF
FACT, THE COURT REACHES THE FOLLOWING
CONCLUSIONS OF LAW:

. . . .

4. That the Petitioner shall pay child support to the Respondent in the amount of \$181.00 per month, and shall continue to pay the sum of \$20.00 per month toward his child support arrearage, until such time as said arrearage has been paid in full.

The trial court based its child support award upon the premise that Timothy earned \$6.00 per hour and worked 40 hours

per week for earnings of \$240.00 per hour. No earnings were imputed to Dena.

Dena contends that the circuit court's award was erroneous because in a deposition given in November 2002 in a personal injury case which arose as a result of a car wreck, Timothy testified that he was then earning \$9.50 per hour.

At the hearing in this matter Timothy testified that his current salary was \$6.00 per hour. Moreover, Timothy submitted as an exhibit a pay stub for the period ending July 30, 2004, which reflects a wage of \$6.00 per hour. As noted above, findings of fact by the circuit court should not be disturbed unless they are shown to be clearly erroneous. CR 52.01; McKinney v. McKinney 813 S.W.2d 828, 829 (Ky.App. 1991).

Again, it was for the circuit court to resolve any conflicting evidence in the record concerning Timothy's current wage. As noted by Dena, Timothy may have been puffing his income in the personal injury action in order to secure a higher lost wages award.⁴ However, Timothy's testimony that he currently earns \$6.00 per hour was corroborated by his pay stub presented as an exhibit at the hearing (See circuit court record, p. 73). Together, this testimony and documentation is

⁴ Dena seems to argue that if Timothy did, in fact, puff his wages in the personal injury case, then he should be penalized by way of an increased child support obligation in the present case. We disagree with this view.

substantial evidence supporting the circuit court's finding that Timothy earns \$6.00 per hour.

Next, Dena contends that the circuit court erred by failing to award her maintenance.

KRS 403.200 provides as follows:

- (1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over maintenance order for either spouse only if it finds that the spouse seeking maintenance:
 - (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and
 - (b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.
- (2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:
 - (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
 - (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

- (c) The standard of living established during the marriage;
- (d) The duration of the marriage;
- (e) The age, and the physical and emotional condition of the spouse seeking maintenance; and
- (f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

Under this statute, the trial court has dual responsibilities: one, to make relevant findings of fact; and two, to exercise its discretion in making a determination on maintenance in light of those facts. In order to reverse the trial court's decision, a reviewing court must find either that the findings of fact are clearly erroneous or that the trial court has abused its discretion. Weldon v. Weldon, 957 S.W.2d 283, 285 (Ky.App. 1997).

With regard to its decision not to award maintenance the circuit court made the following findings:

FINDINGS OF FACT:

.

7. That the Petitioner is currently employed for Jerry Hall and earns the sum of \$6.00 an hour and works an average of 40 hours a week.

8. That the Respondent is unemployed at this time.

9. That the Petitioner has worked various jobs during the course of his life, including employment at Cox Interior.

10. That the Respondent has worked for Amazon.com, Cox Interior, and other similar jobs during the course of her life.

11. The Petitioner and Respondent have similar employment histories and each has the capacity to make approximately the same amount of money at this time based upon their education and work history.

. . . .

IN ACCORDANCE WITH THE FOREGOING FINDINGS OF
FACT, THE COURT REACHES THE FOLLOWING
CONCLUSIONS OF LAW:

. . . .

9. That because the Petitioner has a gross income of \$240.00 per week at this time, and because both the Petitioner and the Respondent have similar work histories, similar educations, and similar prospects for employment in the future, and for that reason this Court finds that maintenance is not appropriate in the above styled action.

While the findings of fact made by the circuit court are supported by substantial evidence, nevertheless, these findings are insufficient to be dispositive of Dena's request for maintenance. Specifically, the circuit court failed to make findings concerning the threshold elements contained in KRS 403.200(1).

Accordingly, we remand for findings on the issues of whether (1) Dena has sufficient property, including marital property apportioned to her, to provide for her reasonable needs; and (2) whether Dena is able to support herself through

appropriate employment or whether their child's condition or circumstances make it appropriate that Dena not be required to seek employment outside the home. After making the requisite findings under KRS 403.200(1), the circuit court should reconsider Dena's request for maintenance in light of the additional findings.

Finally, Dena contends that the circuit court erred by failing to allot to her an amount related to the \$16,416.31 personal injury award Timothy received in December 2003.

In its October 8, 2004, Findings of Fact, Conclusions of Law, and Decree, the circuit court made the following findings of fact and conclusions of law related to this issue:

FINDINGS OF FACT:

. . . .

23. That in the Answers to Interrogatories that were submitted in the personal injury claim, the Petitioner stated under oath that he did not have any permanent impairment in his ability to earn money, and stated that the maximum lost wages that he was claiming was the sum of \$5,320.00

24. That the Petitioner has testified and this Court finds that the proceeds received by the Petitioner in the amount of \$16,416.31 could have been spent for various marital expenses, repayment of debts, and other miscellaneous items.

. . . .

IN ACCORDANCE WITH THE FOREGOING FINDINGS OF
FACT, THE COURT REACHES THE FOLLOWING
CONCLUSIONS OF LAW:

.

14. That the insurance settlement received by the Petitioner in December, 2003, was primarily for pain and suffering incurred by the Petitioner, which is a non-marital asset, and the remainder of the funds which could have arguably been considered marital as compensation for lost wages have been spent, and for that reason the Petitioner is not required to reimburse the Respondent for any money received by him for his personal injury settlement.

When a personal injury occurs during the marriage, to the extent that the injury award for loss of earnings and permanent impairment of ability to earn money is applicable to the years while the marriage existed, it is marital property, and to the extent that the award can be prorated to the remaining years of life expectancy following the dissolution of marriage, it is nonmarital property. However, money recovered as damages for pain and suffering for an injury which occurred during the marriage is not marital property; the injured party has simply exchanged property acquired before the marriage, i.e., good health, free from pain, for money received as compensation for the loss. Weakley v. Weakley, 731 S.W.2d 243, 244-245 (Ky. 1987).

The circuit court's determination that the majority of the award received by Timothy was for pain and suffering and,

therefore, nonmarital, is supported by substantial evidence. The total award in the personal injury action was for \$16,416.31, whereas Timothy claimed lost wages of only \$5,320.00. Also supported by substantial evidence is the circuit court's conclusion that the award has been spent and there is no monetary asset upon which to base a division. AS previously noted (see fn 3, supra.), arguably, the loan to Rainwater was from the personal injury award and amounts to an account receivable which may, in part, be subject to division. However, Dena does not raise this as an issue, and we will accordingly not discuss this theory on the merits.

For the foregoing reasons the judgment of the Green Circuit Court is affirmed in part and remanded in part.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffery L. Eastham
Greensburg, Kentucky

BRIEF FOR APPELLEE:

Samuel Todd Spalding
Lebanon, Kentucky