

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-002603-MR

MELVIN SMITH

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE C. DAVID HAGERMAN, JUDGE  
ACTION NO. 04-CI-01237

PAMELA SMITH AND  
PHILLIP BRUCE LESLIE

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE AND TAYLOR, JUDGES; EMBERTON,<sup>1</sup> SENIOR JUDGE.

TAYLOR, JUDGE: Melvin Smith appeals from a Decree of Dissolution of Marriage entered December 9, 2005, by the Boyd Circuit Court incorporating the findings of fact and conclusions of law set forth in the report of the Domestic Relations Commissioner (Commissioner), as modified by subsequent court order. On appeal, Melvin challenges

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<sup>1</sup> Senior Judge Thomas D. Emberton 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.

the division of the marital estate, the award of maintenance, and the award of attorney fees. For the reasons stated, we affirm.

Melvin and Pamela Smith were married in December 1971. Melvin initiated this action by filing a petition for dissolution of marriage in the Boyd Circuit Court on December 20, 2004. Pursuant to Ky. R. Civ. P. (CR) 53.03, the matter was referred to the Commissioner. The Commissioner's report was entered September 26, 2005. Melvin filed exceptions. By order entered October 19, 2005, the circuit court adopted in part and modified in part the Commissioner's report. The parties' marriage was dissolved by Decree of Dissolution of Marriage entered in the Boyd Circuit Court on December 9, 2005. This appeal follows.

Relevant to this appeal, the circuit court adopted, subject to amendment by order entered October 19, 2005, the Commissioner's recommended findings of fact and conclusions of law. These findings and conclusions included that: (1) Melvin had gross earnings of \$108,151.57 in 2004; (2) Pamela had not worked outside the home for more than twenty years; (3) Pamela possessed only a tenth grade education, and suffered health problems; (4) the marital residence had been purchased on a land contract and was scheduled to be paid-off in April 2006; and (5) the parties had a marital credit card debt of \$68,511.54.

The court ordered the sale of the marital residence, with the proceeds to first be paid on the land contract and any remaining proceeds to be applied to the credit card debt. The court also ordered the payment of all bank accounts, totaling approximately \$20,000.00, against the credit card debt. Any remaining credit card debt

was to be paid by Melvin. Additionally, any surplus proceeds from the sale of the marital residence after payment of the credit card debt, were to be divided equally between the parties.

The court also equally divided between the parties Melvin's 401k plan/T. Rowe Price Account, valued at approximately \$85,000.00. Melvin also had a vested employer-funded pension benefit from AK Steel that was divided between the parties. Pamela was awarded maintenance of \$2,000.00 per month for twelve months, \$1,750.00 per month for twelve months, \$1,500.00 per month for twelve months, and \$1,250.00 per month for twelve months. The court further awarded Pamela permanent maintenance of \$1,000.00 per month until Pamela became eligible to draw on Melvin's pension.<sup>2</sup> The court found that the parties' two motor vehicles were Pamela's nonmarital property and further awarded Pamela attorney's fees of \$4,290.00. However, Melvin was awarded the motor vehicle in his possession which was set off against the \$4,290.00 Melvin was ordered to pay toward Pamela's attorney's fees.

We begin our analysis with a statement of the appropriate standard of review. In this case, an evidentiary hearing was conducted by the Commissioner, without a jury. Accordingly, our review of the Commissioner's findings, as adopted by the circuit court, proceeds pursuant to CR 52.01:

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

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<sup>2</sup> Upon receipt of the pension benefit, the court ordered that the permanent maintenance award of \$1,000.00 per month be reduced by any amount of pension benefits Pamela may receive from Melvin, but her total award would remain at \$1,000.00 per month until death or remarriage.

findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court. . . .

CR 52.01. A finding of fact is not clearly erroneous if supported by substantial evidence. Moore v. Asente, 110 S.W.3d 336 (Ky. 2003). Questions of law are reviewed *de novo* and legal conclusions thereon made by the circuit court will not be disturbed absent an abuse of discretion. Sherfey v. Sherfey, 74 S.W.3d 777 (Ky.App. 2002); Carroll v. Meredith, 59 S.W.3d 484 (Ky. 2001).

With the appropriate standard of review in mind, we shall now address Melvin's allegations of error. Initially, Melvin contends the circuit court erred in its division of the marital assets and debts. Specifically, Melvin contends that the marital property was not divided in "just proportions" as required by Kentucky Revised Statutes (KRS) 403.190.

Unfortunately for the parties, the record in this case reveals that the marital estate is meager, at best. Neither party introduced evidence regarding the fair market value of the marital residence. The court did equally divide between the parties assets with substantive value, namely the 401K plan/T.Rowe Price Account and the vested pension benefit. The court further ordered that the cash in the parties' checking accounts be allocated first to pay the primary outstanding debt, over \$68,000.00 in credit card debt.

The circuit court has wide discretion in dividing marital property and we may not disturb the circuit court's rulings on property division issues unless we find that the circuit court has abused its discretion. Davis v. Davis, 777 S.W.2d 230 (Ky. 1989).

Based upon the evidence presented in this case, there has been no showing that the circuit court abused its discretion dividing the property pursuant to KRS 403.190.

Melvin argues that the credit card debt was created by Pamela and it was an abuse of discretion to allocate any of this debt to him, given the property division ordered by the circuit court. However, unlike marital property, there is no presumption that a debt incurred during a marriage is marital or nonmarital nor is there a presumption that debts must be divided equally or in the same proportion as marital property. Neidlinger v. Neidlinger, 52 S.W.3d 513 (Ky. 2001). The circuit court allocated substantial “marital” assets to the payment of this debt and while the record does not reflect what balance, if any, will be owed by Melvin, we do not find that the circuit court abused its discretion in the allocation of the credit card debt. \_

Melvin next contends that the circuit court erred as to the amount and duration of maintenance awarded to Pamela. Maintenance is governed by KRS 403.200 and may be awarded by a court to a party seeking maintenance if that party can establish that he (1) lacks sufficient property that is apportioned to him to provide for his reasonable needs; and (2) is otherwise unable to support himself through appropriate employment. The decision of whether to award maintenance is within the circuit court’s sound discretion and may not be disturbed unless we determine that the circuit court abused its discretion or its ruling is otherwise based upon clearly erroneous findings of fact. Powell v. Powell, 107 S.W.3d 222 (Ky. 2003).

In reviewing the record before us, it is clear that the Commissioner made numerous findings of fact on this issue which were adopted by the circuit court. As

noted, we believe the marital estate was divided in just proportions. As concerns income, the record reflects that Melvin holds a management position at AK Steel where he has worked for more than twenty years and his income in 2004 exceeded \$100,000.00. However, the findings regarding Pamela were just the opposite. Pamela is forty-eight years old with a tenth grade education, who was determined to have no marketable employment skills. The court further heard evidence that she has substantial health problems. Based upon the record, it is obvious that the circuit court thoroughly examined both prongs of KRS 403.200 in awarding maintenance to Pamela. Melvin has failed to demonstrate that the court's findings are clearly erroneous nor do we find that the circuit court abused its discretion in awarding maintenance to Pamela.

Melvin's final contention of error is that the award of attorney's fees to Pamela was an abuse of discretion. The circuit court ordered Melvin to pay Pamela's attorney the sum of \$4,290.00, the court finding that Pamela did not have adequate funds to pay her attorney. KRS 403.220 permits the circuit court to order one party in a divorce action to pay a reasonable amount of the attorney's fees of the other party if there exists a disparity in the relative financial resources of the parties in favor of the party who is ordered to pay the fees. Whether a party is ordered to pay attorney's fees is strictly within the sound discretion of the circuit court. In this case, the court carefully reviewed the gross disparity in income of the parties. Additionally, while ordering Melvin to pay attorney's fees for Pamela, the court further awarded Melvin a motor vehicle in his possession that the court had determined was nonmarital property that belonged to Pamela, since the motor vehicle had been purchased with funds inherited by Pamela.

Pamela has not contested this allocation of nonmarital property. Given the totality of the circumstances, we do not find that the circuit court abused its discretion in ordering Melvin to pay the sum of \$4,290.00 in attorney's fees.

For the foregoing reasons, the Decree of Dissolution of Marriage entered by the Boyd Circuit Court on December 9, 2005, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gordon J. Dill  
Ashland, Kentucky

BRIEF FOR APPELLEE:

Phillip Bruce Leslie  
McBrayer, McGinnis, Leslie & Kirkland  
Greenup, Kentucky