

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

NO. 2009-CA-000095-MR

DANIELLE L. FOLTZ

APPELLANT

v. APPEAL FROM BOONE FAMILY COURT  
HONORABLE LINDA R. BRAMLAGE, JUDGE  
ACTION NO. 05-CI-01311

EDWARD FOLTZ

APPELLEE

OPINION  
AFFIRMING

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BEFORE: LAMBERT AND STUMBO, JUDGES; WHITE,<sup>1</sup> SENIOR JUDGE.

LAMBERT, JUDGE: Danielle Foltz appeals from three orders entered by the Boone Family Court involving property division, maintenance, and dissipation of marital assets. After careful review, we affirm the orders entered by the family court.

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

Danielle and Edward Foltz were married on May 26, 1990. As a result of this marriage, the parties have two minor children. On July 20, 2005, Edward filed a petition for dissolution of marriage in the Boone Family Court. The parties entered into a mediated custody agreement on June 18, 2007, whereby the husband was awarded sole custody of the parties' minor children.

After the filing of the petition for dissolution and pursuant to an agreed order entered January 20, 2006, Edward was to pay \$1250.00 per month in spousal maintenance, and Danielle vacated the marital residence. Later, by order entered August 27, 2007, the maintenance was reduced to \$900.00 per month, based primarily on Edward's testimony that he was paying all of the marital bills, including the mortgage on the marital property.

After extensive discovery and litigation, the parties were unable to reach a settlement agreement regarding the division of marital assets and debts, the amount and duration of spousal maintenance, and child support. The case was set for a final contested property hearing on January 14, 2008. At that time, a joint memorandum agreement was entered designating that the parties would use February 1, 2006, as a valuation date for all property issues and that all debt acquired subsequent to this date should be apportioned to the party acquiring the debt with credit or contribution from the other. However, on January 12, 2008, just before the hearing, Edward filed for bankruptcy, thereby causing a delay in the proceedings until May 8, 2008.

During the parties' marriage, Edward was the owner of Cartec Engineering. Following the filing of the divorce petition, Cartec began to experience a decline in business. Edward attributed this to several factors, including the fact that he was unable to devote as much time to the business because he was the sole custodian of the children; decline in bids; and decline in real estate market and development. Edward testified that he attempted to save his business by cutting expenses, which included terminating employees. However, the market and economy continued to decline to the point that Edward closed Cartec.

The parties were also joint owners of a company known as E.D.F., LLC, which owned two parcels of real estate. The parties attempted to sell the real estate owned by E.D.F., however, according to Edward, Danielle refused a purchase offer which would have generated a profit to the parties. The parties also owned a marital residence which Danielle believed to be valued at \$600,000.00. However, she testified that she had high expectations and had overvalued the real estate. The parties attempted to sell the marital residence, but Danielle refused to reduce the listing price even after this action was recommended by the realtor.

During the bankruptcy process, the marital residence and real estate owned by E.D.F. were sold. Danielle received \$55,514.00 from the proceeds of the marital residence. Danielle will also receive one half of the proceeds from the sale of the E.D.F. property. Edward will receive only his homestead exemption in

the amount of \$20,400.00 and the remaining proceeds will be applied to any outstanding marital debts.

Following the final hearing, the Boone Family Court entered its supplemental findings of fact and conclusions of law on October 20, 2008. On October 30, 2008, Danielle filed a motion to alter, amend, or vacate the family court's October 20, 2008, order involving the division of marital assets and the amount and duration of maintenance and child support. The court issued an order on December 12, 2008, overruling Danielle's motion to alter, amend, or vacate. This appeal now timely follows.

It is well established that a trial court has wide discretion in dividing marital property, and this Court may not disturb the trial court's rulings on property division issues unless the trial court has abused its discretion. *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006) (internal citation omitted). Further, this Court reviews the trial court's findings of fact in a dissolution action only to determine if they are clearly erroneous. Civil Rule (CR) 52.01; *Id.*

Danielle's central argument on appeal is that Edward dissipated the marital assets, specifically the marital real estate and Edward's business assets in Cartec. Danielle also argues that the family court abused its discretion by giving the marital business of Cartec a zero value, with no award or offset to her. Finally, Danielle argues that the family court abused its discretion in determining child support and maintenance by failing to find that Edward was voluntarily under-employed.

In support of her argument that Edward dissipated the marital assets, Danielle argues that the family court ignored her testimony that Edward did not pay the mortgage after December 2007 and did not pay the mortgage on their investment property, while he moved Cartec Engineering to a new facility with an expensive lease. She alleges that Edward's actions resulted in a delinquency at the closing on the marital residence in the amount of \$10,413.00, which was taken out of the proceeds of the sale and that such delinquency was proof of dissipation of marital assets.

However, Edward testified before the family court that he could no longer work the hours needed to operate his own business because he was awarded sole custody of the parties' minor children. Further, Edward testified that prior to the final hearing, he was faced with an increasing amount of debt and a decreased flow of income through Cartec, and he was personally sued by Community Management Corporation for a personal guarantee of a commercial lease in the amount of \$147,216.00. Edward also presented evidence of secured debts in the amount of \$242,999.00 and unsecured debts and/or personal guarantees of \$308,458.30. Edward testified that he closed Cartec due to the severe downturn in the economy and the downturn in real estate development, which led to decreased bids and lack of income to support the business.

Edward's testimony was supported by the testimony of Michael Baker, the trustee in the bankruptcy proceeding. Mr. Baker testified that as a Chapter 7 trustee, he had noticed a significant increase in the number of small

business bankruptcies during the two years preceding the final hearing of this matter. Mr. Baker opined that the increase in small business bankruptcies was due primarily to the downturn in the economy and substantial decline in the real estate market. According to Mr. Baker, the economic downturn in the real estate market had financially affected everyone from sawmills to realtors to home builders. According to Mr. Baker, this would include surveyor and engineering firms such as Cartec.

Edward also presented testimony that prior to filing bankruptcy, the parties attempted to sell the real estate owned by E.D.F. However, Danielle refused to list the real estate for \$185,000.00 as recommended by a realtor. Danielle testified that she also refused to accept an offer to purchase the real estate for \$170,000.00. According to Edward, due to the declining economy, his drop in income, and Danielle's refusal to accept reasonable purchase offers on the various properties, he was left with no choice but to seek bankruptcy protection to avoid the collection efforts of the creditors. As a result of the bankruptcy proceeding, the marital residence was sold by the Chapter 7 trustee, and the parties received the various amounts mentioned herein. Furthermore, as a result of the bankruptcy discharge, the parties were left with no debt incurred during the marriage.

Given the evidence presented to the family court, we cannot say that the family court abused its discretion in finding that the husband did not dissipate the marital assets, nor did it abuse its discretion in finding that Danielle was entitled to \$55,914.18 from the sale of the residence while Edward was to only

receive his homestead exemption. The family court's findings of fact were supported by substantial evidence, and as such, were not clearly erroneous.

Danielle also argues that the family court abused its discretion in failing to award her a monetary value in Cartec. Danielle argues that the parties agreed to February 1, 2006, as the valuation date (not the distribution date) for all marital property. According to her expert, Andrew Bertke, Cartec was worth \$160,000.00, and therefore she should have been awarded one half of this value. However, Edward argues that Danielle's expert did not value Cartec as of February 1, 2006, and instead valued the business as of December 31, 2006, and therefore neither party provided any relevant testimony as to the value of Cartec on the agreed evaluation date.

Further, Edward argues that Mr. Bertke testified that fair market value is what a reasonable person would pay and a reasonable person would accept for a business. However, on cross examination, Mr. Bertke admitted that he failed to consider several important factors in valuing Cartec. Mr. Bertke admitted that it would be important to speak with the owner, consider employee turnover, unfavorable lease terms, and dependence of the owner in the success of the business and market decline. However, Mr. Bertke never spoke with Edward before determining the value of Cartec, nor did he consider the current market decline. Danielle argues that Mr. Bertke tried to interview Edward, but that Edward refused to provide any information about the business.

It is well established that issues relating to the weight and credibility of evidence are within the sole province of the fact finder and generally will not constitute grounds for reversal on appeal. *See Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky. App. 2003). Further, “findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the family court to judge the credibility of witnesses.” *Id.* (Internal citation omitted). Thus, the family court is in the best position to judge the credibility of both Danielle and Edward’s experts, as well as to consider other factors and other evidence presented. Based upon the entirety of the evidence presented, the family court did not abuse its discretion in finding that Cartec had no equity to be divided between the parties.

As to her next assignment of error, Danielle asserts that she should be awarded an additional \$17,400.00 from the sale of the marital residence based on the fact that at the time of the closing, the payoff on the mortgage had gone up from \$249,372.00 to \$259,287.58 and that back taxes for 2007 totaled \$5,121.85 and for 2008 totaled \$2,302.22. In support of her argument, Danielle argues that Edward was solely responsible for paying the real estate taxes and mortgage on the marital residence based on the agreed temporary order entered January 20, 2006, giving Edward exclusive use of the marital residence as of February 1, 2006. That order also stated that neither party was to “commit or permit any waste or diminution of marital assets.” Danielle argues that the provision that stipulated that any debts incurred after February 2006 were to be the parties’ individual debts



deems that the additional \$17,400.00 withheld from the closing costs should have been treated as Edward's debt, and therefore she was entitled to that money.

We agree with Edward that the family court's order did not state that Edward was to be solely responsible for the mortgage payment and taxes on the residence. The marital residence was marital property and therefore both parties were obligated on the mortgage and for any taxes due. In fact, Edward attempted to sell the marital residence to avoid foreclosure and bankruptcy, but Danielle refused to reduce the listing price even though she admitted to overvaluing the residence. Based on this evidence, the family court could have determined that the wife dissipated marital assets by stalling the sale of the residence. On balance, the family court's decision is supported by substantial evidence. Thus, we hold that the family court did not abuse its discretion in failing to award Danielle an additional distribution of \$17,400.00 from the sale of the marital residence.

Finally, Danielle argues that the family court abused its discretion in awarding maintenance and establishing child support. The court awarded Danielle maintenance in the amount of \$900.00 for a period of three years, which the court determined was a sufficient time for Danielle to obtain adequate employment. While Danielle agrees that amount was proper based on the parties' income levels at the time of the trial, she argues on appeal that Edward is voluntarily underemployed.

Under KRS 403.200(2), the amount and duration of maintenance is a matter within the sound discretion of the trial court. *Gentry v. Gentry*, 798 S.W.2d

928, 937 (Ky. 1990). “Whether a [person] is voluntarily underemployed is a factual question for the trial court to resolve.” *Gossett v. Gossett*, 32 S.W.3d 109, 111 (Ky. App. 2000). This Court is not authorized to substitute its own judgment for that of the trial court, if the trial court’s decision is supported by substantial evidence. *Id.*

Prior to awarding maintenance, the family court made extensive findings of fact and conclusions of law based upon the testimony and evidence presented. The record reflects that the family court utilized Edward’s income of \$6,201.00 per month working for Abercrombie & Associates in determining maintenance and child support. As required by KRS 403.200, the family court considered the duration of the parties’ marriage, the earning and expenses of the parties, the physical and emotional condition of the parties, the ability of the wife to meet her reasonable needs, and her ability to support herself through reasonable employment. Based on this and the evidence presented about the downturn in the market for Edward’s type of work, the family court concluded that Edward would pay Danielle maintenance for three years so that she could gain employment to adequately support herself. The family court did not abuse its discretion, and its findings were supported by substantial evidence.

Accordingly, we affirm the orders of the Boone Family Court in their entirety.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brenda L. Bonecutter  
Newport, Kentucky

BRIEF FOR APPELLEE:

L. Craig Kendrick  
Florence, Kentucky