

RENDERED: FEBRUARY 11, 2011; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2008-CA-002421-MR  
&  
NO. 2009-CA-000056-MR  
&  
NO. 2009-CA-000698-MR

GREGORY WHEELER

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEALS FROM ELLIOTT CIRCUIT COURT  
v. HONORABLE KRISTI HOGG GOSSETT, JUDGE  
ACTION NO. 07-CI-00079

TAMRA ISON WHEELER  
(NOW WEDDINGTON)

APPELLEE/CROSS-APPELLANT

OPINION  
AFFIRMING IN PART,  
AND REVERSING IN PART

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BEFORE: VANMETER AND WINE, JUDGES; SHAKE,<sup>1</sup> SENIOR JUDGE.

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<sup>1</sup> Senior Judge Ann O'Malley Shake 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.

VANMETER, JUDGE: Gregory Wheeler appeals, and Tamra Ison Wheeler (now Weddington) cross-appeals, from the September 22, 2008, order of the Elliott Circuit Court issuing findings of fact, conclusions of law, and a decree of dissolution of marriage, as well as from the December 1, 2008, order amending the decree and the subsequent order denying Tamra's motion to alter, amend, or vacate the decree. For the following reasons, we affirm in part, reverse in part, and remand.

Gregory and Tamra were married on February 6, 2004. No children were born of the marriage, but both parties had children from past relationships. After approximately three and a half years of marriage, the parties separated on June 10, 2007. Tamra filed a petition for dissolution of marriage on June 22, 2007, and then filed a motion for temporary maintenance.

Following a hearing on July 23, 2007, the trial court entered an order requiring Gregory to pay temporary maintenance in the amount of \$1,244 per month, retroactive to the filing date of Tamra's motion. The court denied Gregory's subsequent motions requesting modification of temporary maintenance.

This matter came before the court for a final hearing on May 30, 2008. On September 22, 2008, the court issued findings of fact, conclusions of law, and a decree of dissolution of marriage, ruling on the division of property and maintenance. Both parties filed timely post-judgment motions and on December 1, 2008, the court entered an order denying in part and granting in part Gregory's motion for a new trial and/or to amend the final decree of dissolution. For

whatever reason, the trial court did not rule on Tamra's post-judgment motion at that time. Gregory filed a notice of appeal, which Tamra moved to dismiss on the basis that her post-judgment motion had not been ruled upon. On March 19, 2009, the trial court issued a one-page order summarily denying Tamra's post-judgment motion. This appeal followed.

This matter is before this court upon the trial court's findings of fact and conclusions of law and upon the record made in the trial court. Our review of the trial court's findings of fact "is governed by the rule that such findings shall not be set aside unless clearly erroneous." *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky.App. 2005). A factual finding is not clearly erroneous if supported by substantial evidence. *Id.* (citations omitted). Substantial evidence is evidence, when taken alone or in light of all the evidence, "that a reasonable mind would accept as adequate to support a conclusion." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (citations omitted). The trial court's conclusions of law, however, are subject to independent *de novo* appellate determination. *Gosney*, 163 S.W.3d at 898-99 (citations omitted).

On appeal, both parties dispute the trial court's findings of fact and conclusions of law contained within the court's September 2008 order, as well as the December 2008 order amending the final decree. We will first address the claims of error raised in Gregory's appeal.

#### Gregory's claims

First, Gregory argues the trial court erred by failing to grant a new trial. Appellate review of a trial court's denial of a motion for a new trial is to determine whether the denial was clearly erroneous. *Rippetoe v. Feese*, 217 S.W.3d 887, 890 (Ky.App. 2007) (citing *Miller v. Swift*, 42 S.W.3d 599, 601 (Ky. 2001)). In this case, Gregory's post-judgment motion was captioned "Motion for new trial pursuant to Civil Rule 59.01 and notice of hearing," yet he prayed "that the court will grant a new trial **and/or amend its final decree of dissolution to correct the above referenced errors.**" (emphasis added). Gregory's post-judgment motion did not raise new factual issues, but rather contested the weight given by the trial court to specific evidentiary items. The trial court, therefore, properly considered his motion as requesting an alternative form of relief, *i.e.* amendment of the final decree, and did not err by so amending the decree without conducting an additional hearing and/or a new trial.

Next, Gregory asserts the trial court erred in its designation of marital and non-marital property. The rule is well-established that "[a] trial court is to divide marital property in just proportions considering all relevant factors." *Croft v. Croft*, 240 S.W.3d 651, 655 (Ky.App. 2007). *See also* KRS 403.190(1). Yet, "just proportions does not necessarily mean equal proportions." *Croft*, 240 S.W.3d at 655 (citation omitted). In addition, all property acquired after the marriage is presumed to be marital property unless shown by clear and convincing evidence to come within one of KRS 403.190(2)'s exceptions. *Sexton v. Sexton*, 125 S.W.3d 258, 266 (Ky. 2004).

Specifically, Gregory argues the trial court erred by designating the Harley Davidson motorcycle as marital property subject to division. In its September 2008 order the trial court found the motorcycle

was purchased by Greg in May 2004 for \$15,000.00. Greg has possession of this and has had since the parties separated. Greg testified that the down payment to acquire this motorcycle came from a personal injury settlement regarding an injury sustained well before the parties married. Greg however failed to present adequate tracing to establish any non-marital interest in this property and Tammy disputes that there is a non-marital interest in the property. Greg testified that he had caused this motorcycle to be titled in his father's name. The Court finds that the motorcycle is marital property.

The trial court awarded possession of the motorcycle to Gregory. In its December 2008 order, the court amended the decree to include findings that Gregory utilized funds from his pension, as opposed to his personal injury settlement, as a down payment on the acquisition of the motorcycle. The court further found that the remainder of the purchase price was financed by, and that the motorcycle was titled to, Gregory's father. Though the court found the down payment to be traceable to non-marital assets, the court found no evidence of a specific amount of the down payment. Ultimately, the court affirmed its previous designation of the motorcycle as marital property and award to Tamra one-half of its value.

Gregory argues that the trial court erroneously designated the motorcycle as marital property because his father held title to it. However,

[n]either title nor the form in which property is held determines the parties' interests in the property; rather, "Kentucky courts have typically applied the 'source of funds' rule to characterize property or to determine parties' nonmarital and marital interests in such property." "The 'source of funds rule' simply means that the character of the property, *i.e.*, whether it is marital, nonmarital, or both, is determined by the source of the funds used to acquire the property."

*Sexton*, 125 S.W.3d at 265 (citations omitted). The record reflects that the motorcycle was purchased after the parties wed but before their separation and that Gregory was unable to trace the funds used to acquire the property, outside of the unknown amount of the down payment, to non-marital assets. As a result, the trial court did not err by designating the motorcycle as marital property.

With respect to the motorcycle, as well as other property to be discussed below, Gregory contends that because no proof was offered to contest his assertions during the hearing, the trial court was bound to accept his testimony as satisfying his burden of proof. Gregory directs us to the court's findings of fact which state that the court is not persuaded by the truthfulness of some of Gregory's assertions. Nonetheless, "[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." CR<sup>2</sup> 52.01. *See also Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 118 (Ky. 1991) ("It is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence.") (citation omitted). Gregory's contention that the trial

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

court must accept his testimony because no evidence was offered to rebut it ignores the fact that the trial court has discretion to judge the credibility of his testimony, with or without the presentation of additional evidence. Accordingly, his claim is without merit.

Next, Gregory asserts that the trial court erred by failing to make a finding with respect to the Monte Carlo automobile. While Tamra concedes this point on appeal, she maintains that the error was harmless, emphasizing that the Monte Carlo was purchased for use by one of her sons, with funds secured by the residence she owned prior to the marriage, and that similar to the other vehicles purchased for use by her sons and secured by her residence, which the court awarded to Tamra including all indebtedness against her residence, Tamra argues that the trial court's failure to specifically designate the Monte Carlo and all debts associated with it as her property was harmless error and the automobile should be so awarded. We agree.

Next, Gregory asserts that the trial court erred by designating the camper and truck as marital property. Gregory testified during the hearing that he purchased a camper and truck for his girlfriend after the parties separated, but that his girlfriend had repaid him the full purchase price for each. Gregory further maintains that since the camper and truck were purchased after the parties separated, they should have been classified as non-marital property.

The trial court noted in its findings that the court was not persuaded by Gregory's testimony with respect to these items and that no tracing had established

the manner in which these items were acquired and/or what proceeds were used to acquire them. Further, we note that property acquired following marriage and after an actual separation but before a decree of legal separation or dissolution is deemed to be marital property. KRS 403.190. Absent clear and convincing evidence that the camper and truck were purchased with non-marital assets, the trial court properly designated these items as marital property. Thus, the court's award of possession to Gregory, with Tamra to receive one-half of the value of each based upon Gregory's testimony as to the purchase price, was not erroneous.

Next, Gregory claims the trial court erred by designating as marital property an all-terrain vehicle ("mule") he purchased after the date of separation for use at Wheeler Oil, Ltd. Before addressing this claim of error, we find it imperative to briefly discuss Wheeler Oil, Ltd., a Kentucky limited partnership that Gregory has operated since 2002. Evidence was presented during the hearing that Wheeler Oil, Ltd. operates in the oil and gas business and is a party to three primary leases: the "Upper Fraley" lease, the "Lower Fraley" lease, and the "Albert Ison" lease. Undisputedly, the "Fraley" leases were secured prior to the parties' marriage; yet, Tamra claims the "Albert Ison" lease was secured in 2006, after the marriage. Gregory maintains that the 2006 "Albert Ison" lease agreement merely renewed a lease that was in effect prior to the marriage.

The trial court found that proceeds received by Wheeler Oil, Ltd. during the marriage were deposited into the parties' joint checking account until 2007, when a Wheeler Oil, Ltd. checking account was opened with a deposit from Gregory's



personal injury settlement proceeds.<sup>3</sup> Thereafter, income received from operation of the oil wells was deposited into the Wheeler Oil, Ltd. account. Following the parties' separation, Gregory purchased a "mule" for use at Wheeler Oil, Ltd. However, since no evidence was presented tracing the manner in which this property was acquired, the trial court properly classified the "mule" as marital property.

Next, Gregory claims the trial court erred by failing to distribute his mobile home in its September 2008 order. Although Tamra concedes this point on appeal, she directs us to the December 2008 order in which the court amended its decree to include a finding that Gregory's mobile home represents "mixed status" property. Specifically, the court found that the \$39,000 payoff on the mobile home's mortgage was traced to Gregory's non-marital funds. However, as to the \$30,000 used to improve and remodel the property after the date of separation, but still during the marriage, the court found that no tracing established the source of these funds and therefore any increase in value to the property was presumed marital.<sup>4</sup> The court awarded the mobile home to Gregory, finding that it represented property with both marital and non-marital components. Despite its finding, though, the court failed to address the extent of Tamra's interest in the marital aspect of the property. Accordingly, we remand with directions for the trial court

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<sup>3</sup> Gregory sustained this injury before the parties married.

<sup>4</sup> The record reflects that the court was not provided with any appraisal or other competent evidence regarding the fair market value of the mobile home.

to determine Tamra's interest and to make any necessary adjustments to the division and distribution of the parties' assets.

Next, Gregory argues the trial court erred by failing to find Tamra responsible for two oil spills which occurred after the parties separated and which were apparently caused by deliberate acts of vandalism. Gregory alleged that Tamra acted in concert with his son to cause the oil spills, which Tamra denied. The court heard the testimony of both parties and considered the deposition testimony of Gregory's son before concluding that the proof was inadequate to establish that Tamra was responsible for the vandalism. Since the court's decision was based on a lack of evidence, we cannot say its findings are clearly erroneous.

Next, Gregory contends that the trial court erred by designating as marital property a \$50,000 deposit he made into the parties' joint checking account. The court found that Gregory received a personal injury settlement and deposited the \$50,000 into the parties' joint checking account; \$39,000 of which was used to pay off the mortgage on his mobile home. With respect to the remaining \$11,000, which was commingled with other funds in the parties' joint checking account, no evidence was presented tracing its use or current location, as required under the "source of funds" rule and thus, the funds are presumed marital. *See Sexton*, 125 S.W.3d at 265.

Next, Gregory asserts that the trial court erred in its calculation of retroactive modification of maintenance. Pursuant to the terms of a July 2007 order, Gregory was to pay \$1,244 per month in temporary maintenance to Tamra. At the time of

the July 2007 order, Tamra was unemployed; in February 2008, she regained employment. Ultimately, the court determined that Tamra was not entitled to an award of maintenance and awarded Gregory an offset in the amount of \$6,220, representing the five months of maintenance payments Gregory made between April 2008 and August 2008. On appeal, Gregory argues that the maintenance he paid would increase his recoupment to \$8,700; however, he presents no evidence or citation to the record in support of his assertion as mandated by CR 76.12(4)(c). Consequently, his claim is without merit.

#### Tamra's claims

First, Tamra claims that the trial court erred by allocating equally to the parties the cost of cleanup for the aforementioned oil spills. She argues that because the trial court found no persuasive proof that she was responsible for the oil spills, Gregory and Wheeler Oil, Ltd. should have been held solely responsible for the cost of cleanup. In addition, she maintains that since the oil spills did not affect wells from which she received profits, the cost of cleanup should not have been offset against her profits received.

The trial court determined that the Wheeler Oil, Ltd. proceeds received since the parties' separation represented income earned during the marriage and that certain proceeds, after certain deductions, should be divided equally between the parties. The court found this division fair and just in light of the significant improvements made to the wells during the parties' marriage and Gregory's acknowledgment that funds from Tamra's children's savings account were utilized

to make these improvements. In addition, the court found that proceeds from Wheeler Oil, Ltd. had been deposited into the parties' joint checking account until 2007. After deducting amounts expended to clean-up the oil spills and for operation and maintenance of the oil wells, the court distributed one-half of the total amount remaining to Tamra.

While Tamra asserts that the oil spills did not affect the wells which generated the profits divided between the parties, no evidence was presented to the trial court during the hearing regarding this issue, in particular the "Strickland leases." Furthermore, the court did not make any findings in its order denying Tamra post-judgment relief, although Tamra raised the issue of the "Strickland leases" in her post-judgment motion. Because the record is insufficient so as to allow us to address this claim of error, we remand this matter to the trial court with directions to take additional proof and make findings concerning this issue.

Next, Tamra contends that the trial court erred by refusing to take additional evidence or make additional findings regarding certain vehicles. She claims that she learned after the final hearing that in addition to the vehicles specifically addressed during the hearing, an additional five vehicles are titled in the name of Wheeler Oil, Ltd., but associated with her social security number. Tamra brought this issue to the court's attention in her post-judgment motion and requested that the court take further evidence regarding the value and ownership of the aforementioned vehicles, and require Gregory to immediately transfer the vehicles out of her name and disassociate said vehicles from her social security number in

the event that said vehicles are deemed non-marital property or assigned to Gregory, since the existence of her present association with them may limit her ability to obtain credit in the future. The trial court denied her request without making any findings.

On appeal, Tamra references a supporting exhibit which presumably shows that the additional five vehicles are associated with her name; however, said exhibit cannot be located in the record or in the appendix to her appellate brief. Again, insufficient findings and evidence exist to address her claim of error and thus, we remand this matter to the trial court with directions for Tamra to submit evidence to the court in order for the court to make the necessary findings of fact and conclusions of law based on the record.

Next, Tamra asserts that the trial court erred by granting Gregory's motion to terminate temporary maintenance payments retroactive to April 2008, and by imposing on her an offset for payments received between April 2008 and August 2008. She argues that despite the fact that she regained employment in February 2008, the maintenance should have continued during the pendency of this action, given her limited income and the goal of maintenance to allow parties to maintain their usual lifestyle to the greatest extent possible. We disagree.

During the pendency of an action for dissolution, the trial court may allow a spouse temporary maintenance. KRS 403.160. *See also Horvath v. Horvath*, 250 S.W.3d 316, 318 (Ky. 2008). The purpose of temporary maintenance is to preserve the status quo between the spouses while the dissolution proceeding is

pending. *Horvath*, 250 S.W.3d at 318 (citing 27B C.J.S. *Divorce* § 503). In this case, the record reflects that Tamra regained employment in February 2008, earning approximately \$41,000 annually. Furthermore, during the pendency of the dissolution action, she continued to reside in the residence she owned prior to the marriage, stipulated by the parties to be valued at \$140,000. Based on the evidence, the court determined that Tamra was not entitled to an award of maintenance since she had sufficient income to meet her reasonable expenses, the marriage was of a short duration, and Tamra received a distribution of the marital property. Our review of the record discloses that the court's findings are supported by substantial evidence and its decision with respect to maintenance is not clearly erroneous.

Next, Tamra claims that the trial court erred by designating certain property as Gregory's non-marital property since Gregory failed to trace the source of the funds used to acquire said property. She maintains that certain items were purchased directly from Gregory's personal injury settlement proceeds, but that a significant portion of the settlement proceeds was commingled with funds in the parties' joint accounts. By commingling the funds, Tamra asserts that it became the burden of Gregory to demonstrate and trace the non-marital source of the funds used to acquire this property, which he failed to do. She further avers that Gregory's testimony that certain items were purchased using settlement proceeds, without any supporting documentation, is insufficient evidence to satisfy his burden of proof. However, because Tamra does not identify below or on appeal

the specific items she claims were erroneously designated as non-marital, this claim of error is not properly preserved for our review and thus, we decline to address it.

Lastly, Tamra claims that the trial court erred by failing to recognize her non-marital contribution to the improvements made on Gregory's mobile home after their separation but prior to the final decree of dissolution, and by failing to credit her for half of the value of the improvements. As discussed previously, in the December 2008 order, the trial court designated the mobile home as "mixed status" property, with both marital and non-marital components. The court awarded the mobile home to Gregory, but failed to set forth the manner and amount in which Tamra would be compensated for the marital aspect of the property. Accordingly, on remand we direct the trial court to take into account its designation of Gregory's mobile home as "mixed status" property and make any necessary adjustments to the property distribution.

For the aforementioned reasons, the orders of the Elliott Circuit Court are affirmed in part and reversed in part, with directions on remand to address Tamra's claims regarding proceeds from the oil spills, in particular the "Strickland leases;" the vehicles Tamra alleges are associated with her social security number; and Tamra's interest, if any, in the marital component of Gregory's mobile home.

ALL CONCUR.

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BRIEF FOR APPELLEE/CROSS  
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