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ARKANSAS COURT OF APPEALS

DIVISION III
No. CA08-1507

TRAVIS WHITEHEAD APPELLANT V. CHASIDY WHITEHEAD APPELLEE	**Opinion Delivered** SEPTEMBER 16, 2009 APPEAL FROM THE ASHLEY COUNTY CIRCUIT COURT, [NO. DR2008-76-2] HONORABLE ROBERT C. VITTITOW, JUDGE AFFIRMED IN PART; REVERSED AND REMANDED IN PART

RITA W. GRUBER, Judge

Travis and Chasidy Whitehead were married on December 10, 2005, and divorced by decree entered October 3, 2008. They have one son, born June 7, 2006. Travis appeals from the divorce decree, contending that the circuit court erred in awarding custody to Chasidy and that the trial court erred in dividing certain personal property. We affirm the circuit court's award of custody, but we reverse and remand for additional findings regarding the parties' personal property.

Custody

The primary consideration in child-custody cases is the welfare and best interests of the child involved; all other considerations are secondary. *Walker v. Torres*, 83 Ark. App. 135, 118 S.W.3d 148 (2003). We review child-custody cases de novo, but we will not reverse a

circuit court's findings in this regard unless the findings are clearly erroneous. *Id*. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id*. Because the question of whether the circuit court's findings are clearly erroneous turns largely on the credibility of the witnesses, we give special deference to the superior position of the trial judge to evaluate the witnesses, their testimony, and the child's best interests. *Sharp v. Keeler*, 99 Ark. App. 42, 44, 256 S.W.3d 528, 529 (2007). There are no cases in which the superior position, ability, and opportunity of the trial judge to observe the parties carry as great a weight as those involving minor children. *Id*.

In this case, in letter findings incorporated into the decree by reference, the circuit court explained its decision to award custody to appellee:

> CUSTODY – These parties were both involved in the day to day care of the child. The evidence indicates Ms. Whitehead has spent more time with the child. Mr. Whitehead and his witnesses all testified that Ms. Whitehead was a good mother, but they were concerned about her health. This was a result of her bulimia and excessive consumption of alcohol while attending the band engagements of Mr. Whitehead. The only evidence of excessive alcohol was the testimony that such behavior occurred at those engagements. If her behavior was such a concern, there was a simple solution—quit the band. Mr. Whitehead, in a sense, contributed to her behavior, and now wants to use such against her in a custody action. She testified that she has consumed alcohol rarely since the separation in March, 2008.
>
> Ms. Whitehead testified the bulimia was never a problem and that she never needed treatment. There had been no problem since separation. Her testimony regarding alcohol and bulimia subsequent to separation was not disputed.
>
> When Ms. Whitehead has had the child since separation, she spends

> most of her free time with him. In fact, during those periods, she arranges to spend her lunch hour with him at her mother's home. On the other hand, Mr. Whitehead has to leave the child with his parents in Bastrop on some of his weekends.
>
> The Court finds the child's interests would best be served by placing custody in the mother.

Appellant contends that the trial court erred in finding that appellee had spent more time with the child; that appellant left the child with his parents in Bastrop instead of spending time with him; and that appellee had rarely consumed alcohol since the separation. He also contends that the circuit court completely disregarded the evidence regarding appellee's bulimia.

First, both appellee and her mother, who provided daycare for the child, testified that appellee was the primary caregiver and spent more time with the child than did appellant. Appellant's testimony that he did the majority of the housework and tended the yard while appellee bathed and fed the child does not contradict the circuit court's finding. While appellant also testified that he got the child ready in the morning and that he took the child to church, the trial court's finding does not suggest that appellant spent no time with his child. Finally, appellant admitted that he had left the child with his parents in Bastrop on some of his weekends when he was playing in his band. The circuit court weighed all of the testimony, and we hold that its findings on this issue are not clearly erroneous.

Second, with regard to appellee's drinking, witnesses provided by appellant testified only that appellee drank while at appellant's band performances. Both of these witnesses

testified that they had never seen appellee drink in front of the child. Appellee testified that she drank when she attended appellant's band performances and that she had gone to her boss's house after work with co-workers on one or two instances and had a drink. She said that she had never been intoxicated in front of her son and that she never would be. She also said that she drinks less since the separation from appellant. No evidence was presented to contradict appellee's testimony. Once again, the circuit court weighed the testimony, and its findings on this issue are not clearly erroneous.

Finally, the circuit court did not completely disregard the evidence regarding appellee's bulimia. Appellee testified that she no longer suffered from bulimia. There was no evidence presented to the contrary. After a de novo review of the record and giving special deference to the superior position of the circuit court to evaluate the witnesses, their testimony, and the child's best interests, as we must, we cannot say that the court's findings supporting its award of custody are clearly erroneous.

Property Division

With respect to the division of property in a divorce case, we review the circuit court's findings of fact and affirm unless those findings are clearly erroneous. *Dial v. Dial*, 74 Ark. App. 30, 35, 44 S.W.3d 768, 771 (2001). The court has broad powers to distribute property in order to achieve an equitable distribution. *Keathley v. Keathley*, 76 Ark. App. 150, 61 S.W.3d 219 (2001). The overriding purpose of Ark. Code Ann. § 9-12-315, which governs the division of property upon divorce, is to enable the court to make a division of property

that is fair and equitable under the specific circumstances. *Id.* Section 9-12-315 does not compel mathematical precision in the distribution of property; it simply requires that marital property be distributed equitably. *Copeland v. Copeland*, 84 Ark. App. 303, 139 S.W.3d 145 (2003).

Appellant contends on appeal that the trial court erred in its division of two items of personal property: the 2002 Honda four-wheeler and a stimulus check in the amount of $1500, both of which were given to appellee. He claims that the four-wheeler was his premarital property and therefore that the circuit court erred in giving it to appellee. He argues that the stimulus check was marital property and therefore should have been divided equally.

We address the four-wheeler first. There is no dispute that appellant brought the four-wheeler with him when he married appellee. At that time, some amount was still owed on the four-wheeler. There is also no dispute that the four-wheeler was "paid off" during the marriage using money he obtained from the sale of a premarital asset, that is, a truck he owned before the marriage. What is not clear from the court's order is whether the court considered the property to be marital or nonmarital. If the court considered the property to be nonmarital, then the court was required to state in writing its basis and reasons for not returning the property to appellant. *See* Ark. Code Ann. § 9-12-315(a)(2) (Repl. 2008). We are unable to determine the basis for the court's decision because there is nothing to explain the court's findings, and we can make no determination from our de novo review of the

record. Therefore, we remand to the circuit court for additional findings regarding the four-wheeler.

The parties agree that the stimulus check was marital property. Arkansas Code Annotated section 9-12-315 provides that "all marital property shall be distributed one-half (½) to each party unless the court finds such a division to be inequitable." The court may make some other division that the court deems equitable; however, when it decides not to divide the property equally between the parties, it must recite its basis and reasons for the unequal division in its order. Ark. Code Ann. § 9-12-315(a)(1)(B).

Appellee testified that she received the stimulus check and did not split it with appellant because appellant had withdrawn two thousand two hundred and seventy dollars ($2270) from their joint checking account when the parties separated, leaving eighty-two cents in the account. Appellant testified that, when he withdrew the money, he left two accounts containing a total of almost two thousand three hundred dollars ($2300) for appellee. There was some testimony from both parties that the money appellant left for appellee was in an account the parties had intended to be used for their son. However, the account was not set up in the name of the child but in the name of the parties. Thus, it was marital property. On a fully developed record, we may have divided the property precisely as did the circuit court. However, the circuit court did not state why it did not divide the stimulus check equally between the parties, and therefore we cannot determine whether the division was equitable. Accordingly, we reverse and remand for additional findings.

In conclusion, we reverse and remand for further findings so that the circuit court may articulate whether the four-wheeler is marital or nonmarital property and, if nonmarital, why it was not returned to appellant. We also remand for further findings regarding whether the distribution of the parties' marital property was equal or unequal and, if unequal, the reasons why such distribution is equitable.

Affirmed in part; reversed and remanded in part.

VAUGHT, C.J., and HART, J., agree.