

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

NO. 2007-CA-002004-MR

JULIE JOHNSON

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE C. DAVID HAGERMAN, JUDGE  
ACTION NO. 04-CI-01127

SHANNON JOHNSON

APPELLEE

OPINION  
AFFIRMING IN PART AND  
VACATING AND REMANDING IN PART

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BEFORE: ACREE AND VANMETER, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

HENRY, SENIOR JUDGE: This is a dissolution of marriage case in which Julie Johnson appeals from orders of the Boyd Circuit Court, challenging some of the court's determinations and rulings relating to maintenance, distribution of marital

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<sup>1</sup> Senior Judge Michael L. Henry 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.

property, and distribution of marital debt. For the reasons stated below we affirm in part, vacate in part, and remand.

### FACTUAL AND PROCEDURAL BACKGROUND

The parties were married on October 25, 1986. They have one child, a daughter, born December 21, 1993. On November 18, 2004, Julie filed a petition for dissolution of marriage. On August 26, 2005, pursuant to *Putnam v. Fanning*, 495 S.W.2d 175 (Ky. 1973) the trial court entered a decree dissolving the marriage but reserving all other issues for future determination.

The reserved issues were referred to the Domestic Relations Commissioner. On October 27, 2005, a hearing was held before the Commissioner, and on January 12, 2006, the Commissioner issued her Report and Recommendations. The Report recommended, among other things, that (1) Shannon's chiropractic business be valued at \$68,400.00 with the parties to be assigned the value on a fifty-fifty basis; (2) that Shannon pay Julie maintenance of \$1,500.00 per month for five years; (4) that Shannon pay Julie child support of \$984.00 per month; (3) that Shannon be assigned substantially all of the marital debt; (4) that Julie be awarded the parties' 1997 Ford F-150 pickup truck and Mitsubishi Gallant; and (5) that Julie be awarded the horse trailer.

Julie and Shannon each filed exceptions to the Commissioner's report. On February 20, 2006, the circuit court entered an order overruling all exceptions; however, that order was vacated by an order entered February 27, 2006.

Following a hearing on the exceptions, on March 27, 2006, the circuit court entered an order which, as relevant to this appeal, directed as follows: (1) that the marital residence be immediately placed on the market for sale; (2) that the Ford F-150 pickup and horse trailer be sold and the proceeds therefrom be applied to the debt on same; (3) that Julie submit an insurance claim for a \$2,974.97 King's Daughters Hospital medical bill which she incurred after the separation; and (4) that Shannon be permitted to pay Julie for her interest in the chiropractic business over a sixty month period. The order adopted the balance of the Commissioner's recommendations as set forth in her report.

On April 6, 2006, Shannon filed a motion to alter, amend, or vacate the March 27, 2006, order. As relevant to this appeal, the motion requested that Julie be required to pay half of the mortgage payment on the marital residence until it sold and that Shannon not be required to pay maintenance. On April 21, 2006, the circuit court entered an order directing that Shannon's \$1,500.00 per month maintenance obligation be reduced to \$750.00 until the residence sold.

On May 1, 2006, Julie filed a motion seeking clarification of the circuit court's ruling concerning who was obligated to pay the \$2,974.97 King's Daughters Hospital medical bill referenced in the March 27 order and a motion to alter, amend, or vacate the April 21, 2006, order insofar as it reduced Shannon's maintenance obligation until the marital residence was sold. On May 5, 2006, the trial court entered an order reaffirming the reduction in Shannon's maintenance obligation until the marital residence was sold. The court noted that it had received

no information concerning the medical bill, and that an order thereon would be entered when such was received. On May 19, 2006, Julie filed a notice of appeal of the foregoing order. *See* Case No. 2006-CA-001041-MR.

On June 5, 2006, Julie filed a motion which, among other things, sought that Shannon be required to reimburse her for \$1,300.00 in repairs made to the Ford F-150 pickup truck to ready it for sale. On June 9, 2006, the circuit court entered an order denying the motion. On July 10, 2006, Julie filed a Notice of Appeal of the circuit court's June 9, 2006, order. *See* Case No. 2006-CA-001424-MR.

On November 3, 2006, while the above appeals were pending, Shannon filed a motion to hold Julie in contempt for failing to apply the proceeds from the sale of the horse trailer to the debt thereon. The motion alleged that Julie had used the proceeds from the sale to purchase a new horse trailer. Julie responded that because there was never any debt on the horse trailer to begin with, she should be permitted to retain the sale proceeds. Following a hearing, on February 6, 2007, the trial court entered an order denying Shannon's motion to hold Julie in contempt, but requiring that the horse trailer proceeds be paid over to Shannon for payment against marital debt.

On June 29, 2007, this Court entered an Opinion and Order dismissing Case Nos. 2006-CA-001041-MR and 2006-CA-001424-MR upon the basis that the appeals were interlocutory because the trial court had not ruled upon the King's Daughters Hospital bill issue. Upon remand Julie filed a motion seeking a ruling

upon the medical bill. On September 24, 2007, the trial court entered an order requiring Julie to be responsible for the King's Daughters medical bill. This appeal followed.

#### PAYMENT OF BUSINESS VALUE OVER FIVE YEARS

During the marriage Shannon completed the educational and licensing requirements to become a chiropractor. Upon becoming licensed he first worked at other clinics, and then opened his own office. It is undisputed that the chiropractic business is marital property. The parties agreed to have a business valuator value the business and split the marital property on a fifty-fifty basis.

The business valuator valued the business as worth \$68,400.00. As the parties agreed to a fifty-fifty division, the Commissioner recommended that Julie and Shannon each be awarded \$34,200.00 of this marital asset.

Shannon did not file an exception to the Commissioner's recommendation on this issue, but on March 23, 2006, filed a motion requesting that he be permitted to pay out Julie's share at the rate of \$570.00 per month for five years. In its order of March 27, 2006, the trial court granted Shannon's motion to pay out Julie's share over a 60 month period.

Julie argues that the trial court's granting of Shannon's motion for a 60-month pay out was erroneous because (1) the request was untimely; (2) the trial court failed to adequately consider Shannon's ability to pay the amount lump sum; and (3) because the trial court did not factor an interest component into the five-year payout.

Kentucky Rules of Civil Procedure (CR) 53.06(2) indicates that exceptions to a Commissioner's report should be filed within 10 days of the issuance of the report. However, "a trial court has discretion whether to consider objections or exceptions to a domestic relations commissioner's recommended report beyond the 10-day period set forth in CR 53.06(2)." *Hunter v. Hunter*, 127 S.W.3d 656, 663 (Ky.App. 2003); *Eiland v. Ferrell*, 937 S.W.2d 713 (Ky. 1997). As such, the trial court's consideration of the late-filed request is not reversible error.

With regard to Shannon's ability to pay the full \$32,400.00 lump sum, the record well establishes that the parties exited their marriage in deep debt, that Shannon was assigned substantially all of the marital debt, and that Shannon has a substantial monthly debt service obligation. Julie cites us to no evidence of record that Shannon has available the cash that would be necessary to make a lump sum payment of this obligation. Implicit in the trial court's determination is a finding that Shannon does not have the ability to make the payout through presently available cash funds, and that finding is fully supported by the record.

We agree with Julie, however, that the trial court erred by not factoring an interest component into the 60-month payout period. Money has a time value; a dollar today is worth more than a dollar tomorrow. *Atlantic Mut. Ins. Co. v. C.I.R.*, 523 U.S. 382, 384, 118 S.Ct. 1413, 1415 140 L.Ed.2d 542 (1998). As noted by Julie, discounting the 60 month \$570.00 payout at the rather modest

interest rate of five percent produces a present value of the stream of \$30,204.70 - \$2,195.30 less than \$32,400.00, which well illustrates the foregoing principle.

The record discloses that the parties agreed to have the business valued by an expert and to divide the value fifty-fifty.<sup>2</sup> The trial court's failure to include an interest component in its payout calculation resulted in Julie getting less than bargained for in her agreement with Shannon concerning the division in the value of the business. Accordingly, we are persuaded that the trial court erred in its disposition of this issue and remand for a monthly payout calculation which includes a reasonable interest rate component.

#### TEMPORARY MAINTENANCE REDUCTION

Julie recommended that she be awarded monthly maintenance of \$1,500.00. The trial court originally adopted this recommendation in its order of March 27, 2006; however, in its April 21, 2006, order addressing the parties' motions to alter, amend, or vacate, the trial court ordered that the maintenance obligation be reduced to \$750.00 until the residence was sold.

An award of maintenance may be made in the sound discretion of the trial court. *Clark v. Clark*, 782 S.W.2d 56, 60 (Ky.App. 1990). To reverse an award or denial of maintenance, the complaining party must show an "absolute abuse" of this discretion by the trial court. *Id.* We construe the circuit court's temporary reduction in maintenance as falling within the foregoing rules.

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<sup>2</sup> There are various ways to value a business. Shannon's monthly gross income for child support purposes is listed at \$14,000.00 per month, or \$168,000.00 per year. We believe it noteworthy that the evaluator valued the business as worth less than the sum of 5 months of Shannon's gross monthly income.

In its order of May 5, 2006, the trial court made the following finding in support of the temporary maintenance reduction: “Based upon the pleadings and the exhibits in the court file, the Court finds that the Respondent is unable to pay the amount of \$1,500.00 per month in maintenance and at the same time service the significant amount of debt he has assumed and at the same time provide for his reasonable needs.” “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.” CR 52.01; *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986). “A factual finding is not clearly erroneous if it is supported by substantial evidence.” *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky.App. 2002) *overruled on other grounds by Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008). “Substantial evidence” is “evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.” *Id.* As stated in *R.C.R. v. Commonwealth, Cabinet for Human Resources*, 988 S.W.2d 36 (Ky. App. 1998), “when the testimony is conflicting we may not substitute our decision for the judgment of the trial court.” *Id.* at 39.

The monthly mortgage payment on the marital residence is \$1,118.00 per month; Shannon’s monthly student loan repayment obligation is approximately \$2,000.00 per month; his child support obligation is \$984.00 per month; the health insurance premium on the child is \$349.63; and he has a substantial monthly credit card debt obligation.



Given Shannon's high debt-service obligations, we are not persuaded that the trial court abused its discretion by temporarily reducing Shannon's maintenance obligation until such time as the marital residence is sold.

#### OUTSTANDING MEDICAL EXPENSE

Julie incurred a medical bill of \$2,974.97 from King's Daughters Hospital for surgery incurred during the separation but prior to the final decree. The bill represents the \$1,000.00 deductible and twenty percent of the bill in excess thereof.

There is no statutory presumption as to whether debts incurred during the marriage are marital or nonmarital in nature. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 522 (Ky. 2001). However, as long as a couple continues to remain legally married the court may consider their financial gains and losses as marital. *See Stallings v. Stallings*, 606 S.W.2d 163 (Ky. 1980).

"In dividing marital property, including debts, appurtenant to a divorce, the trial court is guided by Kentucky Revised Statute (KRS) 403.190(1), which requires that division be accomplished in "just proportions." *Lawson v. Lawson*, 228 S.W.3d 18, 21 (Ky.App. 2007) (emphasis added) (internal citations omitted).

"Debts incurred during the marriage are traditionally assigned on the basis of such factors as receipt of benefits and extent of participation; whether the debt was incurred to purchase assets designated as marital property; and whether the debt was necessary to provide for the maintenance and support of the family. Another factor, of course, is the economic circumstances of the parties

bearing on their respective abilities to assume the indebtedness.”

*Neidlinger* at 523 (internal citations omitted). “[I]ssues pertaining to the assignment of debts incurred during the marriage are reviewed under an abuse of discretion standard.” *Id.*

In consideration that the marital debt was otherwise substantially assigned to Shannon and the debt incurred was for the benefit of Julie, we are not persuaded that the circuit court abused its discretion in assigning the hospital debt to the appellant.

#### HEALTH INSURANCE/LIFE INSURANCE

Julie contends that the trial court erred by not requiring Shannon to pay for her \$200.41 per monthly health insurance premium and by not requiring him to take out a life insurance policy in an amount sufficient to cover his marital debt obligations.

For the same reasons as previously discussed, we are not persuaded that the trial court abused its discretion in denying Julie’s motions to require that Shannon undertake these obligations.

#### HORSE TRAILER PROCEEDS

A horse trailer used to haul their child’s horses to horse shows was a marital asset. In its March 27, 2006, order the circuit court ordered that the trailer be sold with the proceeds to be used to pay the corresponding debt on the trailer. However, as it developed, there was no outstanding debt on the property. When

this came to light Shannon moved for the excess proceeds be used to pay on the parties' other marital debts. The trial court granted the motion.

In light of the substantial marital debt assigned to Shannon, his substantial monthly debt service obligation, and the relatively small amount of debt assigned to Julie, we are constrained to conclude that the circuit court did not abuse its discretion by ordering the proceeds from the sale of the horse trailer to be used to service the parties' marital debt.

### TRUCK REPAIRS

On June 1, 2006, Julie moved the circuit court to require that Shannon be required to pay \$1,300.00 in repair expenses incurred in repairing the F-150 pickup truck the court had ordered sold in its March 27, 2006, order. Julie states that the repairs were made prior to the circuit court's ordering that the truck be sold. In support of her motion, Julie filed an affidavit in which she stated that the truck could not have been placed for sale without the repairs having been made. The circuit court denied Julie's motion by order entered June 9, 2006. Julie argues that if Shannon is not required to reimburse her for the repair expenses, he will gain a windfall. Shannon argues that Julie's assertion that repairs were even made may be fraudulent and that, in any event, even if the repairs were required, "it would have been because the Appellant intentionally let the truck sit idle for six (6) months allowing it to fall into disrepair."

Julie does not cite us to any receipts, invoices, or other documentation (other than the cancelled check) regarding the repairs, nor are we even told what

the repairs were. Upon the record before us, we cannot conclude that the circuit court abused its discretion by denying Julie's motion to require Shannon to reimburse her for the truck repairs.

### CONCLUSION

For the foregoing reasons the rulings of the trial court are affirmed in part, reversed in part, and remanded for additional proceedings consistent with the opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Christopher A. Dawson  
Flatwoods, Kentucky

BRIEF FOR APPELLEE:

Tracy D. Frye  
Russell, Kentucky