

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

NO. 2018-CA-000895-ME

HICHAM TIBTANI

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE DAWN M. GENTRY, JUDGE  
ACTION NO. 14-CI-01802

NEDA A. TIBTANI

APPELLEE

OPINION  
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

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BEFORE: DIXON, NICKELL, AND MAZE, JUDGES.

MAZE, JUDGE: Hicham Tibtani brings this appeal from the Kenton Circuit Court's amended findings of fact and conclusions of law regarding the payment of child support and division of property. After careful review, we affirm in part, reverse in part, and remand.

## **I. Facts and Procedural History.**

Hicham and appellee, Neda A Tibtani, met in 2002 and were married in February 2010. The couple have three children together. The marital residence was located on Edgewood Road in Edgewood, Kentucky, which Hicham purchased with cash prior to the marriage. During the marriage, Hicham managed the daily operations of City Heights Market in Covington, Kentucky. Hicham also owned a 50% interest in Friends Grocery in Newport, Kentucky, which he acquired in 2002. Hicham's business partner, Abdulnasar al-Sweity, owned the other 50% of Friends Grocery. Neda served as a homemaker during the marriage.

Neda petitioned for dissolution of marriage in September 2014. A hearing was held on the matter and contested issues included Hicham's income for child support purposes, whether he owned an ownership interest in City Heights Market, and who should be awarded the home on Edgewood Road. At the hearing, Hicham denied having an ownership interest in City Heights Market and alleged he merely worked there. He alleged al-Sweity owned City Heights Market. However, Hicham admitted that he paid his personal expenses out of the City Heights Market's checking account. He alleges that these expenses would offset his share of the profits in Friends Grocery. Hicham testified that his annual income was \$38,162, as reflected in his tax returns. However, he admitted to purchasing multiple pieces of real estate and vehicles with cash before and during the

marriage. These purchases included \$200,000 for his interest in Friends Market; \$150,000 for real estate in Newport, Kentucky; \$150,000 for real estate in Covington, Kentucky; a Chevy Tahoe; a 2012 Honda Civic; a 2011 Toyota Camry; a John Deere tractor; and a boat. Hicham also testified to traveling with \$10,000 in cash, the legal limit, every time he visited his family in Morocco.

Neda testified that Hicham's income exceeded the amount he claimed on his taxes. In support of this claim, Neda introduced spreadsheets she alleged were taken from Hicham's computer. Neda testified that the spreadsheets were attached to emails that were sent from al-Sweity's email address to Hicham's email address. Each spreadsheet appeared to show City Heights Market's monthly income, sales, expenses, and direct deposits. The spreadsheets spanned a period from February 2011 to April 2015. Hicham denied creating the spreadsheets and alleged the figures accounted for did not accurately reflect City Heights Market's sales and expenses.

At the conclusion of proof, the trial court entered written findings of fact and conclusions of law finding that Hicham had an ownership interest in City Heights Market and that the home on Edgewood Road was "joint premarital property," which it awarded to Neda. The trial court also found "implausible" Hicham's testimony that his tax returns reflected his actual income given the amount of property he had purchase with cash during the marriage. The trial court

found Hicham's income for child support purposes to be \$113,934.52. The trial court also awarded Neda a 12.5% interest in Friends Grocery and ordered Hicham to pay Neda's attorney fees. The trial court subsequently entered amended findings of fact and conclusions of law that made only minor changes to its initial order. This appeal follows. Additional facts will be developed as necessary.

## **II. Standard of Review**

In an action tried without a jury, 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<sup>1</sup> 52.01. Findings of fact are not clearly erroneous when supported by substantial evidence, that is, "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). "[J]udging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court." *Vinson v. Sorrell*, 136 S.W.3d 465, 470 (Ky. 2004).

Under KRS<sup>2</sup> 403.190, a three-step process is used to divide the party's property in a dissolution of marriage action: "(1) the trial court first characterizes

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<sup>1</sup> Kentucky Rules of Civil Procedure.

<sup>2</sup> Kentucky Revised Statutes.

each item of property as marital or nonmarital; (2) the trial court then assigns each party's nonmarital property to that party; and (3) finally, the trial court equitably divides the marital property between the parties.” *Sexton v. Sexton*, 125 S.W.3d 258, 265 (Ky. 2004). “The question of whether an item is marital or nonmarital is reviewed under a two-tiered scrutiny in which the factual findings made by the court are reviewed under the clearly erroneous standard and the ultimate legal conclusion denominating the item as marital or nonmarital is reviewed de novo.” *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006).

### **III. Hicham's Ownership Interest in City Heights Market.**

Hicham testified that he co-owned the land City Heights Market was located on but denied having an ownership interest in the business. He alleged that he originally intended to be a partner in the business with al-Sweity but abandoned this plan following legal trouble. However, the Kentucky Secretary of State's website listed Hicham and al-Sweity as the incorporators of City Heights Market. This information, along with Hicham's undisputed access to the City Heights Market's bank account to pay personal expenses, provided substantial evidence for the trial court's finding that Hicham had an ownership interest in City Heights Market.

### **IV. House on Edgewood Road**

The Edgewood Road home was purchased in 2008, two years before

the parties' marriage. Both Hicham and Neda were listed as the grantees in the general warranty deed. Neda's name was also listed on the title to the property. However, it was undisputed that Hicham provided all of the cash to purchase the property. Neda testified that Hicham gave her a 50% interest in the home as a birthday gift. Hicham denied gifting Neda an interest in the home. He testified he put Neda's name on the title solely to ensure his children had a place to reside in the event of his death. Judging the credibility of witnesses was the exclusive province of the trial court. Accordingly, the trial court's finding that the Edgewood Road home was a premarital asset, jointly owned by the parties, was supported by substantial evidence and will not be disturbed on appeal.

**V. Hicham's Income and Child Support Obligation.**

The spreadsheets Neda obtained from Hicham's computer contained a column for employee expenses. They also contained a column for checks to "Hich." For March 2015—the second to last month the spreadsheets covered—these two columns totaled \$9,495.46. The trial court, relying on Hicham's testimony that he paid personal expenses out of the City Height Market's bank account and the lack of testimony that City Heights had any other employees, reasoned that this amount reflected Hicham's actual income. It therefore imputed an annual income of \$113,945.52 and ordered Hicham to pay Neda \$1,729.20 per month in child support. Hicham argues these findings were not supported by

substantial evidence and must be reversed. We disagree.

The trial court has broad discretion in considering a party's assets and setting a correspondingly appropriate child support obligation. *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001). Such an order will not be disturbed on appeal unless the trial court has abused its discretion. *Id.* The trial court abuses its discretion when its decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* A party's child support obligation must be based on "actual gross income of the parent if employed to full capacity or potential income if unemployed or underemployed." KRS 403.212(2)(a). "[I]n making child support determinations, courts must consider all income proven by substantial evidence, regardless of whether that income is documented." *Schoenbachler v. Minyard*, 110 S.W.3d 776, 778 (Ky. 2003).

Hicham complains the trial court's reliance on the spreadsheets was arbitrary. However, there was overwhelming evidence Hicham earned more than he claimed on his taxes. The accounting the spreadsheets showed was consistent with Hicham's testimony that he received his ownership interest in Friends Grocery through pay from City Heights Market, as well as his testimony that he paid his personal expenses out of the City Heights Bank Account. Although the authenticity of the spreadsheets was disputed, Neda testified that the spreadsheets were sent from al-Sweity's email account to Hicham's email account. Proof of

additional income need only be supported by substantial evidence. Based on the totality of the evidence before the trial court, we hold the trial court did not abuse its discretion by ordering Hicham to pay \$1,729.20 per month in child support based on an imputed income of \$113,945.52.

#### **VI. Neda's Interest in Friends Grocery.**

The trial court acknowledged that Hicham's ownership of Friends Grocery predated the marriage by eighty-eight months but concluded the business was partially marital property because it was owned by Hicham for ninety-two months while the parties were married; therefore, it ordered Hicham to pay Neda 12.5% of the monthly net income from Friends Grocery for ninety-two months. Hicham argues this portion of the trial court's order did not comply with Kentucky law for dividing property in a dissolution of marriage action. We agree.

A business acquired entirely by one party prior to the marriage is not a marital asset. KRS 403.190(2). However, the increase in value of a business acquired before the marriage is marital property to the extent the increase resulted from the efforts of the parties during the marriage. KRS 403.190(2)(e). "The efforts of the parties may include the contribution of one spouse as a primary operator of the business and the other spouse as primarily a homemaker." *Goderwis v. Goderwis*, 780 S.W.2d 39, 40 (Ky. 1989). Although the increase in value of Friends Grocery was marital property, Neda did not have an ownership

interest in the business absent a finding she made a non-marital contribution to the business. Accordingly, the portion of the trial court's order relating to Neda's interest in Friends Grocery and her share of the business's future profits must be reversed.

## **VII. Attorney Fees**

Finally, Hicham objects to the portion of the trial court's order requiring him to pay Neda \$5,000 in attorney fees. He does not dispute the trial court's finding that Neda's income was only \$15,000 per year. Under KRS 403.220, a trial court is authorized "to order one party to a divorce action to pay a reasonable amount for the attorney's fees of the other party, but only if there exists a disparity in the relative financial resources of the parties in favor of the payor." *Rumpel v. Rumpel*, 438 S.W.3d 354, 363 (Ky. 2014) (internal citations omitted). Based on the evidence presented, the trial court's award of attorney fees was not an abuse of discretion.

## **VIII. Conclusion**

The order of the Kenton Circuit Court is affirmed except as it pertains to Neda's interest in Friends Grocery. On remand, the trial court should request the parties provide evidence of the value of Friends Grocery at the time of the marriage and its value at the time of their separation. *See Goderwis*, 780 S.W.2d at 40-41. If the business increased in value due to the joint efforts of the parties

during the marriage, the increase must be equitably divided between the parties.

The trial court may modify its order in light of this modification in the amount of assets to be divided between the parties. *Id.* at 41.

ALL CONCUR.

BRIEF FOR APPELLANT:

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