

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0174

CHARLOTTE WOODS NORTON

VERSUS

BRIAN KEITH NORTON

Judgment Rendered: June 11, 2010

* * * * *

APPEALED FROM THE FAMILY COURT
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER 090,954, DIVISION D

THE HONORABLE ANNETTE LASSALLE, JUDGE

* * * * *

Kenneth R. Williams
Baton Rouge, Louisiana

Attorney for Plaintiff/Appellant
Charlotte Woods Norton Ambrose

Charles L. Dirks, III
Baton Rouge, Louisiana

Attorney for Defendant/Appellee
Brian Keith Norton

BEFORE: PARRO, KUHN, AND McDONALD, JJ.

Parro, J. concurs without reasons. (by jmm)

*jmm
JEK by jmm*

McDONALD, J.

This is an appeal of a judgment partitioning a retirement benefit in a community property regime, rendered in the Family Court of East Baton Rouge Parish. The issue is whether the trial court correctly reduced the former spouse's interest because of a post-community promotion that the family court ascribed to his separate estate. For the following reasons, the judgment is affirmed.

Brian Keith Norton, appellee, was employed as a firefighter with the Baton Rouge Fire Department in April 1979. In May 1981, he and Charlotte Woods married, and in March 1990, Charlotte¹ filed a petition for separation. Judgment of separation between the parties, based upon mutual fault, was rendered on October 15, 1990. Judgment of divorce was rendered October 2, 1991. Pursuant to the law in effect at that time, the community was dissolved, effective March 7, 1990.

Mr. Norton continued to serve as a firefighter through December 1990. In January 1991, he was probationally promoted to fire equipment operator. After serving a probationary period, he was permanently classified as a fire equipment operator, effective July 1, 1991. In October 1995, he took the test to qualify as a fire captain. He passed the test and was placed on the employment promotion list until February 15, 1997, when he was made a captain, on a probationary basis. On August 15, 1997, he was given permanent status as a captain. From June 15, 2002, through June 15, 2007, he was in the Deferred Retirement Option Program (DROP) and terminated his employment effective June 15, 2007.

In August 2006, Mrs. Ambrose filed a petition to partition community property, with a sworn detailed descriptive list showing Mr. Norton's interest in the City-Parish Employee's Retirement System as the only asset. A hearing on this matter was held on March 11, 2009, at the conclusion of which the record was kept

¹ Charlotte subsequently remarried and is now Mrs. Ambrose, and will hereinafter be referred to as Mrs. Ambrose.

open for additional evidence. Judgment on partition of the community property was signed June 29, 2009. The judgment apportioned the retirement benefit in accordance with the formula set forth in *Sims*² and modified by *Hare*,³ such that Mrs. Ambrose received 17.403 per cent of the total monthly benefit and DROP account proceeds that Mr. Norton would have been entitled to had he retired as a fire equipment operator, rather than as a captain. Mrs. Ambrose appeals this portion of the judgment.

Four assignments of error are asserted in the appeal; however each is premised upon error in utilizing the *Hare* exception in apportioning Mrs. Ambrose's share of the retirement benefit.

In order to reverse a factual determination by the trier of fact, the appellate court must apply a two-part test: (1) the appellate court must find that a reasonable factual basis does not exist in the record for the finding; and (2) the appellate court must further determine that the record establishes that the finding is clearly wrong (manifestly erroneous). *Barnett v. Saizon*, 08-0336, p. 5 (La. App. 1 Cir. 9/23/08), 994 So.2d 668, 672. The manifest error standard of review applies to all factual findings, including a finding relating to the factual (as opposed to legal) sufficiency of evidence to warrant application of a legal theory or doctrine. *Id*; *Hall v. Folger Coffee Co.*, 03-1734 (La. 4/14/04), 874 So.2d 90. This standard of review also applies to mixed questions of law and fact, such as the issue of whether the facts found by the trier of fact trigger application of a particular legal standard. *Id*; *Reed v. Wal-Mart Stores, Inc.*, 97-1174 (La. 3/4/98), 708 So.2d 362.

We have carefully examined the record in this matter and conclude that the family court's findings were not manifestly erroneous. Specifically, with regard to the burden of proof and resolving any doubts in favor of the non-employee spouse,

² *Sims v Sims*, 358 So.2d, 919 (La. 1978).

³ *Hare v. Hodgins*, 586 So.2d 118 (La. 1991).

we note that the family court clearly found that Mr. Norton had met the burden of proof. Also, when there was a doubt as to whether the fire equipment operator test was passed during the community or post-community, the court resolved the issue in favor of Mrs. Ambrose.

We also note, as did the family court, that the testimony of the fire chief established that the promotion to captain was the result of personal effort on the part of Mr. Norton, rather than non-personal factors. Undeniably, seniority was a factor. However, the chief made clear that passage of the test and satisfactorily completing the probationary period required significant personal effort. Further, he established that in some cases, persons were able to pass the test and achieve the rank of captain many years before those with more seniority. We are mindful of the supreme court's rationale in establishing the *Hare* exception and that "a brick at the bottom of a wall may be more important to its stability than quite a few near the top." Nevertheless, we are not called upon to decide this matter, but to review the family court's decision.

After review of the record and law relevant to this matter, we affirm the judgment of the family court, and issue this opinion in compliance with Uniform Rules of Louisiana, Courts of Appeal, Rule 2-16.1.B. Costs are assessed to Charlotte Woods Norton Ambrose.

AFFIRMED.