RENDERED: JULY 21, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000302-MR

RHONDA NELSON — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JULIE PAXTON, JUDGE
ACTION NO. 03-CI-00468

TIMOTHY R. NELSON — APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND
REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; HUDDLESTON, SENIOR JUDGE.[1]

COMBS, CHIEF JUDGE: Rhonda Nelson appeals from a final decree of the Floyd Family Court which dissolved her marriage to Timothy Nelson. She contends that the family court erred in its characterization, valuation, and division of the marital property. She also argues that the court improperly deviated from the statutory guidelines in determining the amount of

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Timothy's child support. In addition to these allegations of error, she appeals as well from an earlier order of the family court which denied her motion for the trial judge to recuse herself.

Timothy filed a petition to dissolve the marriage on April 23, 2003. At that time, the couple had been married for fourteen (14) years and had two minor children: Waylon, born in 1989; and Chase, born in 1991. In October 2002, Timothy and Rhonda had been involved in a domestic violence action before the court, which resulted in the court's granting temporary custody of the children to Rhonda with visitation privileges for Timothy.

On January 27, 2004, Rhonda filed a motion requesting the trial judge to recuse herself pursuant to Supreme Court Rule (SCR) 4.300, Canon 3E(1), which provides that "a judge shall disqualify him or herself in a proceeding in which the judge's impartiality might reasonably be questioned[.]" Rhonda contended that the judge's impartiality might be compromised because a member of the judge's staff (who was responsible for scheduling the judge's docket and performing other administrative duties) was related to Timothy. The motion was denied on January 27, 2004.

Rhonda then filed an affidavit with the Supreme Court of Kentucky, seeking to have the judge disqualified. The

Supreme Court entered an order on February 6, 2004, holding that the affidavit had failed to demonstrate any disqualifying circumstance which would require the appointment of a special judge pursuant to KRS[2] 26A.020. The request was denied without prejudice to the right of any party to seek appellate review of the issue after entry of a final judgment.

After conducting a hearing on the dissolution action on May 6, 2004, the family court entered its findings of fact, conclusions of law, and final decree on September 20, 2004. On September 21, 2004, Rhonda, who had not yet received a copy of the final decree, filed a motion for the court to enter a final decision and a motion for an order protecting the children. In support of her motions, she filed affidavits from herself and from her attorney.

The motion for a protective order for the children and the supporting affidavits alleged that Timothy had known the specific terms of the final decree for several days even though it had not yet been entered by the court. Rhonda claimed that on the basis of this knowledge, Timothy had informed the children that they would be moving from their home in thirty days -- greatly upsetting them. On September 23, 2004, Rhonda filed a motion for clarification regarding certain terms of the decree as well as a motion to alter, amend, or vacate. The

[2] Kentucky Revised Statutes.

latter motion was denied in an order which also addressed the motion for clarification. This appeal followed.

Rhonda first argues that the judge should have recused herself because one of the judge's staff members, Dovie Damron, is Timothy's second cousin. Rhonda contends that Dovie's presence tainted the dissolution proceedings with the appearance of impropriety. In her affidavits, she attested that she believed that Dovie might provide *ex parte* information about the case to the judge and that she might influence the judge to make rulings in Timothy's favor.

In its order of January 27, 2004, the court provided the following explanation for its decision to deny Rhonda's motion to recuse:

> The Respondent [Rhonda] first came to this court in a domestic violence action wherein she filed a petition for emergency protection against the Petitioner [Timothy]. This was on October 7, 2002. The parties have appeared numerous times before this court and this judge in the domestic violence action as well as in the case at bar. It is only following a dismissal of domestic violence petitions of both the Petitioner and Respondent that this motion to recuse is filed.
>
> The court finds this motion to be brought in an attempt to "judge shop." If this had been a justifiable concern, certainly the Respondent would have raised same 1½ years ago prior to the multiple appearances before this court and not following a dismissal of the cross-domestic violence petitions brought by the parties

> against each other. The court would note that it was unaware of any relationship, familial or otherwise, between either of the parties and any court personnel until the filing of Respondent's motion.
>
> The Respondent attaches ethics opinions regarding recusal. The court would note that those recusals deal with persons married to (thus in an intimate relationship with) persons appearing before the court, not relatives as distant as second cousins.

We agree with the family court that there were insufficient grounds to require a recusal. "A party's mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds to require recusal." Webb v. Commonwealth, 904 S.W.2d 226, 230 (Ky. 1995). A trial judge is required to disqualify himself in any proceeding "[w]here he has knowledge of any . . . circumstances in which his impartiality might reasonably be questioned." KRS 26A.015(2)(e). Such circumstances have not been demonstrated in this case. Dovie's relationship either to Timothy or to the judge is too distant to implicate the Supreme Court Rule requiring disqualification in instances where:

> the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such person: (i) is a party to the proceeding, or an officer, director or trustee of a party; (ii) is acting as a lawyer in the proceeding; (iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding; (iv) is to the judge's knowledge

> likely to be a material witness in the proceeding.

SCR 4.300, Canon 3E(1)(d).

Rhonda contends that Timothy had learned the terms of the final decree several days before it was entered by the court. At the beginning of the final hearing, the judge offered to remove Dovie from any contact with the case. Although Rhonda declined this offer, she now argues that she should receive a new hearing because of Dovie's alleged involvement as the source of the suspected leaks. As we find no error, we affirm the denial of the motion to recuse.

Rhonda next argues that the court erred in its characterization, valuation, and division of the couple's primary asset, the marital residence, a double-wide mobile home located on property in Floyd County. Hunter v. Hunter, 127 S.W.3d 656, 659-60 (Ky.App. 2003), sets forth the proper procedure to be followed by a court in dividing marital property:

> Under KRS 403.190, the trial court's division of property involves a three-step process: (1) characterizing each item of property as marital or nonmarital; (2) assigning each party's nonmarital property to that party; and (3) equitably dividing the marital property between the parties. Property acquired by either spouse subsequent to the marriage is presumed to be marital property, except for certain enumerated types including property acquired by gift. The party claiming property

> acquired after the marriage as his/her nonmarital property through the gift exception bears the burden of proof on that issue.

The court determined that the property on which the mobile home is located was a gift from Timothy's parents, Thomas and Earlene Nelson. The deed in the record shows that the land was sold by Thomas and Earlene to Timothy and Rhonda for $1.00 in 1994 when it was valued at $10,000.00. Timothy testified that Rhonda's name was included on the deed in order to avoid trouble; he stated that "it was my choice to have her put on there so there wouldn't be any ruckus." Upon questioning, he stated that if they had not been married, he would not have put her name on the deed. The court found that although the property may have been intended to be a gift to Timothy alone, it was nonetheless Timothy's deliberate intention to lead Rhonda to believe that she had an interest in the property. Therefore, the court characterized the land as marital property, awarding Rhonda $5,000.00 -- representing one-half of the value of the land as of 1994.

With respect to the mobile home, the court determined that it was obtained entirely with gifts of money from Timothy's father, Thomas. The home was purchased in 2000 from Barker Mobile Homes for $25,540.00. The record contains copies of five checks from Thomas, totalling $25,510.69. Two (in the amounts

of $1,328.23 and $3,796.35) were made out to Rhonda; the remaining three checks were made out to Timothy. The court found that Rhonda had received the two checks solely by virtue of her status as Timothy's wife. Therefore, it concluded that the mobile home was entirely Timothy's non-marital property.

The only current valuation of the property was provided by a professional real estate appraiser, Norman Smith, who was hired by Rhonda. Smith assigned a fair market value to the entire property (the land and mobile home combined) of $80,000.00. He did not assign separate values to the land and the home, stating that he had not been asked to do so. He also explained that the land and mobile home would be more valuable if they were sold together rather than separately. The court rejected Smith's valuation as "uninstructive" because the values of the home and the land were not assessed separately.

The court awarded the mobile home and the real property to Timothy, reciting that "[t]he Court believes that separating the mobile home from the real property would materially impair the value of both." Timothy was ordered to pay Rhonda her marital share of the value of the land ($5,000) within ninety (90) days of the entry of the decree. Rhonda was given thirty (30) days thereafter to relocate.

Rhonda's first allegation of error concerns approximately $6,500.00 in proceeds that she and Timothy had

received from the sale of their previous home, a single-wide mobile home. Timothy testified that the money was used as partial payment for a car for Rhonda, which was awarded to her by the court. Timothy's father had also testified by deposition that the money was used for this purpose. Rhonda, however, contends that the money was applied to the purchase of the second marital residence and that it was, therefore, marital property. Although standards for tracing have been somewhat relaxed (see Chenault v. Chenault, 799 S.W.2d 575, 579 (Ky. 1990)), Rhonda has failed to offer any evidence to support her contention. We cannot agree that the court necessarily abused its discretion in concluding that the proceeds from the sale of the first mobile home had been used to purchase Rhonda's car based on the testimony of Timothy and his father. There was evidence upon which the court could base this finding, and it is vested with the discretion of electing to believe this testimony over Rhonda's contentions.

We shall next consider the court's determination that the mobile home was bought entirely with gifts of money from Timothy's father and that it was entirely Timothy's non-marital property. Rhonda alleges that discrepancies between the dates of the checks and the dates of the payments for the mobile home show that at least part of the home must have been financed from marital funds. Our review of the record confirms that these

discrepancies do exist. However, in her testimony at the hearing, Rhonda acknowledged that Timothy's father had given the checks to them as a gift and that she and Timothy had used the money to purchase the mobile home.

Rhonda emphasizes that the two checks made out to her alone should be considered her non-marital property. The court found these two checks were intended to be a gift to Timothy because there was no testimony to indicate that Rhonda had been granted such a gift except for her status as Timothy's wife. Rhonda challenges this finding, pointing out that the checks were made out specifically to her and were acknowledged as gifts to her in Timothy's mandatory case disclosure and affidavit.

The treatment of joint gifts in the context of marital dissolution has recently been addressed in Hunter, supra, 127 S.W.3d 656, in which this Court attempted to resolve a disparity between the holdings of two previous cases, Angel v. Angel, 562 S.W.2d 661 (Ky.App. 1978), and Calloway v. Calloway, 832 S.W.2d 890 (Ky.App. 1992). In Angel, we held that a tract of land conveyed without consideration to the divorcing parties by the wife's brother should have been treated as the wife's non-marital property "unless the trial court finds that [the husband] was named as a grantee for a reason **other than his marriage** to [the wife]." (Emphasis added.) Angel, 562 S.W.2d at 665. In Calloway, by contrast, we held that "gifts during

marriage to both spouses shall be treated as marital property upon dissolution." Calloway, 832 S.W.2d at 893. The Hunter court concluded that the apparent conflict between these two holdings was more apparent than real since the underlying principles in both cases focused on: (1) effectuating the actual intent of the donor and (2) furthering the legislative intent of KRS 403.190(3) to look beyond documentary title alone as conclusive. Hunter, 127 S.W.3d at 662.

By deposition, Timothy's father testified that he gave the money to Timothy and Rhonda to buy a home: "I gave Tim Twenty Thousand Dollars gifted and give Rhonda Fifty-One Hundred Dollars gifted." When he was asked whether there was any reason for Rhonda's name to have been on either of the checks or the property other than the fact that she was married to Timothy, he replied, "That's all, no other reason." He further testified that "they used it [the money] to purchase a doublewide." Rhonda contends that Thomas's testimony was self-serving and did not reveal his true intent at the time the gift was made.

Although the testimony by the parent of a party during the course of dissolution proceedings may well be biased in favor of his child, it is nonetheless a source of evidence regarding intent. As the finder of fact, the family court has the prerogative to choose which evidence to believe and which to

disbelieve. Sroka-Calvert v. Watkins, 971 S.W.2d 823, 828 (Ky.App. 1998).

In Hunter, the husband's parents had testified that they intended to give the disputed real property to their son and that they had included his wife on the deed solely because of her marriage to him. The Hunter court concluded that the trial court had not erred in finding that the property was the non-marital property of the husband. The factual circumstances of Hunter and Angel are highly similar to the case before us. Accordingly, we hold that the family court did not clearly err in characterizing the mobile home as entirely Timothy's non-marital property based on his father's testimony indicating his intent in making the gift.

Rhonda has argued that the mobile home became marital property when it was attached to the land. We disagree. The mobile home did not change its essential non-marital character because its wheels were removed and concrete block skirting was installed. In addition, she cites KRS 132.750 to support this argument. Although it has now been repealed, that statute nonetheless would not have been relevant to this issue because it concerned the classification of mobile homes for taxation purposes rather than for dissolution of marriage proceedings.

We do agree with Rhonda that the court erred in not considering the appreciated value of the mobile home when

apportioning the marital and nonmarital property. In awarding Rhonda $5,000.00 for her marital share of the real property based on its value as of 1994, the court erroneously awarded to Timothy the full amount of the appreciation both on the marital and on the non-marital portions of the property. Travis v. Travis, 59 S.W.3d 904, 910-11 (Ky. 2001), directs that a court must treat appreciated value as marital property subject to equitable division:

> When the property acquired during the marriage includes an increase in the value of an asset containing both marital and nonmarital components, trial courts must determine from the evidence why the increase in value occurred because where the value of [non-marital] property increases after marriage due to general economic conditions, such increase is not marital property, but the opposite is true when the increase in value is a result of the joint efforts of the parties. KRS 304.190(3), however, creates a presumption that any such increase in value is marital property, and, therefore, a party asserting that he or she should receive appreciation upon a nonmarital contribution as his or her nonmarital property carries the burden of proving the portion of the increase in value attributable to the nonmarital contribution. By virtue of the KRS 403.190(3) presumption, the failure to do so will result in the increase being characterized as marital property. (Citations and quotation marks omitted.)

In this case, the combination of the mobile home and the land had increased $44,460.00 in value during the course of the marriage from $35,540.00 to $80,000.00. As dictated by

Travis, the presumption is that the increase of $44,460.00 is entirely marital property, and the burden to prove otherwise rests on the party maintaining that it is non-marital.

The court heard testimony from both Timothy and Rhonda regarding improvements that had been made to the mobile home, such as carpeting, hardwood flooring, and painting. Timothy claimed that the improvements had been made by the seller of the mobile home as part of their sales agreement. He did testify that they may have purchased a furnace separately. Rhonda testified that the improvements had been made **after** the sale. Neither party provided any documentation to support his or her testimony.

The court concluded that there was insufficient evidence to show that any of the alleged improvements had increased the value of the mobile home and essentially ascribed the increase to general economic conditions rather than to joint efforts by the parties. The court found the increase to be both marital (as to the land) and non-marital (as to the mobile home). In so ruling, the court failed to give proper weight to the presumption that the appreciated value of the property was marital in nature. Travis, supra. Neither party was able to offer wholly persuasive testimony; Timothy did not meet his burden to prove that the appreciated value should be characterized as non-marital in nature. Accordingly, we hold

that the court clearly erred in failing to declare the appreciated value to be marital and subject to equitable division.

Brandenburg v. Brandenburg, 617 S.W.2d 871 (Ky.App. 1981), provides the proper formula for apportioning an increase in the value of property that is comprised of marital and non-marital components. The formula is based on the principle that "the interests of the parties [are] the same percentages as their respective contributions to the total equity in the property." Brandenburg, at 872. The formula directs a court to divide the value of the marital contribution by the total contribution and then to multiply by the equity at the time of distribution or dissolution. Id. The family court shall re-visit Rhonda's marital contribution of $5,000.00 according to the Brandenburg formula to arrive at a proper figure representing her share of the appreciated value of the property -- both the land and the mobile home. We vacate and remand for entry of an order that awards Rhonda the proper amount as her marital share in utilizing the Brandenburg formula.

Finally, Rhonda disputes the court's reduction of Timothy's child support payments by twenty percent. Finding that Timothy had been voluntarily underemployed in 2003, the court calculated his child support payments based on his gross monthly income of $1335.00 for 2002. A literal application of

the Kentucky child support guidelines would require payments by Timothy of $281.60 per month. KRS 403.212. However, the court also found that Timothy kept the children for a longer time than that which had been directed by the court's visitation schedule; *i.e.*, for twenty percent more time than what had been designated for him. Thus, his child support payments were reduced by twenty percent to $225.28.

> Courts may deviate from the guidelines where their application would be unjust or inappropriate. Any deviation shall be accompanied by a written finding or specific finding on the record by the court, specifying the reason for the deviation.

KRS 403.211(2).

Case law agrees with that statutory language: "A decision on whether to deviate from the guidelines is within the trial court's discretion." Rainwater v. Williams, 930 S.W.2d 405, 407 (Ky.App. 1996). Therefore, we find no abuse of discretion in the court's decision to use Timothy's income for 2002 to calculate his child support responsibilities. Nor is there error in its decision to reduce his payments by twenty percent based on the altered visitation schedule. Both decisions are properly supported by the record. We find no basis for reversal.

The findings of fact, conclusions of law, and final decree of dissolution of marriage entered by the Floyd Family

Court are hereby affirmed except as to the award of $5,000 to Rhonda as her share of the marital residence. That portion of the order is vacated, and this case is remanded for entry of an order consistent with this opinion. The order denying the motion to recuse is also affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Earl M. McGuire Prestonsburg, Kentucky	Clyde F. Johnson Prestonsburg, Kentucky