

## ARKANSAS COURT OF APPEALS

DIVISION III

No. CA10-918

PAMELA MAIORANO

APPELLANT

V.

SAMUEL MAIORANO

APPELLEE

**Opinion Delivered** March 16, 2011

APPEAL FROM THE GARLAND  
COUNTY CIRCUIT COURT  
[NO. DR-09-147-3]

HONORABLE THOMAS LYNN  
WILLIAMS, JUDGE

REVERSED AND REMANDED

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### JOSEPHINE LINKER HART, Judge

Pamela Maiorano appeals the property settlement and alimony provisions of her divorce decree. In this one-brief case, she argues that the trial court erred in 1) determining the amount of alimony she was to be awarded; 2) failing to award her the value of a condominium that the parties had agreed was her exclusive property; and 3) failing to equally divide the parties' retirement benefits. We reverse and remand.

Although we review traditional equity cases de novo, we will affirm the trial court's findings of fact unless they are clearly erroneous or clearly against the preponderance of the evidence. *Grover v. Grover*, 101 Ark. App. 346, 276 S.W.3d 740 (2008). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been committed. *Id.* In reviewing the trial court's findings, we give due deference

to the trial court's superior position to determine the credibility of the witnesses and the weight to be accorded to each witness's testimony. *Id.*

The relevant facts are as follows. The parties were married on September 28, 1979, and separated in June 2006. They have no minor children. Samuel is a building-supply salesman with a gross income of approximately \$92,000 per year. Pamela, who was 64 at the time of the divorce and nine years older than Samuel, turned down a \$40,000- to \$42,000-per-year job to collect \$1030 per month in Social Security benefits. She found her job to be too "tedious." Pamela had worked outside the home for more than thirty years; her last employment was as an insurance underwriter. Neither party had significant health problems. Both parties have retirement savings that exceed \$200,000; Pamela testified that Samuel gave her \$50,000 to "equalize" their respective retirement portfolios. Samuel stated that he was currently living with his girlfriend but had a mortgage payment of \$747 per month on a "vacation" condominium that he bought as an "investment." Pamela testified that she was living in an apartment owned by her son, rent free. Neither party was obligated to make a car payment.

During the marriage, Samuel was unfaithful to Pamela. With knowledge of Samuel's prior infidelity, in 2004, the parties agreed that prior to purchasing a condominium, if Samuel had another extramarital affair, Pamela would own the condominium as her own separate property. Samuel acknowledged that he subsequently had another extramarital affair, and by their 2004 agreement, Pamela was sole owner of the condo. During the pendency of the divorce, Samuel sold the condominium. Soon after the sale, he forwarded \$100,000 to Pamela.

In their testimony at the hearing, the parties essentially agreed that Samuel withheld from Pamela approximately \$150,000 from the sale of the condominium.<sup>1</sup>

The trial court asked the parties to submit proposed findings of fact. The trial court adopted the conclusions set out in Samuel's proposed findings, which stated that the parties were entitled to all the real and personal property "currently in his or her name and possession," that Samuel be ordered to pay to Pamela \$300 each month in alimony, and that Samuel be required to provide medical and dental insurance for Pamela as long as he could continue to provide coverage for her under the insurance policy that was provided through his employer. Pamela timely filed a notice of appeal.

We first dispose of Pamela's argument that the trial court erred in failing to equally divide the parties' retirement benefits. We find no error here. Pamela herself testified that Samuel gave her \$50,000 to "equalize" the parties' retirement portfolios. It is within the province of the trial court to decide whether or not to credit this testimony. *Id.*

Pamela next argues that the trial court erred in failing to give to Pamela the approximately \$150,000 that was acknowledged by both parties to be Pamela's separate property. Under Arkansas Code Annotated section 9-12-315 (Repl. 2009), the trial court is obligated to award all nonmarital property to the party who owned it unless the equities require

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<sup>1</sup> The testimony at the hearing regarding how much money Pamela was entitled to varied from Samuel's concession that he withheld \$149,000 from the condo sale to Pamela's assertion at trial that she was still owed \$150,000. The proposed findings of fact that the parties submitted showed a much greater variation. Pamela's proposed findings stated that she was owed \$199,044 from the condo sale, while Samuel's proposed findings of fact ignored the agreement to transfer ownership of the condominium entirely.

a division of that property with the other party. However, in that circumstance, the trial court was required to make express findings regarding such a distribution. The trial court failed to make such findings. We therefore reverse and remand on this point.

Finally, Pamela argues that the trial court erred in awarding her too little alimony. We decline to address this argument at this point. In light of our holding that the trial court erred in either failing to award Pamela approximately \$150,000 of the condo-sale proceeds or justifying why it was equitable to award Samuel a portion of her nonmarital property, the equities in this case have been substantially altered.

In fixing the amount of alimony, a trial court should consider the following factors: (1) the financial circumstances of both parties; (2) the couple's past standard of living; (3) the value of jointly owned property; (4) the amount and nature of the parties' income, both current and anticipated; (5) the extent and nature of the resources and assets of each of the parties; (6) the amount of income of each that is spendable; (7) the earning ability and capacity of each party; (8) the property awarded or given to one of the parties, either by the court or the other party; (9) the disposition made of the homestead or jointly owned property; (10) the condition of health and medical needs of both husband and wife; (11) the duration of the marriage; and (12) the amount of child support. *Boyles v. Boyles*, 268 Ark. 120, 124, 594 S.W.2d 17, 20 (1980). With our holding that approximately \$150,000 was not marital property, but instead Pamela's separate property, the *Boyles* factors have to be reconsidered. Accordingly, we remand this question to the trial court to re-weigh the equities with regard to the amount of the alimony

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award in light of our holding that Pamela is entitled to the balance of the proceeds from the sale of the condo.

Reversed and remanded

ROBBINS and HOOFFMAN, JJ., agree.