

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA11-149

DANA M. FINCHER

APPELLANT

V.

KENNY WILLIAM FINCHER

APPELLEE

Opinion Delivered SEPTEMBER 28, 2011

APPEAL FROM THE HEMPSTEAD
COUNTY CIRCUIT COURT,
[NO. DR-10-12-1]

HONORABLE RANDY WRIGHT,
JUDGE

REVERSED AND REMANDED

JOSEPHINE LINKER HART, Judge

Dana Fincher brings this appeal from the decree of the Hempstead County Circuit Court granting Kenny Fincher an absolute divorce. Appellant's principal argument challenges the court's finding that appellee proved and corroborated his grounds for divorce. We agree and reverse and remand.

The parties married in 1989 and separated in January 2010. Two children were born of the marriage; only one remained a minor at the time of trial. Appellee filed his complaint for divorce on January 19, 2010. Appellant answered, denying that appellee had grounds for divorce. She also filed a counterclaim seeking separate maintenance.

After a two-day trial in September 2010, the circuit court granted appellee a divorce on the grounds of general indignities and awarded the parties joint custody of their minor daughter, with neither party to pay child support to the other party. The remaining issues



were reserved. The court later entered its order deciding the parties' rights in certain property. Among other things, the court found that the marital home surrounded by forty-two acres was a gift to appellee from his parents and, therefore, not marital property. The court also found that appellee's father made a gift to appellee of one share of stock in Yellow Creek Corporation. This timely appeal followed.

We review domestic-relations cases de novo on the record, but we will not reverse the circuit court's findings unless they are clearly erroneous. *Hunter v. Haurert*, 101 Ark. App. 93, 270 S.W.3d 339 (2007). A circuit court's finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been committed. *Id.* We give due deference to the superior position of the circuit court to view and judge the credibility of the witnesses. *Id.*

Appellant first argues that the circuit court erred in granting appellee a divorce because he failed to prove or corroborate the grounds for divorce. Divorce is a creature of statute and can only be granted upon proof of a statutory ground. *Gunnell v. Gunnell*, 30 Ark. App. 4, 780 S.W.2d 597 (1989). Appellee's action for divorce was based on the ground of general indignities. See Ark. Code Ann. § 9-12-301(4) (Repl. 2009). In order to obtain a divorce on that ground, the plaintiff must show a habitual, continuous, permanent, and plain manifestation of settled hate, alienation, and estrangement on the part of one spouse, sufficient to render the condition of the other intolerable. *Poore v. Poore*, 76 Ark. App. 99, 61 S.W.3d 912 (2001). In *Bell v. Bell*, 105 Ark. 194, 150 S.W. 1031 (1912), the supreme court set out what evidence is necessary to establish indignities as a ground for divorce:



It is for the court to determine whether or not the alleged offending spouse has been guilty of acts or conduct amounting to rudeness, contempt, studied neglect or open insult, and whether such conduct and acts have been pursued so habitually and to such an extent as to render the condition of the complaining party so intolerable as to justify the annulment of the marriage bonds. This determination must be based upon facts testified to by witnesses, and not upon beliefs or conclusions of the witnesses. It is essential, therefore, that proof should be made of specific acts and language showing the rudeness, contempt, and indignities complained of. General statements of witnesses that the defendant was rude or contemptuous toward the plaintiff are not alone sufficient. The witness must state facts—that is, specific acts and conduct from which he arrives at the belief or conclusion which he states in general terms—so that the court may be able to determine whether those acts and such conduct are of such nature as to justify the conclusion or belief reached by the witness. The facts, if testified to, might show only an exhibition of temper or of irritability probably provoked or of short duration. The mere want of congeniality and the consequent quarrels resulting therefrom are not sufficient to constitute that cruelty or those indignities which under our statute will justify a divorce.

105 Ark. at 195–96, 150 S.W. at 1032.

Appellee’s evidence regarding his grounds is as follows. He testified that there were many things that led him to seek a divorce from appellant, including appellant’s lying to him and hiding things from him. He also said that there were disagreements and loud arguments. According to appellee, appellant told him several times that he was a “son of a bitch, just like your daddy.” He also said that appellant yelled and screamed at the children. Appellee also testified as to three specific incidents that “embarrassed” him. The first occurred in January 2010 when he learned from the mail carrier that the family’s mail was being held at the post office at appellant’s request instead of being delivered to the home. The second incident occurred in the summer of 2009 when appellee was denied a loan because appellant was more than thirty days late on a car note on several occasions. The third incident occurred when appellant berated a rodeo judge for not crediting some points to the parties’ son. In his



deposition, which appellant introduced into evidence, appellee testified that appellant was late in paying other notes and loans, including a cattle note to the Bank of Prescott and a note with Diamond State Bank. Some of the late car payments were more than thirty days late, with two payments being sixty days late. Appellee said that he learned that the loan at Diamond State Bank was three months late. The late car payments also resulted in an increase in the car insurance premiums, according to appellee.

Even if we were to recognize appellee's testimony accusing appellant of financial irresponsibility and verbal abuse as sufficient to establish grounds for divorce,¹ appellee failed to provide any proof corroborating those grounds. It is well settled that the testimony of the plaintiff as to the ground for divorce is not sufficient and that same must be corroborated by other testimony. *Rocconi v. Rocconi*, 88 Ark. App. 175, 196 S.W.3d 499 (2004).

We likewise reverse the circuit court's decisions concerning the property division and whether certain property was marital property or appellee's separate property as premature because the decision as to whether property is marital or separate only arises upon the dissolution of the marriage. Ark. Code Ann. § 9-12-315(a) (Repl. 2009); *Spencer v. Spencer*, 275 Ark. 112, 627 S.W.2d 550 (1982); *Moore v. Moore*, 21 Ark. App. 165, 731 S.W.2d 215 (1987).

We remand for the circuit court to consider appellant's counterclaim seeking separate maintenance.

Reversed and remanded.

PITTMAN and ROBBINS, JJ., agree.

David P. Price and Robert S. Tschiemer, for appellant.

Wilson, Walker & Short, by: *Charles M. Walker*, for appellee.

¹See *Breazeale v. Breazeale*, 248 Ark. 437, 451 S.W.2d 865 (1970) (financial irresponsibility); *Hodges v. Hodges*, 27 Ark. App. 250, 770 S.W.2d 164 (1989) (same); *Hickman v. Hickman*, 2010 Ark. App. 704 (verbal abuse).