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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001112-MR
&
NO. 2007-CA-001149-MR

JANIE GREER LEWIS

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM LAUREL CIRCUIT COURT
v. HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 01-CI-00783

JAMES RANDOLPH LEWIS

APPELLEE/CROSS-APPELLANT

OPINION

2007-CA-001112-MR – AFFIRMING;
2007-CA-001149-MR – AFFIRMING IN PART, REVERSING
IN PART, AND REMANDING

** ** * * * * *

BEFORE: MOORE, THOMPSON, AND WINE, JUDGES.

WINE, JUDGE: Janie Greer Lewis (“Janie”) and James Randolph Lewis (“Randy”) appeal from a judgment of the Laurel Circuit Court dissolving their marriage. Janie failed to properly preserve her objections to the trial court’s rulings relating to division of marital property, restoration of non-marital property,

maintenance, attorney fees and costs. We find that none of the issues which she raises on appeal rise to the level of palpable error. In his cross-appeal, Randy challenges the trial court's findings regarding division of marital property and debts, restoration of non-marital property, maintenance, and costs. For the most part, the trial court's rulings on these matters are neither clearly erroneous nor an abuse of discretion. However, we agree with Randy that the trial court applied the wrong standard by allocating to him the entire cost of a court-appointed expert. Hence, we affirm in part, reverse in part, and remand for additional findings and entry of an amended judgment.

Procedural History

The parties were married on June 1, 1990. One child was born of the marriage. In 2000, the parties separated, but subsequently reconciled. During the initial separation, the parties entered into a reconciliation agreement in which, among other things, Randy agreed to pay Janie \$9,000.00 in maintenance. The reconciliation was short-lived, and Janie filed this action to dissolve the marriage on September 10, 2001.

On Janie's motion, the trial court entered an order on October 15, 2001, which adopted the provisions of the reconciliation agreement relating to maintenance. In 2003, the trial court reduced Randy's maintenance obligation to \$6,000.00 per month, retroactive to October 29, 2001. After voluminous discovery, the trial court entered a bifurcated decree of dissolution on March 24, 2006. The parties were granted joint custody of the child, with Janie designated as

the primary residential custodian. Custody and child support are not at issue in this appeal.

The court referred the remaining matters to the domestic relations commissioner (“DRC”) for a hearing and recommended findings. The unresolved issues remaining for adjudication involved restoration of non-marital property, division of marital property, assignment of responsibility for payment of debts, credits due either party for payment of debts, Janie’s request for maintenance, and attorney fees and costs. Following a hearing, the DRC issued a report with proposed findings of fact and conclusions of law and judgment on February 19, 2007.

Both Janie and Randy filed objections to the DRC’s report, but Janie’s objections were not timely. Consequently, the trial court summarily overruled her objections. However, the trial court also overruled Randy’s objections and adopted the DRC’s proposed judgment on March 30, 2007. Thereafter, Randy filed a motion to alter, amend or vacate pursuant to Kentucky Rules of Civil Procedure (“CR”) 59.05. On April 25, 2007, the trial court amended the judgment to correct a factual error, but otherwise denied Randy’s motion. We will set out additional facts below as necessary.

Issues on Appeal and Cross-Appeal

In her direct appeal, Janie argues that the trial court erred in calculating Randy’s non-marital interest in several businesses, including Lewis L.P. Gas, Inc. (“Lewis L.P. Gas”) and Flea Land Flea Market, Inc., (“Flea Land”).

She also contends that the trial court erred in calculating Randy's non-marital interest in the marital residence, in determining the amount and duration of maintenance, and in setting the amount of her award of attorney fees and costs. In his cross-appeal, Randy also challenges the trial court's calculation of his non-marital interest in Lewis L.P. Gas and Flea Land. In addition, Randy argues that the trial court erred in its factual findings concerning the parties' respective contributions to accumulation of marital assets, the distribution of the stock of Randy Lewis, Inc., the distribution of household furnishings and personal property, assignment of debts, and the award of attorney fees and costs to Janie.

Preservation

As an initial matter, Randy argues that Janie failed to preserve her objections to the DRC's findings regarding the disposition of assets. After the DRC issued his proposed findings of fact, conclusions of law and judgment, the Laurel Circuit Clerk notified the parties that they had ten days to file exceptions from the recommended order. On February 28, 2007, Janie filed a motion to alter, amend or vacate or vacate the DRC's report. On March 1, 2007, the trial court issued an order advising the parties that there was no provision under CR 53.06 for a motion to alter, amend or vacate a commissioner's report.

After receiving the court's order, Janie's counsel filed a document styled "Exceptions to Commissioner's Report." However, the document merely stated that the report was entered on February 19, received on February 23, and that a detailed memorandum enumerating specific objections would follow within

two weeks. Randy filed timely and detailed exceptions to the DRC's report on March 6, 2007. He also objected to allowing Janie additional time to submit detailed objections.

Janie's counsel eventually served detailed objections to the DRC's report on March 13, 2007. After receiving her pleading, Randy moved to strike the objections or to summarily overrule them as untimely. The trial court agreed and summarily overruled the objections on March 30, 2007. Randy argues that Janie is now precluded from raising these issues on appeal.

In general, a party who desires to object to a report must do so as provided in CR 53.06(2) or be precluded from questioning on appeal the action of the circuit court in confirming the commissioner's report. *Eiland v. Ferrell*, 937 S.W.2d 713, 716 (Ky. 1997). While a trial court has the discretion to summarily overrule untimely objections, it is not required to do so. *Id.* at 717. In this case, however, the trial court summarily overruled Janie's objections as untimely. Janie does not contend that the trial court abused its discretion by declining to consider her untimely objections.

Nevertheless, Janie contends that this Court is authorized to consider these issues under the palpable error standard of CR 61.02. We agree. The plain language of that rule allows an appellate court to consider a claim of palpable error even though the issue was not properly preserved before the trial court. *Herndon v. Herndon*, 139 S.W.3d 822, 826-27 (Ky. 2004). Furthermore, Randy also appeals from the trial court's calculation of his non-marital interest in these assets.

Thus, we may address Janie's assignments of error to the extent that these issues are already presented in Randy's cross-appeal.

Increase in value of non-marital assets during marriage

The central issue in both Janie's appeal and Randy's cross-appeal concerns the trial court's calculation of Randy's non-marital interest in Lewis L.P. Gas¹ and Flea Land. Prior to the marriage, Randy owned 85% of the stock of Lewis L.P. Gas, and a 25% stock ownership interest in Flea Land. The trial court found that Randy's interest in Lewis L.P. Gas was worth \$1,018,680 as of the date of the marriage and \$1,731,132 as of the date of the parties' separation, resulting in an increase of \$712,452.00 during the marriage. Similarly, the court found that Randy's interest in Flea Land² was worth \$20,047.00 as of the date of the marriage and \$577,214.00 as of the date of the parties' separation, resulting in an increase of \$557,167.00. The trial court found that 20% of the increase in the value of these interests was attributable to the joint efforts of the parties, and divided that interest equally.

Randy takes issue with the sufficiency of the evidence supporting the court's finding that Lewis L.P. Gas increased in value over the course of the marriage. Nevertheless, he maintains that the trial court erred in finding that any

¹ Earlier in the dissolution proceedings, Lewis L.P. Gas was the subject of an original action before the Kentucky Supreme Court. *Lewis LP Gas, Inc. v. Lambert*, 113 S.W.3d 171 (Ky. 2003), *abrogated on other grounds in Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004). The trial court issued a restraining order prohibiting Randy from selling the corporation's shares in FerrellGas. The Kentucky Supreme Court granted injunctive relief, concluding that the trial court lacked jurisdiction over the corporation or its non-party shareholders.

² Randy was only one of several investors in Flea Land.

portion of the increase in value of either business was attributable to the joint efforts of the parties. For her part, Janie accepts the trial court's valuations as to both businesses. However, she argues that the increase in their respective values should be deemed to be entirely marital.

Under Kentucky Revised Statute ("KRS") 403.190(2), "marital property" includes all property acquired during the marriage by either spouse subsequent to the marriage. However, the statute excludes "[t]he increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during marriage." KRS 403.190(2)(e). As a result, when the property includes an increase in the value of an asset containing both marital and non-marital components, the trial court must determine from the evidence why the increase in value occurred. *Travis v. Travis*, 59 S.W.3d 904, 910 (Ky. 2001). If the increase in value was due to general economic conditions, then the increase is deemed to be non-marital. But if the increase is due to the "team" efforts of the parties, then the increase in value is marital. *Sharp v. Sharp*, 491 S.W.2d 639, 644 (Ky. 1973).

The term "efforts of the parties" should not be construed narrowly to require active involvement by both spouses in the development of the asset. Rather, 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). Moreover, KRS 403.190(3) creates a presumption that any such increase in value is marital property.

Therefore, a party asserting that he or she should receive appreciation upon a non-marital contribution as non-marital property carries the burden of proving the portion of the increase in value attributable to the non-marital contribution.

Otherwise, the increase will be characterized as marital property. *Travis*, 59 S.W.3d at 910-11.

In this case, there was evidence that Janie contributed to the business operations of both Lewis L.P. Gas and Flea Land. As the trial court noted, Janie actively solicited accounts and negotiated contracts on behalf of Lewis L.P. Gas. She also met with clients, answered phones and ran errands for the bookkeeper. Likewise, she contributed to the operation of Flea Land by initiating the company's annual Christmas dinner for vendors and starting the bingo operation. In addition, Janie contributed to the marriage as a homemaker and primary caretaker of the child. Although Randy takes issue with the extent of these contributions, we cannot say that the trial court clearly erred by finding that the increase in value of these businesses was at least partially attributable to the efforts of both parties.

The more difficult question concerns the trial court's finding that only 20% of the increase was attributable to the efforts of the parties. This matter is further complicated because Janie failed to preserve her objection to the DRC's finding. Thus, our review is limited to palpable error resulting in "manifest injustice". However, the classification of an asset as marital or non-marital property "involves an application of the statutory framework for equitable distribution of property upon divorce and therefore constitutes a question of law

subject to this Court's independent determination.” *Holman v. Holman*, 84 S.W.3d 903, 905 (Ky. 2002). However, we will not disturb the trial court’s factual findings if they are supported by substantial evidence. CR 52.01. *See also Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998).

If this were only a question of law, we might find that the trial court committed palpable error in concluding that only 20% of the increase in value in the businesses was due to the efforts of the parties. As previously noted, Janie presented substantial evidence showing her contributions to the marriage generally and to the operation of the businesses in particular. However, the trial court set out additional evidence supporting the conclusion that a significant portion of the increase was due to general economic conditions. With regard to Lewis L.P. Gas, the court stated:

[Randy] offered the testimony of several witnesses, including Jan McPhetridge, Judy Sexton, the manager of Lewis LP Gas, Inc., and Larry Willis, the company’s certified public accountant. The essence of their testimony was that the entity struggled financially for several years prior to its sale in 1997. Mr. Willis testified that the entity was at the point of a forced sale and that the book value of the stock in the entity had decreased from 1990 to 1997 by \$400,000.

Perhaps the most focused and credible evidence on this issue is that provided by [Janie’s] expert, J. Michael Cloyd. Mr. Cloyd prepared correspondence to [Janie’s] counsel dated September 10, 2002, in which he articulates concerns regarding the report of value created by [Randy’s] expert, John Craft.

Mr. Cloyd disputes Mr. Craft’s finding that the 1997 sale of the entity to FerrellGas was a fair market sale. Mr. Cloyd states that the 1997 [sale] was an investment sale peculiar to the particular investment

requirements of FerrellGas. He discusses the fact that FerrellGas converted from a privately owned company to a Master Limited Partnership in 1994, a move unprecedented in the propane industry, and one designed to give FerrellGas greater financial ability to expand its operations by strategically acquiring smaller operations such as Lewis LP Gas, Inc. Mr. Cloyd concluded that the passage of two federal acts, the Clean Air Act in 1990 and the National Energy Policy Act in 1992, made the LP gas business much more attractive and was the fundamental motivation behind FerrellGas' strategic initiative to acquire entities such as Lewis LP Gas, Inc.

In separate correspondence to [Janie's] counsel dated September 4, 2002, Mr. Cloyd commented upon the historical financial statements of Lewis LP Gas, Inc. His findings mirrored the same story told by the testimony of [Randy's] witnesses concerning the company's financial performance. He concludes that the historic financial statements reflect a flat performance by the company between 1991 and 1997, that the book value of the company had decreased from 1991 to 1997, and that the selling price of the company had "very little relationship" to the assets recorded on the books. In a most telling comment, Mr. Cloyd states that "while we do not have sufficient information to assess all the factors involved in arriving at the selling price of the company in 1997, it certainly appears that the increase in value occurred during the marriage and is largely the result of the Congressional Acts referred to on the attached information sheets and FerrellGas M.L.P.'s decision to aggressively acquire and retain operations throughout the United States."

Similarly, the trial court set out the evidence relating the increase in the value of Flea Land during the marriage.

[Randy] again offered the testimony of witnesses, including Brenda Hail, the manager of Flea Land[,] and Larry Willis, the company's certified public accountant. The essence of their testimony was that [Randy's] father, Audley Lewis, and Ms. Hail managed the day to day

operations of the entity. [Randy] was never employed in the entity and never received a salary from the entity.

Larry Willis testified that he dealt only with Ms. Hail and [Randy's] father as concerned the accounting issues. He testified that neither [Janie] nor [Randy] had any active involvement in the operation of Flea Land.

When asked concerning Flea Land in her deposition testimony given September 14, 2002, [Janie] acknowledged that "basically it was always the manager who ran the business." [Janie] testified that she would occasionally help out in the office or in the concessions area and that she conceived of and originally organized an annual Christmas dinner for the employees and vendors in the market.

Based on this evidence, the trial court found that Randy had met his burden of proving that a substantial portion of the increase in the value of both Lewis L.P. Gas and Flea Land was not the result of the efforts of the parties. Since this factual finding was supported by substantial evidence, we will not disturb it. There is less evidence to support the trial court's finding attributing 80% of the increase in value to general economic conditions. But since Janie failed to properly preserve her objections to this finding, we cannot say that the trial court's allocation amounted to palpable error in this case.

Sufficiency of the evidence supporting valuation

Randy also argues that the trial court erred by relying on the report of court-appointed expert Calvin Cranfill, who placed a value on Lewis L.P. Gas. Randy states that Cranfill's report was not properly admitted because it was not sworn or subject to cross-examination. However, Randy did not object to the

admission of Cranfill's report on this basis. Therefore, any issue regarding its admissibility is not preserved for review.

Moreover, a trial court has discretion to appoint an expert in any matter involving the valuation of marital or non-marital property in a dissolution proceeding. *Robinson v. Robinson*, 569 S.W.2d 178, 180 (1978), *overruled on other grounds in Brandenburg v. Brandenburg*, 617 S.W.2d 871 (Ky. App. 1981). Likewise, Kentucky Rule of Evidence (KRE) 706 permits the court to appoint experts. The parties have a right to be advised of the expert's findings, to take the witness's deposition, and to call the witness to testify on direct or cross-examination. But in the absence of such a request, the rule does not anticipate that an appointed expert's report be sworn in the conventional sense. Since Randy makes no showing that he requested to examine Cranfill under oath, we find that the trial court did not err by considering his report as evidence in this case.³

Randy also takes issue with Cranfill's methodology in placing values on Lewis L.P. Gas and Flea Land. With regard to Lewis L.P. Gas, Randy notes that Cranfill did not interview any employees or directly review the corporation's books or records. Randy raises similar objections to Cranfill's valuation of Flea

³ Randy states that he preserved this issue in his "Position Memorandum" filed on June 16, 2006. Record on Appeal [ROA] at pp. 3977-4041. On page 3 of the memorandum, Randy notes that the trial court appointed Cranfill to do his own valuation of the businesses and to review the other financial aspects of the case. Randy adds that "[t]he parties were not afforded an opportunity to depose Mr. Cranfill and his report was submitted without any opportunity to take Mr. Cranfill's deposition." However, Randy does not state that he ever made a request to depose Cranfill.

Land. He also asserts that Cranfill erroneously included in his valuation property that is not owned by Flea Land.

However, it is well established that issues relating to weight and credibility of evidence are within the sole province of the fact-finder and generally will not constitute grounds for reversal on appeal. *See Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008). *See also* CR 52.01. Although Randy raises several general objections to Cranfill's methodology with respect to Lewis L.P. Gas, he does not identify flaws which are so significant as to undermine the trial court's basis for relying on his report. As to Flea Land, the trial court's judgment addressed the additional acreage in its findings, specifically assigning that acreage to Randy as his non-marital property. Finding no clear error, we affirm the trial court's conclusions on these matters.

Division of Marital Residence

Janie next challenges the trial court's valuation and division of the marital equity in the parties' residence. The trial court found that the property was worth \$196,000.00 and was encumbered by a \$115,000.00 mortgage at the time of the marriage. Consequently, the court concluded that Randy had an \$81,000.00 non-marital interest in the residence. The court further found that the property was worth \$291,500.00 and was encumbered by a mortgage of \$18,454.72 as of the date of separation. Based on these findings, the trial court concluded that the property had marital equity of \$192,045.28. The court awarded the residence to

Janie, subject to an offset to Randy of \$177,022.64, representing his marital and non-marital equity in the property.

Janie takes issue with several aspects of the trial court's findings. First, she notes that the trial court based its starting valuation on a 1986 appraisal of the property – some four years prior to the marriage. Janie contends that there was no basis for the trial court to assume that the 1986 appraisal reflected the value of the property in 1990. Janie also argues that the trial court failed to credit her with contributions of her non-marital property.⁴ Lastly, Janie alleges that the trial court should not have deducted the remaining balance on the marital mortgage because Randy diverted marital funds during their separation to pay a non-marital debt.

As previously noted, Janie did not preserve these issues for review by filing timely exceptions to the DRC's report. Furthermore, she did not make a request for additional findings pursuant to CR 52.04. Moreover, her pre-hearing statement does not identify any issues relating to the division of the marital residence. *See Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky.1989), and CR 76.03(8). In the absence of any sufficient effort to preserve these issues for review, we decline to consider them even under the palpable error rule.

Maintenance

⁴ In 2003, the trial court directed that most of the parties' vehicles be sold at auction and the proceeds be applied toward the balances of the non-marital and marital mortgages. Janie states that two of the vehicles were her non-marital property, and that she is entitled to a credit for her non-marital contribution to payment of the non-marital mortgage. The trial court noted Janie's non-marital interest in the vehicles. However, the court did not specifically account for that interest in its allocation of property.

The trial court awarded rehabilitative maintenance to Janie for two years, in the amounts of \$3,500.00 per month for the first year and \$2,500.00 per month for the second year. Janie maintains that this award is inadequate considering the length of the marriage and extent of Randy's assets. In his cross-appeal, Randy argues that Janie was not entitled to any additional maintenance considering the amount of assets she received in the dissolution and the temporary maintenance she received during the six years this action was pending.

An award of maintenance is within the sound discretion of the court and will not be disturbed on appeal absent an abuse of discretion. *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990); *Perrine v. Christine*, 833 S.W.2d 825 (Ky. 1992). When determining whether an award of maintenance is appropriate, KRS 403.200(1) requires the trial court to find that the spouse seeking maintenance: (1) lacks sufficient property, including marital property apportioned to her, to provide for her reasonable needs; and (2) is unable to support herself through appropriate employment. Once the court determines that maintenance is appropriate, KRS 403.200(2) further directs the court to consider the following factors in setting the amount and duration of maintenance:

- (a) The financial resources of the party seeking maintenance, including marital property apportioned to [her], and [her] ability to meet [her] needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

- (c) The standard of living established during the marriage;
- (d) The duration of the marriage;
- (e) The age, and the physical and emotional condition of the spouse seeking maintenance; and
- (f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

The amount and duration of maintenance are within the sound discretion of the trial court. *Gentry*, 798 S.W.2d at 937. “As an appellate court . . . this Court is [not] authorized to substitute its own judgment for that of the trial court on the weight of the evidence, where the trial court's decision is supported by substantial evidence.” *Leveridge v. Leveridge*, 997 S.W.2d 1, 2 (Ky. 1999).

The trial court set out extensive findings supporting its conclusion to award temporary maintenance. The court first noted the Janie is 42 years of age, has no substantial employment history, and provides primary care for the parties’ son. Although Randy is nearing retirement age, his income from all sources exceeds \$400,000.00 a year. And while Janie reports significant income from a non-marital family corporation, the trial court found that most of these disbursements are “pass-through” income which must be applied toward Janie’s income tax obligation.

On the other hand, the trial court also noted that Janie suffers no disabilities that prevent her from being gainfully employed and the parties’ child does not require any special care. In addition, Janie received extensive temporary maintenance during the six years that this matter was pending, and the trial court

awarded her a substantial amount of marital assets. In separate portions of the trial court's judgment, the trial court also noted Janie's testimony regarding her involvement in the operation of Lewis L.P. Gas, Flea Land, and a clothing store called Scruples. Given these findings, the trial court's award of limited, rehabilitative maintenance does not amount to palpable error.

Randy suggests that Janie was not entitled to any maintenance, but he does not seriously argue that the trial court's award was an abuse of discretion. But he also contends that the trial court erred by failing to credit him for overpayment of *pendente lite* maintenance. As previously noted, the trial court awarded temporary maintenance of \$9,000.00 per month pursuant to the parties' reconciliation agreement, and later reduced that amount to \$6,000.00 per month, retroactive for October 29, 2001. Randy maintains that the latter amount still exceeded Janie's reasonable needs, and consequently he is entitled to a credit for the overpayment.

We find no abuse of discretion. Randy sought a credit for overpayment in his pleadings before the DRC and the trial court, but none of the trial court's orders directly address the issue.⁵ However, he does not allege that he paid more maintenance than the trial court ordered him to pay. Rather, Randy

⁵ We note that Randy's appellate brief does not provide any citations as to where the issue was preserved for review. CR 76.12(4)(c)(v). We would remind Randy that this Court is not obliged to scour the record on appeal to ensure that an issue has been preserved. *See Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 53 (Ky. 2003). Nevertheless, Randy did raise this issue in his "Position Memorandum" before the DRC and in his objections to the DRC's proposed judgment. ROA at 4034-35, 4897-98. Therefore, we will address the issue despite the inadequate citation to the record.

merely alleges that the temporary maintenance award was excessive in light of Janie's actual reported expenses. A temporary maintenance order is interlocutory and not subject to appeal. *See Cannon v. Cannon*, 434 S.W.2d 48 (Ky. 1968). Furthermore, the DRC's report, as adopted by the trial court, cited the amount and duration of the temporary maintenance award as a factor in its award of limited, rehabilitative maintenance. Under the circumstances, we are satisfied that the trial court adequately considered Janie's receipt of temporary maintenance in its final maintenance award.

Attorney Fees and Costs

Similarly, both parties appeal from the trial court's award of attorney fees to Janie. The trial court ordered Randy to pay \$20,000.00 toward Janie's attorney fees. Janie maintains that the award of attorney fees and costs was inadequate, alleging that she has incurred over \$150,000.00 in attorney fees. She also asserts that Randy was responsible for most of the acrimony of the dissolution proceedings while it was pending over a six-year period. And Janie again notes the wide disparity in the parties' income. Based on these factors, Janie contends that the trial court abused its discretion in its award of attorney fees.

We disagree. As previously noted, Janie did not adequately preserve this issue for appeal. Furthermore, even where there is a disparity in the relative financial resources of the parties, the trial court retains broad discretion under KRS 403.220 to determine the appropriate amount of attorney fees. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 519 (Ky. 2001). The trial court "is in the best position

to observe conduct and tactics which waste the court's and attorneys' time and must be given wide latitude to sanction or discourage such conduct.” *Gentry v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990).

From the record, it is clear that both parties bear some responsibility for the length and contentiousness of the dissolution proceedings before the trial court. And while there remains a disparity between the parties’ resources, Janie retains a significant amount of marital and non-marital assets. Thus, we can find no abuse of discretion in the trial court’s award of attorney fees, much less palpable error.

Randy also argues that the trial court abused its discretion by apportioning the entire expert-witness fee to him. In an earlier order, the trial court directed that Randy pay Cranfill’s expert witness fee of \$13,968.78, but suggested that the expense may be subject to apportionment at a later date. In its final order, however, the trial court assigned the entire expense to him, noting that the funds which Randy used to pay the fee are presumed to be marital assets.

While this is true, the court’s reasoning misses the point. First, the trial court’s earlier order directed Randy to pay the fee. Moreover, the trial court should not have treated Cranfill’s expert witness fee as a marital debt, but as a cost of the proceedings. Furthermore, both parties clearly received a benefit from Cranfill’s services as an expert.

We recognize that the apportionment of such costs is within the sound discretion of the trial court under KRS 403.220. *Culver v. Culver*, 572 S.W.2d

617, 622 (Ky. App. 1978). *See also* KRE 706(b). For this reason, the trial court may have been well within its discretion to assign this expense entirely to Randy given the appropriate findings. However, we find that Randy is entitled to have the decision made under the correct standard. Therefore, we must reverse the trial court's decision on this matter and remand for additional findings and an amended judgment.

Randy's Cross-Appeal

Division of marital property

In his appeal, Randy raises a number of additional arguments concerning the trial court's division of the marital property. First, Randy argues that the trial court clearly erred by finding that the parties had contributed equally to the accumulation of marital assets. He contends that Janie's spending habits and her operation of the clothing store Scruples negatively affected the parties' accumulation of marital property. Randy maintains that the trial court's finding wrongly led it to equally divide the marital property.

As previously noted, the trial court's factual findings will not be disturbed absent clear error. Furthermore, 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, supra* at 40. Janie clearly contributed to the marriage as a homemaker and primary caretaker for the child. In addition, she also assisted with the operation of Lewis L.P. Gas and Flea Land. While Randy takes issue with Janie's spending habits and business decisions, he does not allege that Janie's conduct amounted to a dissipation of marital assets. Thus, the trial court did not clearly err by finding that the parties' contributions to the accumulation of marital property were roughly equal.

Next, Randy takes issue with the trial court's division of the stock interest in Randy Lewis, Inc. Randy Lewis, Inc., is a trucking business enterprise located in London, Kentucky, that specializes in the transportation of propane,

asphalt and other construction materials. The DRC concluded that the stock interest in Randy Lewis, Inc., was a marital asset. However, the DRC further found that neither party had presented sufficient evidence to place an accurate value on the entity as a continuing enterprise. The DRC considered and rejected various options for dividing the assets as not feasible. Consequently, the DRC recommended that the parties be directed to negotiate a private disposition of the stock interest of Randy Lewis, Inc. In the event that the parties failed to reach an agreement, the court directed each party to submit a sealed bid to purchase the other party's marital interest, with the winning bidder to pay the selling bidder the amount of his or her bid upon entry of a supplemental judgment. The trial court adopted the DRC's recommendation. However, both parties filed notices of appeal before the trial court entered a supplemental judgment.

Randy contends that this division constituted an abuse of discretion for several reasons. First, he argues that the trial court erred by failing to place a value on the corporation's assets. Second, he asserts that Janie controlled the operation of Randy Lewis, Inc., throughout the marriage and was better suited to be assigned the entire asset. He also notes that an award of the income-producing asset to Janie would have obviated any need for additional maintenance.

Therefore, Randy asserts that the trial court should have assigned the entire stock interest to Janie.

However, we review the trial court's decisions regarding division of marital assets under an abuse of discretion standard. *Davis v. Davis*, 777 S.W.2d

230, 233 (Ky. 1989). Randy does not assert that the trial court failed to consider the factors set out in KRS 403.190(1) in dividing the property. Moreover, he does not argue that the trial court's method of dividing the stock interest in the corporation unfairly deprives him of any of its value. And finally, we question whether this matter is even ripe for appeal because the parties' filed their notices of appeal before the trial court considered their sealed bids. Consequently, we find no basis for disturbing the trial court's division of the stock interest in Randy Lewis, Inc.

Randy also objects to the trial court's order dividing the household furnishings and personal property. After awarding Randy specific items requested, the trial court directed that each party shall keep the remaining household goods and personal property in their possession without any offset or equalization payment. Randy contends that the trial court's division was unfairly skewed in favor of Janie.

Randy's argument on this point is not well developed. He primarily contends that the trial court erred by refusing to assign a value to the inventory of the now-defunct Scruples clothing store, which he asserts is worth nearly \$160,000.00. The trial court was not convinced that these items had any appreciable resale value. Since Randy does not refer this court to evidence which compels a contrary conclusion, we cannot say that the trial court clearly erred in this finding. Furthermore, Randy did not request any alternate disposition of this inventory, such as consigning it to auction. Therefore, we cannot find that the trial

court's division of the household furnishings and personal property amounted to an abuse of discretion.

Assignment of Debts

Finally, Randy disputes the trial court's refusal to credit him for payment of various marital debts, including a lien against a 1998 Chevy Corvette, the parties' 2000 State and Federal income tax liabilities, and the balance owed on a debt to the First National Bank of Manchester. First, Randy argues that the trial court improperly required him to reimburse Janie for a lien against a 1998 Chevy Corvette. As previously noted, the trial court ordered the parties' vehicles to be sold at auction in 2003, and the proceeds applied toward various marital debts. Shortly after that auction, the trial court found Randy in contempt for encumbering the Corvette in violation of its prior orders. The \$17,947.85 lien was paid from the proceeds of the auction. Consequently, the court's judgment directed Randy to pay Janie one-half of this amount, or \$8,973.93, representing Janie's share of the auction proceeds used to pay off the lien.

Randy asserts that he re-encumbered the Corvette to secure a replacement note on the marital property. The trial court rejected this assertion. In the absence of clear error, we are bound by the trial court's finding.

Secondly, Randy argues that the trial court erred by rejecting his request to be reimbursed for his payment of the parties' federal and state tax liabilities for the year 2000. Although Randy paid these liabilities after the parties separated, the trial court noted that the debt was clearly marital, and Randy made

no showing that he used non-marital funds to pay the obligation. Furthermore, Randy does not elaborate on his suggestion that the trial court applied this standard inconsistently. Therefore, we find no abuse of discretion. For similar reasons, we find that the trial court did not abuse its discretion by denying Randy's request for reimbursement for the houseboat maintenance and slip rental expenses which he paid during separation.

Next, Randy argues that the trial court erred by denying his request for reimbursement for a share of a payment of a note to the First National Bank of Manchester. The parties incurred the debt to finance the operation of the clothing store Scruples. The parties had previously agreed that the remaining \$45,141.12 balance on the note would be paid from the proceeds of the sale of a houseboat.

The party claiming that a debt is marital has the burden of proof. *Neidlinger*, 52 S.W.3d at 523. In making this determination, the trial court should consider receipt of benefits, the extent of participation, whether the debt was incurred to purchase assets designated as marital property, whether the debt was necessary to provide for the maintenance and support of the family, and any economic circumstances bearing on the parties' respective abilities to assume the indebtedness. *Id.* In this case, however, Randy does not articulate a clear argument that the debt should be considered non-marital.

Thus, the question on appeal is whether the trial court abused its discretion by equally allocating the debts between the parties. The allocation of marital debts is committed to the sound discretion of the trial court. *Id.* The trial

court noted that Scruples was a marital business enterprise. As such, the trial court concluded that the parties should jointly share in the risk of its failure as well as the benefit of its possible success. The trial court's reasoning on this point is sound and will not be disturbed.

Conclusion

Accordingly, the judgment of the Laurel Circuit Court is affirmed in all respects except for the assignment of the entire expert-witness fee to Randy. This matter is remanded for further proceedings and entry of an amended judgment allocating the fee under the standards provided in KRS 403.220.

ALL CONCUR.

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