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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000671-MR

ANDREW T. GALLAGHER — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 09-CI-01265

MARJORIE G. GALLAGHER — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT AND MAZE, JUDGES.

MAZE, JUDGE: Appellant, Andrew Gallagher, appeals from the order of the Oldham Family Court regarding several matters pertaining to the dissolution of his marriage to Appellee, Marjorie Gallagher. Finding that the trial court abused its

discretion regarding three issues raised on appeal and must make further findings regarding a fourth, we affirm in part, reverse in part and we remand to the trial court for entry of amended orders.

Background

Andrew and Marjorie were married in North Carolina in 1991 and had two children during their marriage. Both Andrew and Marjorie hold engineering degrees. Prior to moving to Kentucky, Andrew worked for a major airline in Atlanta and Marjorie worked for the Centers for Disease Control, earning approximately $43,000. However, Marjorie quit this job to care for the couple's youngest child. After moving to Kentucky, Andrew worked for United Parcel Service earning just over $100,000 per year, while Marjorie began work as a certified real estate appraiser, earning just over $10,000 per year.

In 2009, Marjorie petitioned for divorce and soon moved for temporary child support, maintenance and debt service. Following a hearing on the matter, the trial court ordered Andrew to continue paying the $2,100 mortgage on the marital home in which Marjorie and the children still lived. The court also required Andrew to pay Marjorie $1,050 in temporary maintenance and $1,302 in temporary child support. Following entry of this order on February 11, 2010, this Court denied Andrew's motion for emergency relief from the order. Accordingly,

the provisions of the trial court's temporary order remained in effect until January 30, 2012, when the court entered its final orders and decree of dissolution.

While the divorce was pending, Marjorie petitioned the trial court for permission to move back to Atlanta to pursue a job opportunity as a real estate appraiser. Marjorie also requested that her maintenance be increased due to Andrew's financial benefit from her vacating the marital home. In response, Andrew requested that his child support be adjusted to reflect Marjorie's new income and that their oldest child had moved in with him in September. In November, before the trial court had ruled on these matters, Marjorie moved to Atlanta with the couple's youngest child.

The trial court included its ruling on these matters in its final order of January 30, 2012. The court's order kept primary residential custody of both children with Marjorie and increased ordered maintenance to $1,500 per month. The trial court imputed an annual income of $36,000 to Marjorie in light of her new employment, up from $6,000, which was used to calculate the temporary child support and maintenance amounts. Andrew also remained responsible for the $2,100 mortgage payment.

The trial court made several decisions regarding the division of Andrew's and Marjorie's assets. The court divided the balance of an L&N Federal Credit Union account as a marital asset. This account originated from Andrew's

decision to close out $6,898 in stock he held as a result of his employment with UPS. The trial court also held Andrew as having an additional $19,178 in restricted stock accrued during the marriage. Andrew was held responsible for half of $20,503 in marital credit card debt. As a result of Marjorie's testimony to this effect, the trial court credited Marjorie with $7,000 which she claimed increased the value of their home in Georgia by the full $7,000 before its sale. In addition, the trial court found that, due to the disparity in the parties' respective means, Marjorie was entitled to $6,000 in attorney's fees from Andrew.

Both parties filed a motion to alter, amend or vacate the trial court's order of January 30. As a result, the trial court awarded primary residential custody of the oldest child to Andrew in light of her decision to live with him. The trial court also reduced Andrew's child support obligation from $1,302.00 to $411.50 to reflect both Marjorie's increase in income (to $36,000.00) and that only one child resided with Marjorie. The order regarding child support was retroactive to December 1, 2011. The court refused to otherwise alter or amend its order of January 30, the remainder of which continued to apply. Andrew's appeal of both orders now follows.

Standard of Review

The issues in this case involve the trial court's decisions regarding child support, maintenance and the division of assets pursuant to a divorce.

Accordingly, we review the trial court's decisions for an abuse of discretion. See *Young v. Young*, 314 S.W.3d 306 (Ky. 2010); *McGregor v. McGregor*, 334 S.W.3d 113 (Ky. App. 2011). To amount to an abuse of discretion, the trial court's decision must be "arbitrary, unreasonable, unfair or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Furthermore, the trial court's findings of fact will not be disturbed unless clearly erroneous, that is, supported by substantial evidence. *Black Motor Co. v. Greene*, 385 S.W.2d 954 (1965); Kentucky Rules of Civil Procedure ("CR") 52.01.

Analysis

Andrew appeals several holdings of the trial court from both its January 30 and March 13 orders. Andrew argues that the trial court abused its discretion by: 1) awarding child support, maintenance and debt service payments to Marjorie which were unsupported by evidence in the record; 2) imputing only $36,000 in income to Marjorie in its final child support and maintenance calculations when evidence of a higher salary existed in the record; 3) holding Andrew responsible for half of the credit card debt which he claims Marjorie created and benefitted from; 4) granting Marjorie $7,000 credit for improvements made to the marital home in Georgia; 5) including Andrew's L&N account as his marital asset; 6) including Andrew's restricted stock among his marital assets; 7) undervaluing one of the couple's marital vehicles when clear evidence of its assessed value existed in the record; 8) requiring Andrew to replenish the couples'

children's funds after prior withdrawals which he claims Marjorie made; and 9) requiring Andrew to pay $6,000 of Marjorie's attorney's fees. We address these issues in turn.

I. Child Support, Maintenance and Debt Service Orders

As a preliminary matter, we note that temporary orders regarding child support and maintenance, such as the one the present trial court entered, are interlocutory in nature and generally are not subject to appeal. *See Atkinsson v. Atkinsson*, 298 S.W.3d 858 (Ky. 2009) (citing *Cannon v. Cannon*, 434 S.W.2d 48 (Ky. 1968); and *Lebus v. Lebus*, 382 S.W.2d 873 (Ky. 1964)). However, to the extent that such orders were incorporated into the final order, and to the extent that Andrew argues the trial court's final order denied him a credit on his child support, maintenance and debt service obligations, this Court has jurisdiction to review those orders. *See Calloway v. Calloway*, 832 S.W.2d 890, 894 (Ky. 1992). Hence, we review Andrew's objections to the various issues arising from the January 30 and March 13 orders, both which may incorporate elements of prior temporary orders.

A. Alleged Deviation from Child Support Guidelines

Child support, as well as the amount and duration of maintenance and debt service, are within the sound discretion of the trial court. *Sexton v. Sexton*, 125 S.W.3d 257, 272 (Ky. 2004); *Gaskill v. Robbins*, 282 S.W.3d 306 (Ky. 2009); *Bailey v. Bailey*, 246 S.W.3d 895, 897 (Ky. App. 2007) (citing *Browning v.*

Browning, 551 S.W.2d 823 (Ky. App. 1977), and *Russell v. Russell,* 878 S.W.2d 24 (Ky. App. 1994)). Kentucky Revised Statutes ("KRS") 403.212 provides guidelines for child support calculation based on several factors, including the parties' income and the number of dependent children. A trial court may deviate from these guidelines if it finds that their application would be "unjust or inappropriate in a particular case" as determined by certain factors. See KRS 403.211(3).

Andrew argues that, because the court required him to continue paying the mortgage on the marital home and to make other payments as the result of the January 30 order, these orders "constitute[] additional temporary child support and maintenance that exceeds KRS 403.212." Andrew further argues that the trial court was required to make the findings listed under KRS 403.211(3) before it deviated from the guidelines. As support for this argument, Andrew cites to the Supreme Court's holding in *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001). In *Neidlinger*, the Court held that a debt incurred by a spouse to maintain and support the children's expensive private education was nonmarital and could not be allocated to the other spouse who was already paying maintenance and child support. The Court reasoned that "[i]f these debts were assigned to [the husband], the effect would be to allow [the wife] to unilaterally increase [the husband's] maintenance and support obligation to a level substantially higher than that established by court order." *Neidlinger*, 52 S.W.3d at 523.

We find *Neidlinger* to be insufficient authority for Andrew's argument. That case involved a debt which the Court held was clearly nonmarital, incurred by and for the exclusive benefit of one spouse. Such is the not the case regarding payment of Marjorie and Andrew's mortgage payment, a debt which was clearly marital and ordered to prevent default on the couple's largest asset. Furthermore, *Neidlinger* does not stand for the proposition that requiring one party to pay all or a substantial portion of a marital debt equates to a deviation from statutory child support guidelines. In fact, this Court has rejected that premise all together. *See Sheene v. Sheene*, 2007-CA-002147-ME, 2009 WL 1025192 (Ky. App. 2009). Hence, for this argument, Andrew provides no real authority. We find no deviation from the child support guidelines occurred which would have required additional findings by the trial court; and we find no abuse of discretion.

B. Retroactivity of March 13 Child Support Order

Andrew further takes issue with the trial court's March 13, 2012 order granting him a reduction in his child support due to Marjorie's new employment in Atlanta and his custody of one of their children. He argues that the trial court's decision to make the order retroactive to December 1, 2011, the date Marjorie began employment in Atlanta, was an abuse of discretion because he took custody of their child on September 25, 2011, and filed his motion for a reduction on October 19, 2011. On this point, we agree with Andrew that he was entitled to an order reducing his child support retroactive to the date that he filed his motion.

The trial court's recalculation of child support imputed a new income of $36,000 to Marjorie and was retroactive to the date she would begin her employment at that salary. While we understand the trial court's desire to not hold Marjorie responsible for this income before she actually earned it, KRS 403.213 and the case law in our Commonwealth establish that, once granted, a motion for modification of child support affects "installments accruing subsequent to the filing of the motion for modification[.]" KRS 403.213(1); see also *Ullman v. Ullman*, 302 S.W.2d 849, 850 (Ky. 1957); *Pretot v. Pretot*, 905 S.W.2d 868, 871 (Ky. App. 1995). Hence, we find that the trial court's decision to make its order retroactive only to December 1, 2011, constituted an abuse of discretion in light of the fair and sound legal principles which urge that date to be October 19, 2011, the date that Andrew filed his motion for modification of the child support obligation.

C. Maintenance Award

Andrew also appeals the trial court's decision to award Marjorie maintenance and to increase the amount of that maintenance in its January 30, 2012 order. In addition to his argument that the maintenance award was excessive, Andrew contends that the trial court abused its discretion in not imputing a higher income to Marjorie and in concluding that he received a financial benefit from her decision to vacate the marital home. We disagree with Andrew that the court abused its discretion in calculating and ordering maintenance.

KRS 403.200 provides that a trial court may grant maintenance to either party in a divorce action only if it finds that a party seeking maintenance

> [l]lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and . . . [i]s unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

KRS 403.200(1). Unlike child support, no specific equation, statutory or otherwise, has been held as the proper method for determining the amount or duration of maintenance. *See Age v. Age*, 340 S.W.3d 88, 95 (Ky. App. 2011). However, the same statute provides a trial court with criteria to guide its decision regarding the amount and duration of maintenance. The statute provides

> (2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:
>
> > (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his 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.

KRS 403.200(2). As KRS 403.200(2)(f) dictates, the court must also consider the ability of the spouse from whom maintenance is sought to meet his or her own needs while at the same time meeting the needs of the spouse seeking maintenance. *Dotson v. Dotson*, 864 S.W.2d 900, 903 (Ky. 1993).

Andrew takes exception with the court's imputation of $36,000 in income to Marjorie in calculating both the child support and maintenance obligations under the March 13, 2012 order. Andrew argues this amount should have been at least $60,000 due to evidence on the record that Marjorie's new job in Atlanta would earn her at least that amount. We disagree with Andrew that this imputation constituted an abuse of discretion.

In her October 5, 2011 motion requesting, *inter alia*, permission to relocate to Atlanta for work, Marjorie included the written job offer she received from a company in Atlanta. It read, in part, "[e]arnings as a full time appraisal contractor are projected to be around $60,000-70,000 annually depending on the amount of work available and your personal productivity." The letter went on to state that 55% of Marjorie's business would be provided to her by the company

and that an additional 5% bonus would be available on work she brought in from her existing clients. The trial court, in its January 30, 2012 order, stated, ". . . the Petitioner's earning capacity, as a college educated professional is at least $36,000."

While it may have been preferable for the trial court to better explain how it arrived at its conclusion regarding Marjorie's earning capacity, we find that the trial court acted within its discretion. The trial court clearly took into account the fact that, upon her arrival at a new client-driven job in a new city, Marjorie's earning capacity would not be optimal. Upon arriving, and while she worked to build her clientele, only 55% of her income was guaranteed. The evidence entered into the record in Marjorie's motion and elsewhere supports the trial court's resulting imputation of $36,000 in income to Marjorie for purposes of both the resulting child support and maintenance calculations in the January 30 and March 13 orders.

The trial court's decision to increase ordered maintenance in its January 30 final order is of more concern to this Court. Certainly, it was true that Andrew saw a financial benefit due to his ability to move back into the marital home; and, certainly, this benefit positively affected both his financial resources and his ability to meet his needs, i.e., living expenses. However, Marjorie saw an immediate increase in her salary from $6,000 to at least $36,000 in the fall of 2011, evidence of which was before the trial court. In addition, much is rightfully made

of the fact that the orders for child support, maintenance and debt service required monthly payments totaling more than 80% of Andrew's net income.

Most troubling is a fact which Andrew points out on appeal. Included in the list of Marjorie's monthly expenses proffered to the trial court prior to its January 30, 2012 order was $2,100 earmarked for payment of a mortgage Marjorie was not paying. As filed in the record, Marjorie's documented monthly expenses, including the mortgage, totaled $7,958. More importantly, the trial court clearly took this amount under consideration when awarding and calculating Marjorie's maintenance benefit. In its findings of fact, the court stated, "[t]he Petitioner and the children have grown accustomed to a comfortable lifestyle. The Petitioner testified the families' recurring monthly expenses totaled almost $8,000. 00." Based on this finding, the trial court found that the Petitioner was unable to provide for her reasonable needs and that maintenance should be awarded.

Given that the $2,100 inaccurately listed among Marjorie's expenses accounted for over a quarter of those total monthly expenses, it is quite obvious to this Court that the figure utilized by the trial court in calculating, and perhaps even awarding, maintenance was skewed by at least 25%. For the trial court to permit Marjorie to claim credit for any expense, especially one this large, that she was not actually paying was clear and reversible error. We find no evidence, let alone evidence of substance, which supports this result, as the record, including the trial

court's own temporary order, reflects that Andrew – not Marjorie - was paying the mortgage.

While Marjorie had enjoyed a relatively high standard of living and still possessed considerable holdings, her income, even at $36,000, paled in comparison to Andrew's. On this basis, we agree with the trial court's findings concerning Marjorie's income. However, we cannot agree that Marjorie's expenses, as presented to the trial court, constituted an accurate basis for the trial court's maintenance award. At the very least, the trial court's findings lack sufficient specificity as to whether Marjorie's expenses were retrospective or prospective, as well as the degree to which the court based its calculation and award on those expenses. While, on remand, the trial court retains its considerable discretion in awarding maintenance, it must consider facts and make specific findings which accurately reflect the liabilities of the parties before deciding whether, and in what amount, to award maintenance.

II. Division of Marital Property and Allocation of Marital Debt

Andrew raises several issues regarding the trial court's valuation and division of certain property or contributions to marital assets. Specifically, Andrew argues that the trial court erroneously attributed partial responsibility for credit card debt to him when Marjorie alone incurred and benefitted from her purchases. Andrew also argues that the trial court erred in its valuation of a marital

vehicle, as well as Marjorie's contributions to the value of a marital home, in holding and dividing more than $25,000 in his stock as marital property, and in requiring Andrew to refund his children's education saving accounts when Marjorie alone withheld funds from them.

As this Court has said, "[t]he property may very well have been divided or valued differently; however, how it actually was divided and valued was within the sound discretion of the trial court." *Cochran*, 746 S.W.2d at 570. With this in mind, we turn to Andrew's specific arguments regarding the valuation and division of his and Marjorie's assets under the court's January 30 and March 13 orders.

A. **Marital Debt**

The debt which forms the basis of Andrew's complaint is $20,503 worth of credit card and line of credit debt which accumulated during his marriage to Marjorie. The trial court found Andrew responsible for payment of half of those debts. Andrew argues that there was no evidence on the record to support the trial court's finding, only to support that Marjorie incurred and benefitted from the debt solely.

Andrew correctly states that, unlike marital property, there is no presumption that a debt incurred during a marriage is marital or nonmarital in nature. See *Smith v. Smith*, 235 S.W.3d 1, 15 (Ky. App. 2006) (citing to *Neidlinger*, *supra*, at 522). Rather, debts are generally "assigned on the basis of

such factors as receipt of benefits and extent of participation, whether the debt was incurred to purchase assets designated as marital property, and whether the debt was necessary to provide for the maintenance and support of the family." *Neidlinger*, 52 S.W.3d at 523 (internal citations omitted). Another factor, of course, is the economic circumstances of the parties bearing on their respective abilities to assume the indebtedness. *Id*.

Pursuant to this Court's ruling in *Bodie v. Bodie*, 590 S.W.2d 895 (Ky. App. 1979), which *Neidlinger* adopts, Andrew argues that the trial court was required to make a finding regarding who created and benefited from the debt, and that the trial court's failure to do so constituted an abuse of discretion. However, our reading of *Bodie* is different. Indeed, *Bodie* affirms the principle that there exists no presumption that debt incurred during the marriage is marital. However, *Bodie* does not require a court to make specific findings other than whether the debt is marital or nonmarital. Furthermore, there is no evidence, provided by Andrew or elsewhere in the record, which indicates the trial court's conclusion that the debt was marital, was erroneous.

Additionally, while Andrew points to the fact that all but one of the accounts for which he has now been assigned partial responsibility were in Marjorie's name only, this is not dispositive of the questions of who benefited from the resulting debt and whether the debt was incurred to purchase marital or household assets. Andrew provides no evidence which would better answer these

questions. Without more, we are unable to conclude that the trial court abused its broad discretion by concluding that Andrew was, at least, partly responsible for the debt in question. The record lacks any evidence which might suggest such an abuse.

B. **Valuation of Marital Vehicle**

Andrew next takes exception to the trial court's valuation of his and Marjorie's marital 1999 Honda vehicle.[1] In its findings of fact, the trial court provides two differing values for the vehicle, first stating that the vehicle was valued at $3,550 as of the date of trial. However, the trial court later finds in its award of assets that the value of the vehicle was zero. In its Conclusions of Law, the trial court states, "The Petitioner is awarded the 1999 Honda Odyssey at no value in that it has a failed transmission and is unable to be driven."

Upon reviewing the record, we find that there was substantial evidence on the record to support the trial court's findings regarding the value of the Honda. The trial court is correct in stating that the Honda had a value of $3,550 on the date of trial. However, shortly following trial, Marjorie drove the Honda to Boone, North Carolina, where it suffered a complete failure of its transmission. Between the date of trial and the trial court's January 30 order, Marjorie submitted a sworn affidavit asserting both this fact and that it was one

[1] On appeal, Andrew also makes brief mention of the trial court's valuation of the marital Toyota Camry (valued at $2,400 and awarded to him). However, he offers no argument regarding how the trial court otherwise erred regarding that vehicle. Therefore, we focus exclusively on the trial court's findings regarding the Honda.

mechanic's opinion that the cost to repair the vehicle nearly matched its assessed value at trial. While he argues that the trial court's valuation of the Honda in the January 30 order was "inconsistent" and in error, Andrew provides no evidence on appeal which would tend to contradict Marjorie's affidavit.

Accordingly, the trial court's Findings of Fact regarding the change in value of the Honda are supported by substantial evidence on the record. Furthermore, it was not then an abuse of the court's discretion for the court to award Marjorie the vehicle at a value of zero. In sum, the trial court's Findings of Fact and Conclusions of Law regarding the Honda are not "inconsistent," as Andrew contends; they merely recognize that between the date of trial and the date of the court's order, circumstances surrounding the Honda's value changed significantly. While it would be better practice for a trial court not to permit as much time to elapse between trial and final order as did in the present case, this does not constitute error or an abuse of discretion.

C. Valuation of Marjorie's Nonmarital Contribution to Value of Home

Andrew next argues that the trial court erred in awarding Marjorie a nonmarital interest in the couples' former home in Alpharetta, Georgia, which they purchased in 1996 and sold in 2005 at a profit of $170,460.97. This nonmarital interest totaled $22,000 and included $7,000 in improvements which Marjorie

claimed and which she testified increased the value of the home at sale by the full $7,000. Andrew argues that the trial court's conclusion was based solely on Marjorie's opinion at trial and that at least part of the improvement she claims was partly attributable to Andrew's labor as well. Andrew asks us to reverse the trial court's finding regarding the $7,000 because it constituted a misapplication of the calculation announced in *Brandenburg v. Brandenburg*, 617 S.W.3d 871 (Ky. App. 1981).

The trial court found that Marjorie used $15,000 from a nonmarital account for a partial down payment on the property in 1996. The court also found that Marjorie withdrew an additional $7,000 from that account in 2002 for improvements to the home. These improvement included hardwood flooring repair and replacement and painting of the home's exterior. The trial court's order mentions that Marjorie testified that this work increased the value of the home by "at least $7,000."

The testimony at trial established that the $7,000 which Marjorie withdrew from her nonmarital account paid $6,800 for the installation or repair of hardwood floors and $200 for exterior paint for the Georgia residence. Andrew expended time and labor in the construction of a new wall in the home; however, testimony indicated that none of the disputed $7,000 was expended for this purpose. Hence, Andrew's argument that he is due at least some credit for this expense of time and labor is unsupported by the evidence on the record.

Regarding the trial court's exclusive reliance upon Marjorie's opinion that the fair market value of the home was increased by the full amount expended, $7,000, we find that the trial court did not err in so relying and that there was sufficient evidence to support its conclusion. Firstly, we must point out, as Marjorie does, that Andrew offers no evidence or testimony in the record to show affirmatively that the trial court had cause to find differently. However, it is also clear on the law that the trial court was within its discretion when it relied on Marjorie, who is a licensed real estate appraiser, regarding the fair market value of the residence. See *Jones v. Jones*, 245 S.W.3d 815, 820 (Ky. App. 2008) (citing to *Robinson v. Robinson*, 569 S.W.2d 178 (Ky. App. 1978) (*overruled on other grounds by Brandenburg*, *supra*) (holding that an owner of a residence, before expressing her opinion concerning the fair market value of her real estate, must be at least minimally qualified to express such an opinion). Marjorie's expertise as a licensed real estate appraiser exceeded the minimum qualification needed for her to be allowed to testify and, most importantly, for the trial court to rely on her testimony. Therefore, we find no abuse of discretion in the trial court's reliance on her opinion.

Andrew also contends that, in the trial court's calculation of equity attributable to each party, the court erred in not crediting him for the entirety of payments made on the Kentucky residence's mortgage since the trial court's February 2010 order requiring him to make such payments. We disagree.

Under KRS 403.190, property or income acquired prior to dissolution is marital unless it meets one of five exceptions:

> (a) Property acquired by gift, bequest, devise, or descent during the marriage and the income derived therefrom unless there are significant activities of either spouse which contributed to the increase in value of said property and the income earned therefrom;
>
> (b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
>
> (c) Property acquired by a spouse after a decree of legal separation;
>
> (d) Property excluded by valid agreement of the parties; and
>
> (e) The 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). The equity which Andrew contributed pursuant to the trial court's temporary debt service order of February 11, 2010, does not meet any of these exceptions. Furthermore, the Supreme Court, as well as this Court, has found that, pursuant to KRS 403.190, property acquired after an unofficial separation and not proven to be otherwise nonmarital is marital. See *Stallings v. Stallings*, 606 S.W.2d 163 (Ky. 1980); *Shively v. Shively*, 233 S.W.3d 738 (Ky. App. 2007).

There is no indication in the record that shows the parties sought and received a legal separation prior to Andrew making the ordered mortgage

payments; nor is there any indication that the resulting equity was otherwise nonmarital. Hence, the trial court did not err in concluding that Andrew was not entitled to credit for these payments.

However, we find merit in Andrew's claim that he is entitled to credit in the division of marital assets for the equity accrued as a result of payments he made pursuant to the court's temporary order. We again point out that it is not a trial court's job to divide marital property evenly – only fairly. For nearly two years, from the time Andrew was ordered to pay the mortgage to the time that order was finalized and continued in 2012, Andrew made every mortgage payment. An exhibit introduced at trial indicates that at least $400 of each payment went toward paying down the principal. Despite this fact, the trial court's order simply requires that the proceeds from sale of the home first pay the indebtedness, then reimburse Marjorie for her 36% nonmarital interest, and then be divided equally among the parties.

Given the extended period of substantial contributions by Andrew toward payment of the mortgage, as well as the heavy burden such contributions placed on him during that time period, we are troubled by the trial court's failure to enter more specific findings as to the division of equity, especially when Andrew filed a timely request for such findings following the January 30 order. At the very least, the trial court has failed to demonstrate that it considered Andrew's substantial contributions to the equity in the marital home when dividing the marital estate. Accordingly, we remand this matter to the trial court for further

findings which address Andrew's court-ordered contribution to the equity in the marital home and any effect that contribution may or may not have upon the division of marital assets.

D. Designation of Stock as Marital Property

On appeal, Andrew claims the trial court erred first by dividing $6,587 in proceeds from the sale of stock, which he had deposited into a bank account in March 2010; and second, by dividing restricted stock worth $19,178 among his marital assets. We find no error or abuse of discretion in the trial court's decision regarding the former; however, the trial court abused its discretion in designating the latter as marital.

Pursuant to KRS 403.190, *supra*, the stock which Andrew sold and the proceeds which he placed in a bank account during the pendency of the divorce action were "acquired subsequent to the marriage" and meet none of the exceptions under that statute. Therefore, they are marital and the trial court was correct in so finding. However, Andrew further contends that, because he expended these funds between March and October of 2010, that the trial court was required to find dissipation before it could divide the expended funds as a marital asset.

Dissipation, that is, expending funds for a nonmarital purpose, is an appropriate finding for a court to consider when property or assets are expended (1) during a period when there is a separation or dissolution impending, and (2) when there is a clear showing of intent to deprive one's spouse of his or her

proportionate share of the marital property. *Robinette v. Robinette*, 736 S.W.2d 351, 354 (Ky. App. 1987) (citing to *Barriger v. Barriger*, 514 S.W.2d 114 (Ky. 1974).

Andrew cites *Robinette* as authority for his argument that dissipation is the only grounds upon which a court may assign an asset that has been expended during the marriage. This reliance, however, is in error. *Robinette* establishes when dissipation is and is not appropriately considered by a court. It does not establish that dissipation is the sole basis upon which the assignment of marital assets may be based. In the present case, the trial court did not consider dissipation – a point which Andrew admits. Accordingly, *Robinette* is inapplicable to this case because we are not reviewing the appropriateness of the trial court's consideration of dissipation.

Citing no other authority for it, Andrew's argument that the trial court was required to make a finding of dissipation before crediting his marital estate with the expended funds is unpersuasive. In the absence of further authority, we are unable to conclude that it was an abuse of the trial court's discretion to assign even expended marital funds to Andrew in the division of assets.

Andrew further argues that the trial court erred in holding that his restricted stock worth $19,178 was divisible as marital property because this stock

had not yet been earned and was unavailable to him during the marriage. On this point, we agree with Andrew.

The parties point to two similar but distinguishable cases as controlling authority on this topic. Andrew points us toward *Sharber v. Sharber*, 35 S.W.3d 841 (Ky. App. 2001). In *Sharber*, a husband received an early retirement benefit from his employer after a decree of dissolution had been entered. In dividing the marital property, the trial court awarded his wife a fraction of the benefit representing the period of his employment during which they had been married. The husband appealed, arguing the benefit could not be counted as marital because it did not vest during the marriage. This Court agreed, looking to the nature of the benefit, including when and how it vested. The Court found that, because the benefit was not offered to the husband (and did not vest) until after the marriage and would have had to be refunded if he returned to work, the benefit was nonmarital.

In the alternative, Marjorie urges us to apply *Burton v. Burton*, 2009-CA-0014310MR, 2011 WL 557469 (Ky. App. 2011). This unpublished case involved the award of one half of a husband's restricted stock to his wife. This Court held that restricted stock units (RSUs) were properly held as a marital asset for the purposes of division of marital property. However, the Appellant in *Burton* concerned himself primarily with the trial court's "double-dipping" of the RSUs for purposes of division of marital property, as well as the calculation of child

support. These RSUs were issued twice a year and usually cashed in by Appellant upon maturity.

While we held that the RSUs were marital asset in *Burton*, the exact nature of the RSUs in that case is unknown. From the facts given in that case, they were issued twice a year – much more regularly than the RSUs in the present case – and were more readily liquidated than those Andrew encountered. Furthermore, though *Sharber* does not deal with RSU, the nature of the incentive-based benefit at issue in that case makes it more comparable to the defined purpose of the RSU in this case.

The Prospectus for the UPS Incentive Compensation Plan defined an RSU as

> a bookkeeping unit. No shares are transferred to you or set aside for you at the time the RSU award is granted. *If and when your RSU award vests*, a number of shares of UPS class A common stock equal to the number of vested RSUs . . . will be transferred to your account . . . .

(Emphasis added). Considering this definition of the RSU in this case, we are unable to conclude that the speculative and unvested RSUs at issue constituted an asset to be divided by the trial court. While it is certainly true that Andrew's work at UPS during the marriage may one day count toward the eventual award of RSUs, Andrew possessed no actual shares of stock the value of which could be

definitively determined and divided. In other words, like in *Sharber*, "no right to receive the [RSU] existed while the parties were married because it was not offered" during the marriage.

This being the case, we find that the restricted stock in question does not meet the statutory definition of a marital asset and that the trial court erred in finding otherwise.

E. Repayment of Funds Withheld From Children's Savings

During their marriage, Andrew and Marjorie maintained three accounts for the benefit of their children: Education Savings Accounts for each child and an additional savings account for the benefit of their daughter. Testimony at trial demonstrated that two $600 checks from Marjorie's grandmother intended for the children's education accounts were deposited into a marital checking account but never transferred to the children's accounts. Additionally, a check for $1,313.40 intended for their daughter's savings account was deposited in a marital savings account but never transferred to the daughter's account. Marjorie testified that she and Andrew used these funds for "marital expenses." Accordingly, in its order, the trial court required each party to replenish half the amount withheld from their children's accounts. Andrew argues there was insufficient evidence in the record to sustain this finding.

Marjorie's testimony to the above was the only evidence placed in the record regarding funds allegedly withheld from the children's savings accounts. It

is clear that Andrew sees such evidence as "mere speculation and not evidence," however he placed no affirmative evidence to the contrary into the record. He cites to a bank statement covering the period from December 25, 2008, to January 26, 2009, and erroneously asserts that it disproves Marjorie's testimony regarding an overdraft which occurred on December 18, 2008. Andrew is unable to cite to any part of the record which truly refutes Marjorie's account of the facts.

In the absence of any evidence to the contrary, it was within the court's discretion to conclude, from Marjorie's testimony and the documentary evidence entered into the record to support it, that funds were withheld from the children's accounts and were used for marital purposes. Hence, we conclude that the court did not abuse its discretion in so concluding.

Additionally, we reject Andrew's argument that the trial court did not possess the jurisdiction over the children's accounts because they were not assets of the parties. As presented to the trial court, this withholding of funds constituted a debt owed by Marjorie and Andrew to their children. Therefore, the trial court had as much right to make orders regarding this debt as it had regarding any other matter brought before it.

III. Attorney's Fees

Andrew's final argument regards the trial court's requirement that he pay part of Marjorie's attorney's fees under the court's January 30 order. Andrew

argues that, given his and Marjorie's respective assets at the time, it was an abuse of the court's discretion to award Marjorie attorney's fees.

Although a trial court is not required to "make specific findings on the parties' financial resources[,]" the court is obligated to "[c]onsider the financial resources of the parties in ordering a party to pay a reasonable amount in attorney's fees." *Miller v. McGinty*, 234 S.W.3d 371, 374 (Ky. App. 2007) (quoting *Hollingsworth v. Hollingsworth,* 798 S.W.2d 145, 148 (Ky.App.1990) (internal quotation marks and citation omitted)). Under KRS 403.220, the trial court may award attorney's fees, but "only if there exists a disparity in the relative financial resources of the parties in favor of the payor." *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004) (quoting *Neidlinger*, *supra*, at 519). If such a disparity exists, "whether to make such an assignment and . . . the amount to be assigned is within the discretion of the trial judge." *Id*.

As support for his claim that the trial court abused its discretion, Andrew points out that Marjorie "had" $60,000 in income from her new job in Atlanta, $4,500 in court-ordered monthly payments from him, a nonmarital account worth more than $22,000 and a savings account worth more than $62,000 at the time of trial. The trial court listed the latter two items in its Findings of Fact regarding Marjorie's financial holdings. However, the trial court also found that Andrew possessed several retirement plans, a 401K plan worth more than $50,000 and an IRA worth more than $95,000, in addition to his $108,000 annual salary.

Reviewing this information, as it was entered into the record and considered by the trial court, we find that the court did not err in concluding that a disparity existed between Andrew's and Marjorie's respective financial resources. Furthermore, we reaffirm our earlier finding that Marjorie's alleged $60,000 salary was merely aspirational in January of 2012. Consistent with its previous finding that Marjorie's income was closer to $36,000, the trial court reasonably concluded that Marjorie's financial resources were considerably less than Andrew's.

This being the case, we are unwilling to question further the trial court's decision whether to grant attorney's fees, nor the amount of such an award. The trial court fulfilled its statutory duty by considering the resources of both Andrew and Marjorie; and, having found that a disparity existed between them, the court did not abuse its discretion in ordering Andrew to pay $6,000 of Marjorie's approximately $13,000 attorney's fees.

Conclusion

For the aforementioned reasons, we find that the trial court abused its discretion when it did not order the March 13 amended child support order retroactive to the date of Andrew's motion to amend and when it held that Andrew's RSUs were marital property subject to division. Furthermore, we find that the trial court committed clear error in its calculation and award of maintenance without accurate basis or sufficient findings and must make further

findings in light of Andrew's payment of court-ordered debt service during the divorce. However, in reviewing the trial court's remaining orders, we find no clear error or abuse of discretion.

Accordingly we affirm in part and reverse in part the orders of the Oldham Family Court, with instruction to amend its January 30, 2012 order in light of our finding regarding the RSUs and its March 13, 2012 order to reflect an effective date of Andrew's amended child support obligation of October 19, 2011. We further instruct the trial court to reevaluate its calculation of maintenance in a manner consistent with our findings herein.

ALL CONCUR.

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