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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000294-MR
&
NO. 2015-CA-000336-MR

SALLY CAROL GRASCH APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE KATHY STEIN,[1] JUDGE
ACTION NO. 11-CI-05862

ALBERT FRANKLIN GRASCH, JR. APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, AND REVERSING AND REMANDING IN PART

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND J. LAMBERT, JUDGES.

CLAYTON, JUDGE: Sally and Albert Grasch (hereinafter "Wife" and "Husband" respectively) were married for approximately 30 years before Wife filed for a dissolution of marriage. After voluminous filings and hearings, and numerous rulings by the trial court, the parties' marital property was divided and the marriage

[1] The Honorable Jo Ann Wise previously presided over this case in Fayette Circuit Court and was listed on the Notice of Appeal.

dissolved. Neither party fully agrees with the trial court's rulings and each has appealed. They collectively present eight issues for our review. Following a recitation of the facts, we address each issue.

FACTS

As the facts are more fully developed within each of the issues analyzed below, a brief overview of the marriage is presented here. Husband and Wife married on September 20, 1980, shortly after completing college. Each was employed and had a bachelor's degree. However, early in the marriage, Husband quit his job and went to law school. Wife continued to work and provide funds for Husband's education. Husband graduated law school and began practicing law. Wife then obtained her Master's in Business Administration. She also gave birth to the parties' two children. Each child was emancipated prior to the dissolution.

In the early 1990s, Husband opened a law firm. Wife was the law firm's business manager. She received a token sum of money for her work, while Husband reaped the lion's share of the firm's proceeds. The parties lived well off of these funds, building a million-dollar house, traveling often, eating at restaurants, and the like.

After 32 years of marriage, however, Husband and Wife separated. Wife would ultimately file for dissolution after Husband removed her from the law practice. The parties litigated the marital property division for approximately 4 years before appealing and cross-appealing the trial court's orders to this Court.

The case now stands ripe for a decision, and each of the parties' issues are discussed in turn below.

ISSUES

I. Are contingency fee cases property of the marital estate subject to division under Kentucky Revised Statutes (KRS) 403.190?

During the marriage, Husband had a law practice where he executed contingency fee contracts with some clients. Wife sought during the dissolution to have the contingency fee contracts divided as marital property. Husband sought to have them declared income and moved the trial court for summary judgment on the issue of whether the contingency fee cases were income or part of the marital estate. The trial court granted summary judgment inasmuch as it found the funds received from contingency fee cases were income, not marital property. Wife appeals the trial court's order on this issue and makes two arguments: (1) the trial court prematurely granted summary judgment as material issues of fact still existed; and, (2) contingency fee cases are marital property. We address her arguments in reverse order.

A. Are contingency fee cases marital property subject to division pursuant to KRS 403.190?

Wife argues that the trial court erred by finding as a matter of law that contingency fee cases were not marital property subject to division pursuant to KRS 403.190. The trial court's reasoning in its order on this issue was brief, "The contingency fee cases of Grasch Law, PSC, are a component of [Husband's]

income when received and are not property of the marital estate and therefore are not subject to division by the Court." (Order of Partial Summary Judgment, p.1). We review this decision *de novo*. *Caniff v. CSX Transp., Inc.*, 438 S.W.3d 368, 372 (Ky. 2014) (citing *3D Enterprises Contracting Corp. v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 174 S.W.3d 440, 445 (Ky. 2005)). Summary judgment is appropriate "where the movant shows that the adverse party could not prevail under any circumstances." *Caniff*, 438 S.W.3d at 372 (quoting *Pearson ex rel. Trent v. Nat'l Feeding Sys., Inc.*, 90 S.W.3d 46, 49 (Ky. 2002)). Thus, if as a matter of law the contingency fee cases are income rather than marital property, summary judgment was proper on this issue.

Whether the contingency fee cases are marital property or income appears to be an issue of first impression in Kentucky. Under KRS 403.190(2), marital property "means all property acquired by either spouse subsequent to the marriage[,]" excepting out certain gifts, inheritances, and the like, none of which is applicable here. "Property" is not defined in KRS Chapter 403. It is defined by "its ordinary meaning[;]" to wit, property is "a determinate thing or an interest in a determinate thing." *Travis v. Travis*, 59 S.W.3d 904, 909 fn. 6 (Ky. 2001). Thus, we must determine whether contingency fee contracts are either "determinate thing[s]" or interests in determinate things.

In Kentucky, contingency fee contracts do not give the attorney property interests in the client's funds. "Contingent fee contracts owe their very existence to the principle that the attorney does not gain any share in the title of the

thing he has engaged himself to recover." *First Nat. Bank of Louisville v. Progressive Cas. Ins. Co.*, 517 S.W.2d 226, 230 (Ky. App. 1974). Thus, even though it is "customary for insurance companies" to make settlement drafts payable to a client and his or her attorney, the attorney gains "no real ownership interest" in the draft, as the attorney "is not entitled to a fee for money collected until he delivers it over to his client." *Id*. These contingency fee contracts, then, are not property interests owned by attorneys. Instead, they are income-generation devices that permit attorneys to determine their fee based on a client's recovery. *Cf. Young v. C.I.R.*, 240 F.3d 369, 378 (4th Cir. 2001) ("The client still controls the claim (or property) and ultimately decides to forego, pursue, or settle that claim. The attorney simply provides a service and receives compensation for that service, whether by an hourly rate or through a contingent fee.").

An attorney's lack of property interest in a contingency fee case is clearly seen in how Kentucky treats an attorney's interest in such cases when representation terminates before the case resolves. For example, an attorney who is discharged without cause before a contingency fee contract is completed is entitled to recover on a *quantum meruit* basis only. *Baker v. Shapero*, 203 S.W.3d 697, 699 (Ky. 2006). Furthermore, without good cause to withdraw representation, and even then in some cases where good cause is shown, an attorney may not recover fees at all, even under a *quantum meruit* theory of recovery, when he or she withdraws from representing a client. *Lofton v. Fairmont Speciality Ins. Managers, Inc.*, 367 S.W.3d 593, 598 (Ky. 2012). Thus, an attorney who

withdraws or is terminated from representing a client under a contingency fee contract may at best seek recovery through *quantum meruit*.

Such recovery in *quantum meruit* is not due to a property interest. Instead, "[*q*]*uantum meruit* is an equitable remedy invoked to compensate for an unjust act, whether it is harm done to a person after services are rendered, or a benefit is conferred without proper reimbursement." *Lofton*, 367 S.W.3d at 597. "The right to recover in *quantum meruit* does not grow out of the contract, but is independent of it and is based upon the promise implied by law to pay for beneficial services rendered and knowingly accepted." *Bradley v. Estate of Lester*, 355 S.W.3d 470, 472 (Ky. App. 2011) (quoting 17A Am. Jur. 2d *Contracts* § 200).

That *quantum meruit* recovery is not a contractual right is best seen by the fact that one can even recover in *quantum meruit* even in the absence of a contract. *Bradley*, 355 S.W.3d at 472 (citing *Kruse's Administrator v. Corder*, 258 Ky. 774, 81 S.W.2d 600, 601 (1935)). Accordingly, the fact that an attorney has at best a *quantum meruit* right to recovery on a contingency fee contract when the attorney's representation is terminated or ends before the case resolves diminishes any claim that the contracts constitute marital property. In this sense, a contingency fee contract is neither "a determinate thing [n]or an interest in a determinate thing." *Travis v. Travis*, 59 S.W.3d 904, 909 fn. 6 (Ky. 2001).

The marital property claim is further diminished because the contracts' values are not determinate: there may be no recovery; the contracts as written may be declared unenforceable by a trial court; or the contracts may be

void. First, contingency fee contracts run a real risk of having a zero or negative value. "[F]or a contingent fee to be appropriate, there must be a realistic risk of nonrecovery." *In re Combustion, Inc.*, 968 F.Supp. 1116 (W.D.La. 1997) (citing *In re Quantum Health Resources, Inc.*, 962 F.Supp 1254, 1256 (C.D.Cal. 1997)). Second, trial courts may find the terms of the contingency fee contracts unenforceable, as "courts are not necessarily bound by a contingent fee agreement executed between a plaintiff and counsel." *In re Orthopedic Bone Screw Products Liability Litigation*, 176 F.R.D. 158, 183 (E.D.Pa. 1997) (citing *Jenkins v. McCoy*, 882 F.Supp. 549 (S.D.W.Va. 1995)). Thus a contingency fee contract's value may again be null by operation of law. Finally, a court may declare a contingency fee contract void due to a public policy violation. In Kentucky, contingency fee contracts in marital dissolution cases violate public policy and are void, even after the attorney's services have been completed. *Overstreet v. Barr*, 255 Ky. 82, 72 S.W.2d 1014 (1934).

Therefore, because contingency fee cases run the risk of having zero or negative value, and because contingency fee contracts give the attorney no property interest in the client's funds, they are neither "determinate things" nor are they interests in the same. *Travis v. Travis*, 59 S.W.3d 904, 909 fn. 6 (Ky. 2001). Accordingly, they are not "property" under KRS 403.190.

We note that some of our sister states have reached the same conclusion for reasons we also adopt. In *Musser v. Musser*, 909 P.2d 37 (Okla. 1995), the Oklahoma Supreme Court decided that an attorney's interest in

contingency fee cases was not a vested interest and did not constitute marital property. It made this determination for a few reasons. First, it noted that contingency fee cases do not allow recovery unless and until the client receives an award of cash or property. Second, it noted that attorneys have no property interest in the contingency fee agreement. An attorney who performed work for a client under a contingency fee arrangement who was discharged by the client before recovery of any award could only seek a fee for the value of his services rendered under a *quantum meruit* theory of recovery, and that recovery is only available if the client recovered funds. *Id*. at 40. Third, in Oklahoma, though the estate of a deceased attorney was entitled to recover the reasonable value of the services rendered under a contingency fee contract even though he died prior to settlement of the case by replacement counsel, "[i]t is again important to note that *recovery for the client had been* achieved by another attorney *prior to the estate acquiring rights in the attorneys fees*." *Id*. (emphasis in original).

Thus, Oklahoma jurisprudence on contingency fees established that no attorney has a property interest in the contingency fee contracts, but he or she rather has an equitable interest to recover the value of services rendered, and even then only when the client eventually received money damages:

> For this reason, we conclude that because Husband in the case at bar is not certain to receive anything under the contingency fee contracts, those contingency fee cases should not be considered marital property. *At most, Husband has a potential for earning income in the future. He is not assured of earning anything for his efforts nor does he acquire a vested interest in the*

> *income from those cases unless his client recovers,* an event impossible to accurately predict.

Id. (emphasis in original).

Likewise, the Illinois Supreme Court found that contingency fees are not marital property but are instead to be used to determine income for maintenance. *In re Marriage of Zells*, 572 N.E.2d 944 (Ill. 1991). The court also noted an ethical conflict posed by a court dividing contingency fees between a lawyer and a non-lawyer, as the Illinois Rules of Professional Conduct prohibited the same from sharing legal fees. *Id*. at 253. Notably, the Kentucky's Rules of Professional Conduct are similar. *Compare* SCR 3.130(5.4)(a)(1)-(3), *with* Il. St. S. Ct. RPC Rule 5.4(a)(1)-(4).[2]

Other states have reached similar conclusions with respect to the non-property nature of contingency fee contracts in dissolution cases. *Roberts v. Roberts*, 689 So.2d 378 (Fla Dist. Ct. App. 1997), *Goldstein v. Goldstein*, 414 S.E.2d 474 (Ga. 1992), *In re Marriage of Hershewe*, 931 S.W.2d 198, 204-05 (Missouri 1996), *Perlberger v. Perlberger*, 626 A.2d 1186, 1197-98 (Pa. Super. 1993).

Wife disagrees with the reasoning of these states and asks us to adopt the reasoning of other states that find contingency fee contracts create property rights. We find her cited cases unavailing in light of Kentucky's established law on contingency fee contracts. For example, the Court of Appeals of Arizona found

[2] We do not address whether the Kentucky Rules of Professional Conduct are implicated by a dissolution decree that orders a non-attorney spouse to split a contingency fee with an attorney spouse, as we find no error with the trial court's order on the marital property issue.

"an attorney's contingency fee contract is a valuable property right, though the contingency upon which it is based has not been fulfilled." *Garrett v. Garrett*, 683 P.2d 1166, 1169 (1983). This analysis does not consider that the contracts may be void, may have no recovery, and do not give the attorney property interest in the client's funds. Instead, the contracts allow potentially for a recovery of fees, the amount of which is based on the client's ultimate monetary or property recovery. Thus, *Garrett* is unpersuasive.

Wife also cites *McDermott v. McDermott*, 986 S.W.2d 843 (Ark. 1999). That reasoning is unpersuasive as Arkansas statutory and case law provide for contingency fee contracts to be enforceable contractual rights such that an attorney can obtain a lien for services rendered on a contingency fee case. Furthermore, attorneys may seek recovery "based upon the fee agreement" when an attorney is terminated without cause. *Id*. at 847 (citing *Crockett & Brown, P.A. v. Courson*, 312 Ark. 363, 849 S.W.2d 938 (Supp. Op. 1993)). And they may seek recovery under *quantum meruit* when the attorney is terminated with cause. *McDermott*, 986 S.W.2d at 847. As Kentucky jurisprudence substantially differs, *McDermott* is unpersuasive.

McDermott is also unpersuasive because it, like other jurisdictions, resolves the contingency fee valuation issue by retaining jurisdiction over the dissolution until the contingency fees completely resolve. *McDermott v. McDermott*, 986 S.W.2d 843, 847-48 (Ark. 1999) (trial court must reserve jurisdiction to await outcome of underlying actions then "[w]hen the proceeds of

contingency fee agreements are actually received, the determination of the marital share in the ultimate recovery should be based upon that portion of the time devoted to the case during the marriage, as compared to the full amount of time devoted to earning the fee."). *See also Metzner v. Metzner*, 446 S.E.2d 165 (W.Va. App. 1994) (only the portion of the fee that represents compensation for work done during marriage, and court retains jurisdiction until contingency fee cases are resolved); *Weiss v. Weiss*, 365 N.W.2d 608, 613 (Wisc. App. 1985) (divide the contingency fee "upon receipt of payment of the contingent fee receivables"). As contingency fee cases may take years or decades to resolve, Kentucky trial courts would be bound to retain jurisdiction over dissolution cases for many years after the marriage is dissolved. This result would cause excessive costs to the parties and consume judicial resources. It is thus in the interests of finality and judicial economy to treat the fees as income. *Cf. Hearn v. Commonwealth*, 80 S.W.3d 432, 436 (Ky. 2002) (finding "the interests of judicial economy and substantial justice for victims would be enhanced" when a trial court adds post-judgment interest to a criminal restitution order "because [the] [victims] would not have to spend additional time and funds seeking an appropriate civil remedy.").

Wife also cites a number of decisions that arise from community property jurisdictions. As property division in community property states differs substantially from common law property states like Kentucky, those cases are inapplicable. *See* Kenneth W. Kingma, *Property Division at Divorce or Death for Married Couples Migrating Between Common Law and Community Property*

States, 35 ACTEC J. 74 (2009); *Garrett v. Garrett*, 683 P.2d 1166 (Ariz. 1983); *In re Marriage of Kilbourne*, 232 Cal.App.3d 1518, 284 Cal.Rptr. 201 (Cal. App. 1st Dist. 1991); *Waters v. Waters*, 170 P.2d 494 (Cal. App. 4th Dist. 1946); *Due v. Due*, 342 So.2d 161 (La. 1977); *In re Marriage of Estes*, 929 P.2d 500 (Wash. App. Div. 3 1997).

We further reject that contingency fee contracts should constitute marital property because defining them as such permits parties to double or triple dip for dissolution awards. For example, to calculate the attorney spouse's income, a court would average, among other sources of income, funds received from past contingency fee contracts. If the same court were to also find that the attorney spouse's not-yet-resolved contingency fee contracts are marital property to be divided equally, then the attorney spouse's future income prediction is grossly over-estimated as it would be comprised in part or in whole by the fees gained through the prior "marital property" contingency fee contracts. *Cf. Weiss v. Weiss*, 365 N.W.2d 608, 613 (Wisc. App. 1985) ("While maintenance and property division are separate awards, they are interdependent and cannot be made in a vacuum."). By over-estimating future income, the non-attorney spouse could obtain a windfall in calculating maintenance, KRS 403.200, and child support, KRS 403.212(2)(b) (under the child support guidelines, gross income includes "salaries, wages, retirement and pension funds, [and] **commissions** . . ."") (emphasis added). *Compare* KRS 403.212(2)(b) *with* Fla. Stat. Ann. § 112.3217(1) ("'Contingency fee' means a fee, bonus, **commission** . . .") (emphasis added).

Instead of creating a windfall, assessing the contingency fee contracts' values as income permits a uniform calculation for marital property distribution, maintenance, and child support. Using it in this fashion also permits a party to petition for modification of maintenance and child support should the attorney-spouse's contingency fee cases turn out to be lucrative. KRS 403.213 (modification of child support); KRS 403.250 (modification of maintenance).

Therefore, we find the trial court did not err by granting summary judgment and finding the not-yet-received contingency fee contracts should be used to calculate Husband's future income.

B. Were there material issues of fact?

Having found that as a matter of law the contingency fee contracts are not marital property, we now turn to Wife's contention that the trial court prematurely granted summary judgment because a material issue of fact existed regarding the contingency fee contracts' valuations. While the contracts' valuations were unresolved fact issues, such valuations were not material fact issues for the marital property question as the contracts legally were not marital property to be divided. Accordingly, no material issue of fact existed and summary judgment was appropriate. *First Federal Sav. Bank v. McCubbins*, 217 S.W.3d 201, 203 (Ky. 2006); *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). The trial court did not err by granting the motion.

II. Did Husband dissipate assets of the marital estate?

Wife appeals the trial court's ruling that Husband did not dissipate marital assets. Wife claims Husband dissipated $29,589.00 of marital assets during the parties' separation. In its Amended Findings of Fact and Conclusions of Law, the trial court found and held as follows:

> 24. Petitioner has asserted a dissipation claim. The Court finds that Petitioner has failed to prove Respondent dissipated marital assets, as required pursuant to case law. The Court further finds that, even if Respondent's expenditures arose to dissipation, the Court would be required to find that Petitioner dissipated marital assets as well, due to certain expenditures she made during the parties' separation, including travel, $7,000 of cash withdrawals, and the purchase of a dog costing approximately $1,300.

Wife argues that the trial court committed clear error because Wife allegedly made a *prima facie* case for dissipation and Husband, in response, made no effort to refute that his expenditures were used for himself and his new paramour. We need not tarry long on this issue. The party claiming dissipation must prove by a preponderance of the evidence that the other party used marital funds for a non-marital purpose while the dissolution was impending and with a clear showing of intent to deprive the other spouse of his or her proportionate share of marital property. *Kleet v. Kleet*, 264 S.W.3d 610, 617 (Ky. App. 2007); *Brosick v. Brosick*, 974 S.W.2d 498, 500 (Ky. App. 1998); *Robinette v. Robinette*, 736 S.W.2d 351, 354 (Ky. App. 1987).

Having reviewed the record and the arguments of both parties it is apparent the trial court properly considered the claim and rejected it. This case

was not one where a party gave away millions of dollars, the same evidencing a clear intent to deprive the other spouse of marital funds. *Kleet*, *supra* (finding dissipation where the husband gave away over two million dollars to his sister, brother-in-law, and accountant). During their separation, both parties in the instant case continued to travel the country, make extravagant purchases, and spend marital property, as they had done during the marriage. Accordingly, we find no error with the trial court's order.

III. Did the trial court err by setting the amount and duration of Wife's maintenance?

Both parties appeal the trial court's maintenance award to Wife. The trial court awarded Wife $2,275 per month for ten years. Wife claims the amount is too small and the duration too short. Husband claims Wife should not have been granted maintenance.

In Kentucky, post-dissolution maintenance is governed by KRS 403.200. Under sub (1) of the statute, a trial court may award maintenance only if it finds the spouse seeking maintenance either lacks sufficient property to provide for her reasonable needs, or if the spouse is unable to support herself through appropriate employment.[3] Under sub (2) of the statute, if the trial court decides to grant maintenance, it must then decide in what amount and for what period of time, using the enumerated statutory factors. KRS 403.200(2)(a)-(f). Whether to award maintenance is "delegated to the sound and broad discretion of the trial court[.]"

[3] Another provision for the spouse who has custody of a child is inapplicable here as the Graschs's children are emancipated.

Shafizadeh v. Shafizadeh, 444 S.W.3d 437, 446 (Ky. App. 2012) (quoting *Barbarine v. Barbarine*, 925 S.W.2d 831, 832 (Ky. App. 1996)). Therefore, "unless absolute abuse is shown, the appellate court must maintain confidence in the trial court and not disturb the findings of the trial judge." *Croft v. Croft*, 240 S.W.3d 651, 655 (Ky. App. 2007) (quoting *Clark v. Clark*, 782 S.W.2d 56, 60 (Ky. App. 1990)). The maintenance award is reviewed for an abuse of discretion, and the trial court's factual findings are reviewed for clear error. *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003).

In the trial court's Amended Findings of Fact and Conclusions of Law, it found that after the separation Wife had a $4,200 monthly net income consisting of investments, employment, rent, and royalties. Wife's marital assets were approximately $175,000. Wife's monthly expenses were $5,949. Thus, the trial court found Wife had a monthly shortfall of $1,749 per month. Applying a 30% tax rate to the shortfall, the trial court found Wife required $2,275 per month for 10 years to provide for her reasonable expenses.

Wife argues the trial court committed clear error in the maintenance award and "capriciously substituted its own numbers for [Wife's] expenses, with no basis." Aplt's Brf. at 19. Wife claims the trial court removed a number of expenses from her proposed monthly expenses, including her disability insurance premium, her eye-care expenses, her monthly payment to her attorney, and her expenses related to her vacation cabin on the lake. Wife argues she will not be able to maintain the standard of living she enjoyed during the marriage. She also

argues the trial court erred by limiting the duration of the maintenance award to 10 years.

Having reviewed the voluminous record, we find no clear error or abuse of discretion in the trial court's maintenance award. The trial court analyzed Wife's claimed monthly expenses and determined those to which she was entitled to provide for her reasonable needs. The trial court modified several expenses based on Wife's admission that "certain expenses in her budget were high" and on her failure to provide a basis for certain expenses. The trial court also did not include expenses for the lake house that Wife received, noting the property could be rented for income or could be sold. We find no error with the trial court making these factual findings. "A family court operating as finder of fact has extremely broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it." *Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky. App. 2007). We will not disturb these findings.

Accordingly, the trial court found Wife's reasonable monthly expenses were $5,949. It assessed Wife's shortfall at $2,275 pre-tax and awarded the same as maintenance for a period of 10 years, which is sufficient to get Wife to retirement age. This number is reasonable considering the parties' prior lifestyle and the property Wife received in the dissolution. *Powell v. Powell*, 107 S.W.3d 222 (Ky. 2003). We will not disturb the trial court's order on this issue.

Finally, we review Husband's KRS 403.200(1) claim,[4] that the trial court abused its discretion when it awarded Wife any maintenance. Husband claims Wife has enough marital and non-marital funds without a maintenance award, and thus does not "[l]ack[] sufficient property . . . to provide for [her] reasonable needs[.]" KRS 403.200(1)(a). After reviewing the record, we do not agree with Husband that the trial court abused its discretion by awarding maintenance.

Pursuant to the statute, "maintenance need not be granted" if the spouse does not "lack sufficient property to provide for his or her reasonable needs and is unable to support himself or herself through appropriate employment." *Mosley v. Mosley*, 682 S.W.2d 462, 463 (Ky. App. 1985). Husband argues that this inquiry ends the analysis in the instant case as Wife exits the marriage with gross income of approximately $65,000 per year and a few hundred thousand dollars of assets. This view of Wife's reasonable needs is too narrow, however, considering all the relevant circumstances.

[4] KRS 403.200(1) states:

> (1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:
>
> (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and
>
> (b) Is 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.

What constitutes "reasonable needs" varies based on the marital situation. "'[I]n situations where the marriage was long term, the dependent spouse is near retirement age, the discrepancy in incomes is great, or the prospects for self-sufficiency appears dismal,' our courts have . . . awarded maintenance for a longer period or in greater amounts." *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003) (quoting *Clark v. Clark*, 782 S.W.2d 56, 61 (Ky. App. 1990)). Accordingly, when awarding maintenance, the trial court "should consider the standard of living to which the parties are accustomed[.]" *Powell*, 107 S.W.3d at 224. This consideration is "especially acceptable" when considering how the non-professional spouse's standard of living will change post-dissolution. *Id*.

Husband ostensibly asks this Court to make the initial finding in a vacuum that Wife's reasonable needs are met, all the while ignoring the substantial change in Wife's standard of living post-dissolution. During the marriage the parties enjoyed a relatively wealthy lifestyle that included numerous trips and a million-dollar residence. Post-dissolution Wife will in no way be a pauper, but she will require a maintenance award to be similarly situated to her marital lifestyle, the same lifestyle Husband's substantial income will permit him to enjoy post-dissolution. Thus, just as on the back-end question of how much and how long to award maintenance we view "reasonable needs" in light of the parties' marital situation, on the threshold question of whether a spouse is entitled to maintenance we will likewise view "reasonable needs" in the marital context.

To that end, we find that the trial court neither abused its discretion nor committed clear error by finding Wife was entitled to a maintenance award. Though she exited the 32-year marriage with substantial assets and a moderate income, the discrepancy in the spouses' incomes and lifestyles post-marriage is great and constitutes an inability to provide for her reasonable needs.

Husband also argues that the trial court abused its discretion by awarding maintenance beyond Wife's retirement age. The maintenance award lasts until Wife is age 67.[5] Husband claims *Weldon v. Weldon*, 957 S.W.2d 283 (Ky. App. 1997),[6] holds that a trial court abuses its discretion when it "award[s] maintenance beyond retirement age when the party will receive one-half of the other party's retirement benefits, thus making their incomes relatively equal." Appellee's Brf. at 26. We disagree. *Weldon* did not hold that all such maintenance awards beyond retirement age are an abuse of discretion. Instead, *Weldon* noted that one factor in its conclusion that a trial court had abused its discretion in awarding maintenance was the fact that "the parties' income levels will be more equal [once the wife reaches age 65] since she will be entitled to half of

[5] Both the July 15, 2013-entered Findings of Fact and Conclusions of Law, and the January 26, 2015-entered Amended Findings of Fact and Conclusions of Law state Wife's age is 57. Wife had filed a CR 59.05 Motion to Alter, Amend or Vacate the July 15, 2013-entered order inasmuch as she argued the trial court erroneously stated her age was 57, when it should have been 56. The Petition for Dissolution does not list the parties' birthdates, and this Court was not able to find any birthdates listed in the voluminous record. Accordingly, if there is a factual error with Wife's age, the maintenance award will end at age 66 instead of age 67. This potential discrepancy, however, is a distinction without a difference.

[6] Husband cites "*Walden v. Walden*, 957 S.W.2d 283, 286 (Ky. App. 1997)" in his brief. Appellee's Brf. at 26. The citation coordinates with the case of *Weldon v. Weldon*, and we will assume Husband's brief merely contains a typographical error in this respect.

[husband's] pension, as he will be entitled to half of hers." 957 S.W.2d at 286. The other factors that calculated into its abuse of discretion equation included that the maintenance award: was to be paid until the wife passed away, remarried, or began cohabitating with another individual; and would equal approximately one-quarter of a million dollars by the time the wife, who was at the time of dissolution 46 years old, reached age 65. *Id*. Notably, the parties had a modest estate, with a marital residence that was valued at $136,000 and had approximately $53,000 in equity, and the husband made $81,000 a year while the wife made $28,000 a year. *Id*. at 284. The marital property was divided equally between the parties, and the husband was to pay $750 a month in maintenance until their children were emancipated, at which point the maintenance increased to $1,200 per month. *Id*.

In many respects, then, *Weldon* supports the trial court's decision in the instant case. Husband's income is at least four times that of Wife's. The parties here had a "modest marital estate" with a marital residence that had approximately one-third equity. *See Weldon*, 957 S.W.2d at 284. The parties here enjoyed a "comfortable lifestyle[.]" *Id*. And Husband was ordered to pay a moderate amount of maintenance until Wife turned 67 years old. While the Court in *Weldon* remanded for entry of a maintenance order that did not continue past the time the wife reached age 65, at which point she could retire with "more equal" income levels, the wife in *Weldon* was only 46 years of age at the time of dissolution, thus the maintenance obligation could last 19 years. In contrast, the maintenance award in the instant case has a definite cut-off at 10 years and is for a

modest amount of money. We can find no abuse of discretion for not cutting off the maintenance at age 67 under these circumstances.

Therefore, for the foregoing reasons, we affirm the trial court's maintenance award *in toto*.

IV. Did the trial court err by not awarding Wife attorney's fees?

We next turn to the issue of attorney's fees. Wife asked for the trial court to order Husband to pay her attorney's fees. The trial court found that the marital estate had paid for approximately $14,000 of Wife's attorney's fees, and Husband had paid $10,000 of Wife's attorney's fees. It further found that Wife has received significant marital and non-marital assets. Thus, Husband was not required to pay additional attorney's fees incurred by Wife. Wife appeals the trial court's order on this issue.

Pursuant to KRS 403.220, the trial court may, "after considering the financial resources of both parties[,]" order one spouse to pay the other spouse's attorney's fees in a marital dissolution. To award attorney's fees there must be a disparity between the parties' respective financial resources. *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004). Even if the trial court finds a disparity, awarding one party attorney's fees is not mandatory, and the trial court's order is reviewed for abuse of discretion. *Id*.

Having reviewed the record and the significant assets of both parties, and the fact that over $20,000 of Wife's attorney's fees were paid by the marital property or by Husband, we cannot find that the trial court abused its discretion by

denying Wife's request for Husband to pay any additional attorney's fees. Thus, we affirm the trial court's order on this issue.

V. Did the trial court erroneously calculate Wife's non-marital interest in the parties' marital residence?

Throughout their 30-plus year marriage, the parties had possessory interests in a number of real properties. Of concern in this issue is Wife's non-marital contribution to their marital residence. Early in their marriage, the parties owned a residence on Lantern Way. Husband has agreed that Wife contributed $125,000 of non-marital funds to their residence on Lantern Way. The parties appear to have also contributed either marital funds or "sweat equity" or some combination thereof in the Lantern Way residence. The property was subjected to several mortgages, and the parties eventually sold the property for $375,000. Due to the mortgages, the net proceeds of the sale were approximately $210,000. The parties invested those proceeds in their final marital home in Williamsburg Estates. Wife asserted a non-marital claim in the ultimate sale of the Williamsburg Estates residence based on her non-marital share of Lantern Way. KRS 403.190.

At the conclusion of the dissolution hearing, the trial court's Findings of Fact and Conclusions of Law resolved Wife's non-marital share as follows:

> 16. The Wife has asserted a non-marital claim in the real estate owned by the parties which is located at 2433 Williamsburg Estates Lane, Lexington, Kentucky. The Court finds that relaxed tracing is appropriate in this case. The Court finds that Petitioner [Wife] has traced two non-marital contributions to Williamsburg Estates: (a) $125,000 contribution resulting from the sale of

> Petitioner's family business; and (b) $35,000 Petitioner received as a gift to her from her family reflected in a contract signed by the parties, dated February 25, 1995. Both contributions were used toward the parties' prior residence located at 91 Lantern Way, Nicholasville, Kentucky ("Lantern Way"). The Court therefore finds that Petitioner's non-marital contribution to the parties' prior residence totaled $160,000, and the rest of the contributions to said residence were marital contributions. The Court finds that there were significant marital contributions to Lantern Way. The Court finds that the evidence at trial established that Lantern Way was paid off, having no mortgage for a certain period, and that it was sold for a purchase price of $375,000 when subject to a mortgage of $163,135.04. The Court therefore finds that 43% of the sale price of Lantern Way was Petitioner's non-marital property. The Court further finds that the evidence at trial established that Petitioner appropriately traced her non-marital contributions toward Lantern Way into Williamsburg Estates.
>
> The problem may be that there is not enough equity in the residence to pay Petitioner back her non-marital contribution. The Court finds that the current value of Williamsburg Estates is unknown because at this time there is no willing buyer. The Court finds that when Williamsburg Estates sells, Petitioner shall be entitled to 43% ($160,000 divided by $375,000) of the net proceeds of Williamsburg Estates, which shall restore her non-marital contribution, and the remainder, 57%, is deemed marital. The Court finds it equitable to distribute the marital portion of Williamsburg Estates equally between the parties.

(Findings of Fact and Conclusions of Law, pp. 3-4).

Wife then filed a motion to alter, amend, or vacate this issue. That motion was granted, and an Amended Findings of Fact and Conclusions of Law was entered accordingly:

> A. Non-marital claim in Williamsburg Estates.

The Parties' first marital residence, purchased May 27, 1982, was a home on Lantern Way in Jessamine County. Both parties acknowledge all of the proceeds from the sale of the home Lantern Way were invested into the purchase of the Williamsburg Estates home. The admitted testimony of both parties was that the Lantern Way home sold for $375,000, subject to a mortgage of $163,165.04, and that the proceeds were invested into the Williamsburg home. Petitioner testified that the mortgage on Lantern Way was the result of the parties' having borrowed from the equity in Lantern to purchase the Williamsburg Estates lot and begin construction prior to the sale of Lantern Way.

The Petitioner asserted that the entire $375,000 of the sale price of the Lantern Way home was her non-marital property. Petitioner proved and adequately traced her initial non-marital contribution of $125,000 into the Lantern Way home, which the parties built as a new construction project. The Respondent admitted $125,000 of the initial contribution into the Lantern Way home was from Petitioner's non-marital sources. Respondent testified that $25,000 of marital funds were contributed to the construction of Lantern Way. The Court finds that there were also significant contributions to Lantern Way during the marriage.

It is Petitioner's assertion that pursuant to *Travis v. Travis*, 59 S.W.3d 904 (Ky. 2001) and *Atkisson v. Atkisson*, 298 S.W.3d 858 (Ky. App. 2009), she was entitled to restoration of the non-marital principal as well as the pure economic gain thereon. It is Respondent's position that there were marital contributions to the home which should be considered when determining how much of the equity should be restored to Petitioner as her non-marital funds.

With regard to non-marital contributions to Lantern Way, Respondent testified that, in addition to the $125,000 non-marital construction investment, an additional $35,000 of Petitioner's non-marital inheritance was used for improvements to Lantern Way. Respondent claimed

> these funds were invested into the Lantern Way property, and should be included in Petitioner's non-marital claim in Williamsburg. Specifically, Respondent claimed the $35,000 was used for a new patio for Lantern Way. However, upon cross examination, a photograph was introduced evidencing the patio existed prior to the time the $35,000 was transferred from Petitioner's non-marital estate. Respondent testified that if the funds were not used for the patio, they were used for another purpose for the marital residence. The Court finds that the Respondent failed to properly trace this $35,000 into the home. Therefore the $35,000 funds from the post-nuptial agreement cannot be included in Petitioner's non-marital interest in the home.
>
> Pursuant to KRS 403.190(1) the Court is first required to restore Petitioner's non-marital investment of $125,000. See Also [sic], *Atkisson v. Atkisson*, 948 S.W.3d 858 (Ky. App., [sic] 2009). This Court Orders Petitioner shall receive $125,000 of the net proceeds after payment of expenses as set forth herein. Any net proceeds in excess of Petitioner's non-marital investment shall be equally divided between the parties.

(Amended Findings of Fact and Conclusions of Law, pp. 3-5).

Husband appeals the trial court's Amended Findings of Fact and Conclusions of Law on this issue. Husband claims the trial court erred in its calculation of Wife's non-marital estate. He asks us to find that $460,000 of total contributions were made to the Williamsburg Estates residence, and of that $160,000 was Wife's non-marital investment. He arrives at these numbers for Wife's non-marital investment by simply adding the agreed-to $125,000 non-marital share to the $35,000 that was the subject of a post-nuptial agreement discussed in Issue VI, *infra*.[7] Using these numbers, Husband argues Wife is

[7] As shown below, Issue VI, *infra*, we find no error with the trial court's ruling that the post-nuptial agreement could not be traced to the Williamsburg Estates residence. Thus, we will only

entitled to 35% (representing the $160,000 non-marital share divided by the $460,000 total contributions) of the net proceeds from the Williamsburg Estates sale. Wife claims the trial court properly returned her $125,000 non-marital share out of the Williamsburg Estates equity. After a thorough review, we do not agree with the trial court's Amended Findings of Fact and Conclusions of Law, nor do we agree with Husband's or Wife's arguments.

Pursuant to KRS 403.190, a trial court must utilize a three-step process to divide property: "(1) the trial court first characterizes each item of property as marital or nonmarital; (2) the trial court then assigns each party's nonmarital property to that party; and (3) finally, the trial court equitably divides the marital property between the parties." *Travis v. Travis*, 59 S.W.3d 904, 909 (Ky. 2001) (footnotes omitted). As happens in some dissolution actions, a property item may have been acquired with both marital and non-marital funds. To ferret out the respective shares, Kentucky uses the "source of funds" rule, where the source of funds determines the marital and non-marital interests. *Id.*

Once the source of funds is determined, the property's marital and non-marital shares must then be divided. To divide the shares a percentage-based formula may be used: the non-marital portion equals the non-marital contribution divided by the total contribution ("NMC/TC"), multiplied by the property's equity ("E"); and the marital property equals the marital contribution divided by the TC

address the $125,000 non-marital share in this issue.

("MC/TC"), multiplied by E. *Brandenburg v. Brandenburg*, 617 S.W.2d 871, 872 (Ky. App. 1981) (citing *Newman v. Newman*, 597 S.W.2d 137 (Ky. 1980)).

In the instant case, Husband argues this formula should have been used to establish a percentage-share of Wife's non-marital portion of the Williamsburg Estates equity. The *Brandenburg* formula, however, is not the only method for determining the non-marital share. "We do not intend to imply by the adoption of this formula that this Court will not approve other procedures utilized by the lower courts in arriving at an equitable division of property as long as the relationship between the contributions of the parties is established." *Id*. at 873. Thus, simply because the lower court did not use *Brandenburg* does not mean it erred.

Further complicating the *Brandenburg* equation is the statutory presumption that property acquired during the marriage is marital property. Accordingly, under KRS 403.190(3), an *increase* in a property's value is presumed to be marital unless the party claiming the increase was non-marital proves otherwise. *Travis*, 59 S.W.3d at 912. Thus, when parties purchase a piece of real property with both marital and non-marital funds, then the parties improve that property with marital funds, the *Brandenburg* percentages may not equitably restore the parties' marital and non-marital shares, as the non-marital share will have increased in value due to the marital contributions. In that case, if the party with the non-marital share cannot prove the property increased in value due to general economic conditions, rather than use percentage shares to divide the

property, the party who expended non-marital funds may have those unenhanced funds returned first from the equity, then the parties will divide any remaining equity in just proportions. *Travis*, *supra*. *See also Atkisson v. Atkisson*, 298 S.W.3d 858 (Ky. App. 2009).

An additional complication arises in the instant case because Wife's non-marital interest is traceable through two properties – the parties' first residence, which was sold, and their second residence, which was purchased in part with the proceeds from the first residence. *See, e.g., Woosnam v. Woosnam*, 587 S.W.2d 262, 263-64 (Ky. App. 1979). Thus, we begin our analysis by determining whether the trial court erred in determining Wife's share in the first residence.

For the Lantern Way residence, the parties' first house, the trial court found Wife contributed $125,000 in non-marital funds. Both parties agree that Wife contributed at least this much in non-marital funds to the residence. The trial court also found the parties contributed significant marital contributions to increase the value of the Lantern Way residence. Having reviewed the record, we agree that the parties spent marital funds and "sweat equity" while living at the residence, thus increasing its value.

Because the parties increased the property's value through marital funds and contributions, the trial court found Wife traced only the $125,000 non-marital contribution to the marital residence. We find no clear error in this finding due to KRS 403.190(3)'s presumption that the increase in a property's value is marital unless proven otherwise. Wife had the burden of proving her non-marital

share increased due to general economic conditions rather than martial contributions, as the KRS 403.190(3) presumption is that increases in value are due to marital contributions. *Travis*, 59 S.W.3d at 910-11. She failed to make this showing. Thus, when the parties sold the Lantern Way residence, which had approximately $210,000 in equity remaining in the property, Wife's full $125,000 non-marital share remained.

This $125,000 non-marital share plus the $85,000 remaining Lantern Way proceeds were used to purchase the parties' final marital residence in the Williamsburg Estates. The parties first purchased the Williamsburg Estates land for $119,900, and then they had a house constructed on the same. Unfortunately for the parties, it appears they spent more money in construction than the residence was ultimately worth. They borrowed over $800,000, they may have contributed approximately $50,000 of marital funds, and they rolled the $85,000 of marital funds from the Lantern Way proceeds into the Williamsburg Estates construction project. By the time the dissolution proceeding occurred, the parties had reduced the mortgage balance to approximately $700,000. Though over a million dollars was invested into the residence, the parties listed the residence for sale for less than a million dollars at the time of the dissolution proceeding.

On May 23, 2014, the parties ultimately filed a notice with the trial court indicating they contracted to sell the residence for $878,000. Then, on January 26, 2015, an Agreed Order was entered showing the net proceeds from the Williamsburg Estates residence equaled $137,717.02. Pursuant to the Amended

Findings of Fact and Conclusions of Law, Wife received $125,000 of non-marital funds, then the parties divided equally the remaining $12,717.02.

This case, then, presents us with the following question: when a husband and wife use wife's non-marital property and both parties' marital property to purchase land and construct a residence that ultimately is worth less than the total contributions, should the marital and non-marital shares be proportioned to share in the loss? Under the facts developed at the evidentiary hearing, we answer that question affirmatively because the record demonstrates the decrease in value of the combined marital and non-marital funds was due to "general economic conditions," thus both funds should share in the loss. *Cf. Travis v. Travis*, 59 S.W.3d 904 (Ky. 2001).

We so hold because it is apparent from the record that the non-marital and marital funds were comingled into one construction project. There is no way to separate the funds and their resulting values. Wife cannot claim that her non-marital share was spent solely on a kitchen or a bedroom or land, nor can she put a final value on any of those items. The funds here were put toward one purpose – to purchase land and build a house. The resulting construction project had a value that was less than the sum total spent on the project. Thus, the marital and non-marital funds should share in the net decrease in value.

According to Husband's testimony, the parties borrowed or spent the following amounts on the Williamsburg Estates property: $119,900 for the land, $736,000 for the first construction mortgage, and $89,000 for the second

construction mortgage. The $825,000 combined mortgages were refinanced over the years, and at the time of the evidentiary hearing the parties had an outstanding balance of just under $700,000. These amounts were supported by documentary evidence. Husband also claimed the parties spent $50,000 in marital funds on the residence. This amount was not supported by any documentary evidence. Both parties also agree that the $210,000 from the Lantern Way sale was used to purchase the land and construct the Williamsburg Estates residence. As stated above, the house sold for substantially less money than the parties spent on the land and construction.

Because it is unquestionable that the parties chose to invest these marital and non-marital funds into the construction of a single residence that decreased in value, both pools of money should share proportional detriment. This result aligns with *Travis* and KRS 403.190(3), which hold that increases in value are presumed to be due to the marital contribution unless the party claiming the non-marital share proves general economic conditions caused the increase in value. 59 S.W.3d at 910. *See also Allison v. Allison*, 246 S.W.3d 898 (Ky. App. 2008).

Here, the evidence demonstrates that the parties pooled the funds to purchase a piece of land and construct the residence. The resulting value of their combined investment was less than their combined contribution. Wife proffered no evidence showing that the decrease in value was due solely to the marital contribution. Indeed, she would be unable to demonstrate such under these facts, as the residence came into existence due to the combined funds and efforts of the

parties. Under these facts, the non-marital and marital funds can be reduced to shares using the *Brandenburg* formula.

Using this formula, the non-marital contribution by Wife was $125,000. The marital contribution, which is defined as marital funds used "in the reduction of mortgage principal, plus the value of all improvements made to the property after marriage from other than nonmarital funds[,]" 617 S.W.2d at 872, is either $210,000 or $260,000.[8] Thus, the total contribution was either $335,000 or $385,000.

[8] We arrive at this number accordingly. First, the combined mortgages' principals were reduced from $825,000 to $700,000, for a total marital contribution of $125,000. Husband's Appellee's Brief avers the total principal balance was reduced "just over $225,000[.]" Brf. at 30. We find his calculation of principal reduction to be either a mathematical error or an attempt to double dip funds. Husband appears to base his calculation on both the mortgage principal reduction of $125,000, and his alleged additional $50,000 of marital funds and his averred $50,000 marital share from the Lantern Way residence (Husband asserts Wife has an additional $35,000 non-marital share in Lantern Way in addition to her $125,000 non-marital share). However, he later adds to this $225,000 figure the additional $50,000 of marital funds and another $25,000 of marital funds he claims was used to improve the Lantern Way residence. This double use of funds (and triple use of funds in the Lantern Way residence instance) skews the principal reduction by six figures. Under *Brandenburg*'s first calculation, we simply look at the total principal reduction. In this case, the mortgage principal was reduced from $825,000 to $700,000. Thus, $125,000 represents the total principal reduction.

The second prong of *Brandenburg*'s total marital contribution equation adds up the value of all improvements made by marital funds. Here, the marital funds from the Lantern Way sale were first used to improve the Williamsburg Estates residence and land. The Lantern Way residence was sold for $210,000, of which $125,000 was non-marital, leaving $85,000 in marital funds that were spent improving the Williamsburg Estates construction. Furthermore, if the trial court accredits as truthful Husband's testimony about the undocumented $50,000 marital contribution to improving Williamsburg Estates, then it should also be included in the second part of the *Brandenburg* equation. Thus, the second prong equals either $85,000 or $135,000.

Adding these two prongs together, the total marital contribution to the Williamsburg Estates equals the principal reduction of $125,000, plus the improvements equal either $85,000 or $135,000. The sum of the two *Brandenburg* prongs for the marital contribution is either $210,000 or $260,000.

As stated above, the Agreed Order showed the equity at the time of distribution was $137,717.02. Accordingly, Wife's non-marital share is either ($125,000 / $335,000) * $137.717.02 = $51,386.95, or it is ($125,000 / $385,000) * $137.717.02 = $44,713.32.

Therefore, we remand for the trial court to make the required factual finding regarding Husband's undocumented averment that $50,000 marital funds were used to construct the Williamsburg Estates residence, which in turn will permit the trial court to make the above-calculated non-marital distribution. We further remand for the trial court to divide the remaining marital funds "in just proportions" after consideration of the relevant factors. KRS 403.190(1)(a)-(d). *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006) ("It is important to bear in mind that a trial court is not obligated to divide the marital property equally.") (citing *Davis v. Davis*, 777 S.W.2d 230, 233 (Ky. 1989)).

VI. Did the trial court err by assigning Wife $35,000 that was the subject of a post-nuptial agreement?

Husband appeals the trial court's order on this issue. During the marriage, Husband created, and the parties signed, a post-nuptial agreement regarding $35,000 of Wife's non-marital funds. Pursuant to the agreement, if the marriage dissolved and the $35,000 could not be traced to a then-existing asset, Wife was to receive the full $35,000 restored to her from marital estate as non-marital property. Husband claims the $35,000 could be traced to the marital

residence. The Amended Findings of Fact and Conclusions of Law found as follows regarding the post-nuptial agreement:

> Respondent claims the $35,000 can be traced into the house, however he provided no documentary evidence. Respondent acknowledged his recollection that $35,000 was spent on a patio was in error when shown dated photographs of the patio. Respondent prepared the document and as an attorney, he knew that, if needed, he would have had to produce evidence that the funds went into the home. The burden is on him to prove the funds can be traced into the house, and he failed to do so. As such, Respondent must pay Petitioner $35,000, which are her non-marital funds pursuant to the terms of the post-nuptial agreement.

(Amended Findings of Fact and Conclusions of Law, pp. 5-6).

Husband claims this Amended Findings of Fact and Conclusions of Law is erroneous. Husband argues that because the trial court changed judges between the initial Findings of Fact and Conclusions of Law and the Amended Findings of Fact and Conclusions of Law, the former should control as that judge was "uniquely able to assess the credibility of the witnesses and the testimony[.]" Appellee's Brf. at 34. He further argues that the testimony at the hearing established that the funds were used to make improvements and repairs at the Lantern Way residence and were thus traced to that asset. Husband claims that Wife is attempting a double recovery of a non-marital interest in the marital residence and a non-marital interest in the $35,000.

Having reviewed the record, we cannot say the trial court erred by amending its factual findings. The post-nuptial agreement clearly states three

times that Wife intended to use the $35,000 for payment of marital debts. It does not say the marital debt was the Lantern Way residence nor any associated debts therewith. It further provided that in the event that the $35,000 could not be traced to an asset at the time of dissolution, then Wife was to receive the $35,000 non-marital funds from the marital property.

The only testimony Husband points us to that the funds could be traced to a marital asset is his expressly refuted testimony that the money was used for a patio at the Lantern Way residence. Husband, after noting the error of his expressly refuted assertion, claimed generally that the funds were used for other improvements at Lantern Way. He proffered no documentary evidence to support his testimony. Notably, on appeal, Husband cites to zero case or statutory law to support his argument that the Amended Findings of Fact and Conclusions of Law should be overturned. He simply disagrees that the second trial court judge should have granted the motion to alter, amend, or vacate, and changed the original factual findings.

"Decisions of the family court concerning the division of marital property are within the discretion of that court, and we will not disturb those decisions except for an abuse of that discretion." *Kleet v. Kleet*, 264 S.W.3d 610, 613 (Ky. App. 2007) (citing *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001); *Cochran v. Cochran*, 746 S.W.2d 568 (Ky. App. 1988)). Having reviewed the testimony and the post-nuptial agreement, we cannot say that the trial court abused its discretion by issuing the Amended Findings of Fact and Conclusions of Law.

No documentary evidence supported that the $35,000 was traceable to Lantern Way, and Husband admitted his assertion that it was used for a patio was expressly refuted. The wife is not receiving a double recovery, as the trial court in its Amended Findings of Fact and Conclusions of Law reduced Wife's non-marital share of the marital residence equity by $35,000.

The parties will be bound by the terms of the post-nuptial agreement that Husband drafted. Accordingly, the trial court's Amended Findings of Fact and Conclusions of Law on this issue will not be overturned as an abuse of discretion.

VII. Did the trial court err by amending its July 15, 2013-entered Findings of Fact and Conclusions of Law?

Husband appeals the trial court's order on this issue. He claims the trial court erred by amending its July 15, 2013-entered Findings of Fact and Conclusions of Law. Husband's argument hinges on the Kentucky Supreme Court's opinion in *Gullion v. Gullion*, 163 S.W.3d 888 (Ky. 2005).

In *Gullion*, the Court was reviewing "[a]n ancillary issue" of "whether the family court abused its discretion in granting Appellant's CR 59.05 motion to alter or amend its judgment." *Id*. at 892. The Court noted that CR 59.05 "simply provides" that "[a] motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment." *Id*. at 893. The Rule "does not set forth the grounds for the motion." *Id*. In federal court, however, where reconsideration of the judgment is an extraordinary remedy that should be used sparingly, the federal counterpart,

Federal Rule of Civil Procedure 59(e) has been limited to four grounds: (1) to correct manifest errors of law or fact; (2) to present newly discovered or previously unavailable evidence; (3) to prevent manifest injustice; and (4) to address an intervening change in controlling law. *Id.* (citing Federal Practice and Procedure § 2810.1). The Court later noted *Gullion* "cited favorably" these four grounds. *Bowling v. Kentucky Dept. of Corrections*, 301 S.W.3d 478, 483 (Ky. 2009).

Husband argues that none of these four grounds applied to Wife's CR 59.05 motion. Having reviewed the motion and the order granting the motion, we find no *Gullion* error occurred. The trial court found errors of both law and fact that required amending or altering the order. As "a trial court has 'unlimited power to amend and alter its own judgments[,]'" *Gullion*, 163 S.W.3d at 891-92 (quoting *Henry Clay Mining Co. v. V & V Min. Co.*, 742 S.W.2d 566, 566-67 (Ky. 1987)), and correcting manifest errors of law and fact are within the scope of CR 59.05, *Gullion*, *supra*, it was proper for the trial court to correct errors of law and fact.

Accordingly, we find the trial court did not err by granting the CR 59.05 motion.

VIII. Did the trial court err by requiring Husband to pay the mortgage and property taxes on the marital residence?

Finally, Husband argues the trial court erred by requiring him to pay the mortgage and property taxes on the marital residence while Wife resided in it for five months post-trial. Notably, Husband's brief cites us to no law and contains

only one reference to the record. This issue does not conform at all with CR 76.12(4)(c)(v), which requires an:

> "ARGUMENT" conforming to the statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.

Husband's brief is deficient in multiple aspects of this Rule. It contains one supportive reference to the record, zero citations of authority, and no statement with reference to the record showing whether, and how, the issue was preserved. Considering the instant case contains six volumes of record, two volumes of exhibits, multiple video-recorded media, and, furthermore, the briefs filed by the parties total almost 100 pages, Husband's complete disregard for the appellate briefing rules on this issue could warrant CR 76.12(8) penalties. *Mullins v. Ashland Oil, Inc.*, 389 S.W.3d 149 (Ky. App. 2012). Rather than strike this issue, though, we will simply review it for manifest injustice. *Id*. at 154.

Husband is arguing that, according to his calculations, Wife "will *receive* $840 per month . . . to live in Williamsburg Estates" for the five months post-trial that she resides there. Appellee's Brf. at 38. Having reviewed the record and the yeoman's effort the trial court expended to divide the marital property "in just proportions[,]" KRS 403.190(1), we find no error, manifest or otherwise, with the trial court permitting Wife to remain in the residence for five months post-trial,

even if, *arguendo*, Husband did expend $4,200 more than he felt was just. Accordingly, we affirm the trial court on this issue.

CONCLUSION

Having thoroughly reviewed the voluminous record, the multiple hearings, the lengthy briefs, and the applicable case law, we find the trial court correctly divided the substantial marital property from this 32-year-long marriage, save for one error – Wife's non-marital share of the Williamsburg Estates equity. Therefore, we reverse and remand for further proceedings consistent with this Opinion on that issue alone. All other issues are affirmed *in toto*.

ALL CONCUR.

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