

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001247-MR
NO. 2015-CA-001425-MR
NO. 2015-CA-001887-MR

KENNETH RAY WOLFE

APPELLANT/CROSS-APPELLEE

v. APPEALS FROM KENTON CIRCUIT COURT
HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 13-CI-01060

MARGARET WOLFE
(NOW HARRISON)

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, DIXON, AND D. LAMBERT, JUDGES.

CLAYTON, JUDGE: This dissolution of marriage action involves an appeal, a cross appeal, and a consolidated appeal of post-decree issues. In the original appeal, Kenneth Ray Wolfe (“Ken”) challenges the trial court’s findings and conclusions of law regarding the division of marital assets, including the non-

marital and marital characterization, the assignment of debt, and certain evidentiary issues about the introduction of evidence and the use of leading questions. In the cross appeal, Margaret Wolfe (now Harrison) contests the trial court's findings and conclusions of law regarding the characterization of Ken's retirement and savings accounts¹ as non-marital and the failure of the trial court to consider fully the earning capacity of Ken. In the appeal of post-decree issues, Ken disputes the trial court's orders involving the failure to grant a continuance and procedural flaws in the motion for contempt. After careful consideration of the record and the arguments of the parties, we affirm the trial court in part, reverse in part, and remand.

BACKGROUND

Ken Wolfe and Margaret Harrison married on September 29, 1985. Margaret first filed a petition for divorce on June 29, 2012. That action was dismissed without prejudice on May 2, 2013. Within two weeks, Margaret re-filed a petition for divorce on May 15, 2013. Pertinent to this matter is the fact that throughout the marriage, the parties kept separate checking accounts and credit cards.

The trial took place over three days – July 11, 2014; August 1, 2014, and October 31, 2014. During the trial, the parties disputed the division of the parties' property, classification of property as marital or non-marital, the allocation of the parties' debts, and evidentiary concerns. On January 9, 2015, the trial court

¹ Four IRA accounts and one Thrift Savings account

entered findings of fact, conclusions of law, and a separate decree. Thereafter, Ken filed a motion to alter and amend the judgment. The trial court held a hearing about the motion on June 23, 2015. On July 21, 2015, the trial court entered an order denying the motion.

On the first day of trial, Christine Dwyer, Margaret's sister testified about Margaret's inheritance and assets purchased or procured through the inheritance. Christine was the sole manager for the investments resulting from the family inheritance. First, she testified about individual lifetime gift transfers made to members of the family, including Ken. According to Christine, members of the Harrison family, and their spouses, each received \$10,000 as an annual gift from Christine and Margaret's parents, William and Emilia Harrison, until their respective deaths in 2004 and 2007. In total, Ken and Margaret each received \$161,000 in gifts from 1999 through 2007.

In addition, Christine provided information about the assets that Margaret inherited from her parents. William and Emilia Harrison, the parents, had three children – Margaret, Christine, and Fred Harrison. Fred died in 2001 and predeceased his parents. Margaret's father died in November 2004, and her mother died in March 2007. When the father died, his estate passed to his wife with one exception. The father's estate had an A.G. Edwards investment account, valued at \$345,322. His wife did not accept the proceeds from this account, and as such, it was divided evenly among their children and passed directly to Margaret,

Christine, and Fred's estate. Each recipient was given \$115,105. Margaret deposited her portion into an A.G. Edwards account opened in her name.

When the mother died in 2007, the will directed that her estate be divided evenly among the three children. She too had an A.G. Edwards investment account, valued at \$190,015. Each child and/or his estate took approximately one-third of this account. Margaret's share was \$65,424, which was deposited into her A.G. Edwards investment account.

Besides the investment accounts, the parents had, in 2002, formed a company, Harrison Investments, LLC. It was registered in Tennessee and had an initial contribution of \$2,600,000. The members of the limited liability company ("LLC") were the mother, father, Christine, Margaret and Fred's estate. The parents' ownership share was 85%, with the three remaining members each having a 5% ownership share. As previously noted, Christine was the managing partner with the sole trading authority for the LLC. The purpose of the company was to manage an investment portfolio for the benefit of the family. When William died, his share was divided evenly among the children. Similarly, when Emilia died, her share was divided evenly among the children.

In May 2008, Fred's estate requested to relinquish its interest in the company. Fred's estate received its portion and the remaining share of the LLC was reapportioned between Margaret and Christine. Then, in 2012, the LLC was transferred from Tennessee to Florida and renamed Dwyer Wolfe Investment, LLC

("DWI"). At the time of the trial, Margaret had a 48% interest and Christine had a 52% interest.

Next, Margaret testified. She clarified that she had four separate Stifel Nicolaus accounts, which were entirely or partially funded with non-marital assets except that Account No. 5565-3565 was funded with **her share** of the proceeds resulting from the sale of the marital asset – the Den Lou Motel. This account was No. 5565-3565 – TOD account². This account was stipulated as "marital."

The account below was non-marital:

Account No. 3174-9791 - an annuity account funded by Harrison Investments (now DWI).

The next two accounts have marital and non-marital funds:

Account No. 4182-8420 – IRA annuity account and SEP account³ funded by Harrison Investment.

Account 5922-4730 – Roth IRA account

The first account included Margaret's premarital retirement account from Procter & Gamble. She received this account prior to the marriage. Margaret retired in 1982 with eligibility to access her retirement account in 1988. When she received access to the retirement account, she rolled \$97,760 of it into this account.

The second account, the Roth IRA account, began with an initial \$10,000 contribution. In 2003, a \$3,500 contribution was made, which was marital. But all subsequent contributions were made with non-marital funds. The

² "Transfer on Death"

³ "Simplified Employee Pension."

amount contributed to the IRA was approximately \$42,000 from Margaret's inheritance.

Margaret also has an interest in two condominiums in Myrtle Beach, South Carolina. These condominiums were purchased by Margaret with Christine and her husband, Kenneth Dwyer, as joint tenants. The first condominium (Unit 651) is based on a fractional ownership with other owners. They purchased it for \$212,000, which was paid from Margaret and Christine's inheritance. Margaret and Christine purchased another condominium (Unit 935) in Myrtle Beach for approximately \$300,000. The parties are the sole owners of this condominium. The funds were obtained from their LLC that had been funded by their parents.

In 1980, Margaret bought a condominium in Villa Hills, Kentucky (2928 Vista Court). She made a down payment of \$77,000 and had a mortgage for \$54,829. The parties have stipulated to both the mortgage amount and the current value of the property, \$165,000. During the marriage, the original mortgage for this condominium was paid off. But it now has an outstanding mortgage of \$55,829. Later, Margaret and Ken bought the next-door condominium (2926 Vista Court) and combined the units into one living space. This condominium has current value of \$210,000 and an outstanding mortgage of \$170,000. Both mortgages were obtained during the marriage. Besides the previously-mentioned property, the Den Lou Motel, Margaret and Ken own an office building with a fair market value of \$435,000.

The allocation of debt is a crucial issue in this divorce action. First, Margaret claimed that Ken owes her \$42,723.15 for various expenses itemized in Petitioner's Exhibit 5. In addition, the parties had a number of credit cards. The record shows that the parties used twelve credit cards. Margaret testified that she used American Express, Discover, Target, Fifth Third MasterCard, PNC card, US Bank Visa, and Dillard's credit cards, and Ken used the remaining cards.

The parties also owned a number of vehicles. In 2010, they purchased a Winnebago. The \$10,000 down payment for this vehicle, according to Margaret, came from a non-marital account. Further, she maintains that Ken provided his \$10,000 from a line of credit on one of the condominiums.

Ken has control of several accounts: Oppenheimer IRA (Account #1870), Oppenheimer IRA (Account #2249), Bank of Kentucky IRA, Union Central IRA (Account #0381), and Thrift Savings Account. He testified that the Oppenheimer IRA (Account #2249) and Thrift Savings Account were entirely marital, that the Oppenheimer IRA (Account #1870) and the Bank of Kentucky IRA were a mixed marital asset; and that the Union Central IRA (Account #0381) was entirely non-marital. But Ken was unable to provide any proof of the non-marital nature nor give the non-marital monetary value of these assets.

On January 9, 2015, the trial court entered findings of fact, conclusions of law, and a decree of dissolution. In the orders, the trial court, on the disputed issues, held regarding the division of property that the following assets were non-marital and awarded to Margaret:

1. Stifel Nicolaus Account No. 8147-2220 (TOD Account).
2. Stifel Nicolaus Account No. 3174-9791 (Annuity Account).
3. Stifel Nicolaus Account No. 4182-8420 (IRA Annuity Account and SEP Account). But \$97,760 of this account was stipulated as marital, and therefore, Ken was awarded one-half of this amount, that is, \$48,880.
4. Stifel Nicolaus Account No. 5922-4730 (Roth IRA). But \$13,500 of this account was stipulated as marital, and therefore, Ken was awarded one-half this amount or \$6,750.
5. Myrtle Beach Condominium Unit #651.
6. Myrtle Beach Condominium Unit #935.

The trial court awarded the following items to Ken as non-marital assets:

1. Oppenheimer IRA (Account #1870).
2. Oppenheimer IRA (Account #2249).
3. Bank of Kentucky IRA.
4. Union Central IRA (Account #0381).
5. TSA Thrift Savings Account.

Further, the trial court stated that the gains in the husband and wife's non-marital accounts were also non-marital as neither contributed to the other's gains.

On January 20, 2015, Ken filed a motion to alter and amend the judgment. A hearing was held on June 23, 2015. On July 21, 2015, the trial court entered an order clarifying some sections of the January 9, 2015 order and

affirming its decision regarding the allocation of the debt and the admission of the exhibits. No mention of the division of Margaret's assets, which were characterized as non-marital, was cited by Ken in his motion. Ken now appeals from both the findings, conclusions, and decree as well as the order denying his motion to alter, amend, or vacate.

Margaret responded to Ken's appeal by filing a cross motion on August 27, 2015, wherein she contests both the January 9, 2015 order and the July 21, 2015 order.

Besides the appeal and cross appeal, Ken appealed a post-decree order. This action began when Margaret filed two motions for which a hearing was held on October 23, 2015. The motions concerned expenses related to the Vista Court condominium that had been Ken's residence. The trial court ordered that he pay all expenses related to the Vista Court condominium and certain expenses to repair and clean the condominium. The trial court made verbal orders and then entered a written order on November 6, 2015, wherein Ken was to pay expenses associated with the condominium and clean-up expenses. Ken now appeals this order.

ISSUES

On appeal of the divorce action, Ken argues that the trial court improperly permitted Margaret's counsel to use leading questions of her witnesses throughout the trial; that the trial court erroneously admitted Margaret's trial exhibits over Ken's objections; the trial court improperly divided the debt; the trial

court improperly admitted parol evidence about certain assets belonging to Margaret; and, that the trial court failed to find that the LLC funds are non-marital since they were commingled with third-party assets. In Ken's post-decree appeal, he articulates that the trial court abused its discretion by failing to grant a continuance in a hearing on the matter and erred in granting a motion for contempt.

Margaret responds to Ken's arguments by maintaining that he is not entitled to a new trial because of the use of leading questions; that the trial court properly admitted Margaret's exhibits; that the assignment of the debt was proper; and, that the trial court properly assigned Margaret's non-marital assets. In addition, Margaret contends that the trial court erred in awarding Ken his four IRA accounts and the thrift savings account as his non-marital assets since this award was inconsistent with the testimony and not supported by substantial evidence. Further, she maintains that the trial court's findings of fact were in error because they did not address the evidence that Ken was receiving income from another source.

STANDARD OF REVIEW

The standard of review regarding the trial court's findings of fact is expressed in Kentucky Rules of Civil Procedure (CR) 52.01, which directs that its factual findings "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Further, a factual finding is not clearly erroneous if it is "supported by substantial evidence." *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d

409, 414 (Ky. 1998). “Substantial evidence” is evidence, when taken alone or in light of all the evidence, which has sufficient probative value to “induce conviction in the minds of reasonable men.” *Id.*

Additionally, abuse of discretion occurs when a ruling is “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). However, we owe no deference to the trial court’s conclusions of law, which we review *de novo*. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005).

With these standards in mind, we turn to these matters.

ANALYSIS

We will now address the issues raised by the parties.

I. *Evidentiary Issues*

A. Use of Leading Questions

Ken argues that the trial court permitted Margaret’s counsel to improperly use leading questions throughout the entire trial. He maintains that this issue was preserved for appellate review by the objections made during the trial to counsel’s use of leading questions. Based on the use of leading questions, Ken contends that a new trial is required.

Margaret proffers that this issue is not preserved because Ken did not specifically reference it in his prehearing statement. Guidance is found in CR 76.03(4)(h) wherein it is stated that a prehearing statement must include: “[a] brief statement of the facts and issues proposed to be raised on appeal[.]” In addition,

CR 76.03(8) states that “[a] party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion.” Ken’s prehearing statement does not specify that the use of leading questions on direct examination is relevant to this appeal.

The Kentucky Supreme Court has stated that the significance of CR 76.03 is that the Court of Appeals will not consider arguments to reverse a judgment that have not been raised in the prehearing statement or on timely motion. *See Am. Gen. Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 549 (Ky. 2008). Thus, the party appealing a trial court's judgment is limited to those issues identified by the prehearing statement. *Id.*

Nevertheless, the Court of Appeals retains the authority to reverse a trial court’s judgment on an unpreserved issue if it finds palpable error therein. CR 61.02; Kentucky Rules of Evidence (KRE) 103(e). *Wright v. House of Imports, Inc.*, 381 S.W.3d 209, 212 (Ky. 2012). When reviewing evidentiary issues, our Court recognizes that “[t]he standard of review for a trial court's evidentiary rulings is abuse of discretion. The test for abuse of discretion is ‘whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.’” *McDaniel v. Commonwealth*, 415 S.W.3d 643, 655 (Ky. 2013) (citing *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000) and quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). Here, the issue has not been preserved, and consequently, the standard is whether

“palpable error” occurred. For palpable error to exist, it must be ascertained that manifest injustice would result without appellate review. CR 61.02.

First, we note that no timely motion was made by Ken to our Court for consideration of this issue. Second, notwithstanding Ken’s rhetoric that there were constant and consistent leading questions, he only cites to two incidents in his brief where, during the trial, he objected to the use of leading questions. And when Ken objected to the use of leading questions, the trial court did not overrule the objection but rather stated:

She is guilty of leading, but these things they’re self-evident, so to speak. So, if you want to object, and you want to turn this into a five-week trial, I’ll sustain every objection because technically, you’re right, o.k. But from a practical standpoint, it’s a dumb idea.

To which, Ken’s counsel replied, “fair enough judge.”

To summarize, we observe that this was a bench trial, that the trial court judge acknowledged that the questioning was leading, that Ken’s counsel accepted the trial court’s reason for permitting the questioning; and, that Ken has not proven any manifest injustice resulting from the questioning. Therefore, we conclude not only that the issue was not preserved for our review but also it was not shown to require palpable error review.

B. Admission of Exhibits

Ken alleges that he was not given sufficient time to raise objections to the admission of Margaret’s 23 exhibits. In fact, the trial court ordered that the parties exchange pre-marked exhibits 14 days prior to trial in order to review the

exhibits. And during the trial, the exhibits were introduced through the respective witnesses, which allowed Ken to object, if either the exhibit had not been provided as required under the trial order or for any other evidentiary reason.

Ken specifically mentions problems with Petitioner's Exhibit 1(C) (unauthenticated probate documents) and 1(E) (unauthenticated Tennessee court records). During the trial, the trial court judge cautioned while addressing the exhibits being admitted into evidence that "several of these exhibits have things in them, um, that include some things that I could never make the basis of a finding of fact on."⁴ In addition, the trial court explained in its findings when it relied on certain exhibits. The exhibits were 1(A), 1(D), 2, 5, 6, and 8. Ken asserts no complaints regarding these exhibits.

Here, the trial court's findings and conclusions are consistent with the admitted evidence including testimony and exhibits. Ken has established no abuse of discretion on the part of the trial court.

II. *Division of Marital property*

Laws governing division of marital property in divorce vary from state to state. Kentucky law requires a division that is equitable, meaning that it must be fair even if it is not equal. Under Kentucky Revised Statutes (KRS) 403.190, a trial court engages in a three-step process when dividing the parties' property in a dissolution of marriage proceeding. First, it must characterize each item or interest as either marital or non-marital property. Second, it must assign

⁴ Trial video 07/11/2014 3:35:40 – 3:35:59.

each party his or her non-marital property. And third, it must divide the marital property in just proportions between the parties. *Travis v. Travis*, 59 S.W.3d 904, 909 (Ky. 2001).

As authorized by KRS 403.190(2), marital property means all property acquired by either spouse after the marriage. Yet, the statute does delineate that some property acquired after the marriage is still characterized as non-marital:

- (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)(a-e).

In the matter before this Court, there are several division of property issues. Initially, we address whether certain Stifel Nicolaus accounts and the Myrtle Beach condominiums, which the trial court assigned to Margaret, are marital or non-marital.

1. Margaret's Stifel Nicolaus accounts and Myrtle Beach condominiums

Regarding the division of Margaret's four Stifel-Nicolaus accounts⁵ and the Myrtle Beach condominiums, the trial court, for the most part, awarded them to Margaret as non-marital assets since their value derived directly from her inheritance. (Although two accounts, the Roth IRA account and IRA & SEP account, had some marital value, and the trial court assigned Ken one-half of the designated marital value.)

Ken challenges this award for two reasons. First, he alleges that the testimony of Christine Dwyer should have been excluded as a violation of the parol evidence rule, and second that Margaret did not prove that the Dwyer-Wolfe LLC is non-marital.

The parol evidence rule prevents a party from introducing testimony or other extrinsic evidence to vary or alter the terms of a written agreement. *Caudill v. Acton*, 175 S.W.3d 617, 620 (Ky. App. 2004). In the case at hand, Ken vociferously maintains that the trial court permitted self-serving testimony by Christine and Margaret concerning the operating agreement for Harrison Investments, LLC, contrary to its language. Yet, at no time, does he explain the nexus between the written instrument and the self-serving testimony. Indeed, this argument is a red herring since Christine and Margaret did not rely on the document during their testimony. And a review of their testimony shows no contradiction to its language.

⁵ Stifel Nicolaus Account No. 8147-2220; Stifel Nicolaus Account No. 5922-4730; Stifel Nicolaus Account No. 3174-9791; and, Stifel Nicolaus Account No. 4182-8420.

Ken maintains that prior to the trial, he filed a motion *in limine* asking the trial court to prohibit any testimony from Christine or Margaret about the intent of the limited liability company because the testimony is hearsay and violates the Dead Man's Rule⁶. Ken believed that the trial court should prohibit Christine and Margaret's testimony because their parents were deceased; they have no knowledge of their parents' reasons for creating the company; and, writing exists as to the purpose of the company, which allegedly contradicts their proposed testimony. Nevertheless, Ken does not specifically mention the parol evidence rule in his motion.

Regarding whether Harrison Investment, LLC provided Margaret with an inheritance, Ken made the following statement on page 16 of his brief:

“Margaret received an inheritance from her parents by capital contributions to a limited liability company. . . .” In so writing, Ken admits that the source of funds for the limited liability company was based on an inheritance. Furthermore, he shares a statement from the operating agreement⁷, which states:

The Company was organized in the State of Tennessee by filing Articles of Organization on January 23, 2002 and its purpose is to provide strategic business succession planning for the assets of the Company with its business objectives of investment management[.]

This statement supports Christine's testimony that the company was formed to manage the Harrison family's assets and to provide a business succession plan.

⁶ KRS 421.210 has been repealed.

⁷ The operating agreement, which is listed as Respondent's Exhibit A, is unsigned and unauthenticated.

Ken then tangentially argues that the company was dissolved, and a successive company, Dwyer Wolfe Investments, LLC formed. But Christine testified that the company was not dissolved but moved to Florida, where she lived, and re-named. Ken does not disprove her explanation. He continues by bemoaning the fact that Christine and her sister discussed financial decisions about the company together and received income from the company. Apparently, Ken is suggesting that because Christine and her sister discussed the company and the use of its assets, this fact makes the assets non-marital. This reasoning contradicts KRS 403.190(2)(a), which says that the key to an asset being designated as non-marital is if it is received as a “gift, bequest, devise, or descent.” Here, Margaret inherited her interest in the company, and the growth was from financial management of the assets completely outside the marriage.

Next, Ken proffers that the trial court adopted Christine’s testimony on this issue through inadmissible parol evidence. He asserts that the trial court permitted inadmissible parol evidence but never references the document to show that Christine’s testimony was an improper interpretation of the agreement. As previously mentioned, he already indicated on page 16 of his brief that Margaret “received an inheritance from her parents by capital contributions to a limited liability company.” Further, the trial court determined that Christine’s testimony was credible and reliable. We see no error in the trial court’s finding that these accounts, devolving from Margaret’s inheritance, were non-marital. Moreover, although Ken maintains that the trial court never ruled on the motion *in limine*, in

essence it did, by allowing Christine and Margaret to testify regarding Harrison Investments, LLC.

Significantly, Ken's contention that the trial court considered parol evidence to establish Margaret's inheritance is without merit because Kentucky law clearly mandates that the trial court is required to consider the factors of KRS 403.190(1) to ascertain whether property is marital or non-marital. We hold that the trial court properly characterized the source of funds for these assets as deriving from Margaret's inheritance.

Ken's second argument, that Margaret did not prove the Dwyer Wolfe Investments, LLC was non-marital is subsumed into the first argument since he maintains that the trial court improperly relied on Christine's testimony concerning the history of Harrison Investments, LLC, but we have concluded that the trial court did not rely improperly on this testimony or violate the parol evidence rule.

Moreover, his reliance on *Zink v. Zink*, 2009 WL 484963 (Ky. App. Feb. 27, 2009), an unpublished case, is misplaced. In *Zink*, the husband was unable to trace a non-marital interest in two rental units. The property, in that case, was purchased days before the parties were married, and while the husband had title, there was no equity. In the case at hand, the property has always been non-marital and the source of funds for the asset was easily ascertained and always separate. *Zink* is inapposite.

Ken also makes the unusual argument that because Margaret's money was commingled with Christine, it loses its non-marital status. Ken makes the

observation that no Kentucky cases support this proposition. Clearly, an asset does not lose its non-marital characterization when it is commingled with another third-party's asset. Instead, an asset may relinquish its non-marital status when it is commingled with marital assets and cannot be traced. Indeed, non-marital property can in effect transmute into marital property when a non-marital claimant fails to adequately trace his or her non-marital interest to overcome the marital property presumption. *Terwilliger v. Terwilliger*, 64 S.W.3d 816, 821 (Ky. 2002). But that is not the situation here.

Substantial evidence supported the trial court's finding that the assets were non-marital. And the assignment to Margaret of the four Stifel-Nicolaus accounts and the two Myrtle Beach condominiums was not an abuse of discretion.

2. Ken's retirement accounts

Margaret's cross appeal challenges the trial court's findings and conclusions regarding Ken's four IRA accounts and one Thrift Savings Account. The trial court found that Ken maintained control of Oppenheimer IRA (Account No. 1870), Oppenheimer IRA (Account No. 2249), Bank of Kentucky IRA, Union Central IRA (Account No. 0381), and a Thrift Savings Account. Further, in its findings the trial court observed that Ken believed these accounts were non-marital accounts because they were started by him prior to the marriage. Then, the trial court states in its conclusions of law:

Kenneth, through his testimony, was able to demonstrate that the following accounts are non-marital retirement

accounts, started prior to the parties' marriage. Accordingly, they are awarded to him.

Margaret argues that the trial court erred in its findings, and therefore, the findings should be set aside. Ken counters that the trial court assigned him these retirement accounts in order to equitably divide the marital estate. But a reading of the trial court's language shows that it did not make this division on the basis of equity but rather designated the accounts as non-marital. This holding does not comport with Ken's testimony or the record.

A review of the record reveals that Ken testified that the accounts were either non-marital, marital with a non-marital component, or marital. The only account, which Ken claimed was entirely non-marital was the Union Central IRA (Account No. 0381). The proffered March 31, 2014 quarterly statement valued the 401K at \$53,916.25. Ken maintained that this account was completely his non-marital asset but was unable to provide any documentation to trace the asset.

Ken designated Oppenheimer IRA No. 2249 and a Thrift Savings Account as entirely marital. The March 31, 2014 statement valued the Oppenheimer IRA account at \$12,116.26, and the Thrift Savings Account at \$7,959.74.

Ken described the remaining two accounts as mixed marital, that is, partially non-marital and partially marital. The first account is Oppenheimer IRA No. 1870. The March 31, 2014 statement showed a value of \$10,013.81. Ken

claimed that he started the account prior to the marriage. Nonetheless, the earliest document he provided was dated December 31, 1992, and the balance was \$1,923.01. While Ken believed the IRA was started prior to the marriage, he was unable to provide any documentation and was uncertain as to the amount of the non-marital portion. He noted that the bulk of the increase occurred during the marriage. Furthermore, the earliest value, on the 1992 statement, was seven years after the parties' marriage in 1985.

Ken also maintains that the Bank of Kentucky IRA is both marital and non-marital. The value on March 31, 2014 statement was \$44,441.33. Ken stated that he began the account in 2004 with \$5,000. He pointed out, however, that the documents for the account show a deposit in August 2010 of \$89,002.23. Ken claimed the source for the money is his non-marital asset, a Crowne Life account. Although the Bank of Kentucky document shows a deposit of \$89,002.23, it denotes the payment as an IRA rollover. The designation "Crowne Life" is handwritten on the document. Furthermore, Ken does not provide any additional proof or documents to establish that the Crowne Life was non-marital or even the source of the rollover. Moreover, Ken testified that he took three withdrawals from this IRA, which totaled \$51,000. These withdrawals consisted of \$1,000 for living expenses and \$50,000 to loan his son from a prior marriage. While Ken stated that the loan had been completely repaid, he did not redeposit the repayment into this account but used it for living expenses.

Under Kentucky's statutory scheme for the distribution of property at dissolution, the trial court must first categorize each item of property as either marital or non-marital under the framework embodied in KRS 403.190. *Brown v. Brown*, 456 S.W.3d 823, 826 (Ky. App. 2015). And Kentucky law permits division of retirement accounts accumulated during the marriage, both vested and non-vested. *Holman v. Holman*, 84 S.W.3d 903, 907 (Ky. 2002).

The standard of review on appeal for a question involving the characterization of whether property is marital or non-marital is two-tiered. Factual findings of the trial court are reviewed under the clearly erroneous standard of CR 52.01, but the trial court's legal conclusions are reviewed *de novo* as an issue of law. *Smith v. Smith*, 235 S.W.3d 1, 6-7 (Ky. App. 2006). Here, the trial court erroneously made the finding that all five of these accounts were non-marital and assigned them to Ken. This was error.

First, the trial court found incorrectly because two accounts – Oppenheimer IRA No. 2249 and the Thrift Savings Account are entirely marital per Ken's testimony. Therefore, these two accounts should be equitably divided between the parties. In addition, the marital portions of the other accounts must also be equitably divided between the parties.

Two accounts were described by Ken as “mixed marital.” These accounts are Oppenheimer IRA No. 1870 and the Bank of Kentucky IRA. And Ken maintains that the Union Central IRA is entirely non-marital. Although Ken proffers that these three accounts are non-marital or marital/non-marital, he must

provide evidence to prove the non-marital portion. When the original property claimed to be non-marital is no longer owned or in existence, it is incumbent upon the party making the non-marital claim to trace the previously owned property into a presently owned specific asset. *Chenault v. Chenault*, 799 S.W.2d 575 (Ky. 1990).

Tracing has been defined as “the process of tracking property’s ownership or characteristics from the time of its origin to the present.” *Sexton v. Sexton*, 125 S.W.3d 258, 266 (Ky. 2004) (quoting BLACK’S LAW DICTIONARY (7th ed. 1999). “A party claiming that property, or an interest therein, acquired during the marriage is nonmarital bears the burden of proof.” *Id.* This burden is met when the party claiming that an asset is non-marital provides clear and convincing evidence that the claimed property is non-marital. *See Smith v. Smith*, 450 S.W.3d 729, 733 (Ky. App. 2014) (citations omitted).

We reverse the trial court’s findings that these five accounts are non-marital since the finding was clearly erroneous. And we remand for the trial court to make an equitable division of the marital accounts and to determine the marital portion of the three accounts labeled “non-marital” or “mixed marital” assets considering the proof necessary to establish the non-marital value.

3. Debts

Next, we address the trial court’s assignment of one-half the credit card debt to each party. The credit card debt was catalogued in Margaret’s Exhibit Number 6. The total amount of the credit card debt was \$39,590.66, and

accordingly, each party was responsible for \$19,795.33. The trial court reasoned that since the credit cards, and their respective debts, were acquired during the course of the marriage, each party was responsible for one-half the debt.

Ken makes two arguments. First, he maintains that the trial court erred in this division since it failed to engage in a *Neidlinger* analysis, that is, it did not make specific findings as to whether each debt was marital or non-marital. Second, Ken maintains that credit card debt was accumulated after the date of separation, and consequently, not marital. He believes that since the credit card debt was incurred after the parties separated, it was not marital debt.

To begin, we note Ken's statement that the issue was preserved by his motion to alter and amend. Significantly, however, Ken never provided a citation to the record in his brief where he objected to the characterization of these debts as marital during the trial. Under CR 76.12(4)(c)(v), it is necessary to reference in the brief where, in the record, the issue was preserved. "Compliance with this rule permits a meaningful and efficient review by directing the reviewing court to . . . where in the record the preceding court had an opportunity to correct its own error before the reviewing court considers the error itself." *Hallis v. Hallis*, 328 S.W.3d 694, 696-97 (Ky. App. 2010).

Although Ken proffers that he preserved the issue by making the motion to alter, such a motion is not sufficient. Moreover, it appears that Ken did not object at trial. Indeed, Margaret, in her brief, points out that Ken never disputed the marital status of the credit card debt. In fact, she cites to the trial

record⁸ and highlights where Ken's attorney objected to the relevance of Margaret's counsel's asking question about the "marital debts." Ken's counsel, in making the objection, said "these are all debts that have been accrued through the course of the marriage, and they're marital debts." And much of Margaret's testimony regarding the credit card debt was demonstrating that it was incurred to pay expenses to repair a building, which was a marital asset. It is incumbent upon a party to show where it objected and provided the trial court with an opportunity to make a ruling. Therefore, this issue has not been preserved.

Besides not preserving the issue for appellate review, Ken has not provided any proof that the credit card debts are non-marital. The party claiming that a debt is marital has the burden of proof. *McGregor v. McGregor*, 334 S.W.3d 113 (Ky. App. 2011). Margaret testified and provided information about the credit card debt. Ken did not challenge her characterization or provide evidence that it was incorrect. In fact, Ken has never provided any information about the proper division of this debt since he never specifically disputed charges on any of the credit cards.

Unlike marital property, there is no presumption that a debt incurred during a marriage is marital or non-marital in nature. *See Smith*, 235 S.W.3d at 15 (citing to *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 522 (Ky. 2001)). Instead, debts are generally "assigned on the basis of such factors as receipt of benefits and extent of participation[.]" *Neidlinger*, 52 S.W.3d at 523 (internal citations omitted). Ken

⁸ Trial, Video Rec. 7/11/2014 2:53:58-2:57:03.

did not show that the credit card debt was of benefit only to Margaret or that she alone participated in incurring these debts.

Additionally, Ken claimed that the credit card debt occurred after the date of separation, that is, after the parties began living separately, and hence, any debt incurred after separation is non-marital, and should be assigned to the party who incurred the debt. The trial court merely noted in its orders that the parties had been separated in excess of the requisite 60 days. Specific to the credit card debt, the trial court noted that even though the parties used different credit cards, they were all acquired and used during the marriage.

Debts incurred prior to dissolution, as previously noted, have no presumption of marital or non-marital status, statutory or otherwise. *Id.* at 522. Ken bolsters that the debt occurred after the parties separated because the credit card statements provided by Margaret had dates from April to June 2014. Therefore, he claims the debt occurred after the parties separated. But the dates on the statements only shows the accumulated debt and not when the debt was incurred.

“As with issues pertaining to the assignment of marital property, issues pertaining to the assignment of debts incurred during the marriage are reviewed under an abuse of discretion standard.” *Id.* at 523. Furthermore, the trial court has broad discretion in its allocation of marital debt. *Lykins v. Lykins*, 34 S.W.3d 816 (Ky. App. 2000). Not only was this issue unpreserved, but also Ken did not prove which debts were incurred by which party or challenge that the debts

incurred benefitted only Margaret. Accordingly, the trial court did not abuse its discretion by assigning each party one-half of the credit card debt.

The second issue concerning debt involves Petitioner's Exhibit 5.

Ken asserts that the trial court erred when it ordered him to reimburse Margaret \$42,732.15, as outlined in Petitioner's Exhibit 5. The trial court held:

The debts Petitioner acquired as detailed in Exhibit 5 all appear to be items owed to her; in other words, they appear to be expenses Respondent was to pay per previous court orders. As such Petitioner is entitled to reimbursement for this amount, or \$42,732.15.

Hence, the trial court characterized the "debts" in Exhibit 5 as expenses, which Margaret had already paid but one-half of the debt was to be reimbursed by Ken based on previous court orders. Supporting the trial court's reasoning is again the fact that the parties kept separate accounts throughout the marriage.

Ken disputes that these "debts" are expenses and suggests that the list only represents alleged marital debts incurred from 1997 to 2013. Additionally, Ken asserts in his brief that Margaret is seeking reimbursement from him to satisfy marital debts that occurred during the marriage and were paid with marital funds. Thereafter, Ken mentions in his brief several court orders that required him to pay a portion of the represented expenses. However, he contests seven of the fifteen expenses outlined in the exhibit. Thus, Ken challenges the findings of the trial court that these are expenses for which he is responsible for one-half of the amount.

Again, Ken does not indicate where, during the trial, he objected to the introduction of Petitioner's Exhibit 5 or to particular items in the exhibit. Ken does cite the trial video where Margaret testified about Exhibit 5.⁹ A review of the trial tape does not show Ken objecting to the explanation for the expenses nor making any arguments against the characterization of the expenses/debts. As noted previously, without demonstrating that these issues and these arguments were presented to the trial court for a ruling, an appellate court is left with nothing to review.

The Court of Appeals is one of review and is not to be approached as a second opportunity to be heard as a trial court. An issue not timely raised before the circuit court cannot be considered as a new argument before this Court.

Lawrence v. Risen, 598 S.W.2d 474, 476 (Ky. App. 1980).

And in *Raisor v. Raisor*, 245 S.W.3d 807, 808-09 (Ky. App. 2008), this Court relied upon the reasoning set forth in *Lawrence v. Risen* and confirmed that an appellant may not present an argument on appeal that was made under a different theory in the trial court. Consequently, we decline to address this claim as Ken "will not be permitted to feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1978), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321, 325 (Ky. 2010).

III. *Ken's income*

⁹ 7/11/14 2:45:10-2:53:03.

In Margaret's cross appeal, she argues that the trial court erred in its findings of fact regarding Ken's earning capacity. She claims that because the trial court did not consider her evidence about Ken's numerous bank accounts it erred. The evidence presented was about cash and check deposits, transfers, and payments, which she alleged, indicate that Ken is receiving income from an alternate source. A review of the trial court's orders shows that the trial court found that Ken earned approximately \$1,926 per month, and Margaret earned approximately \$4,367 per month. The trial court made no findings and based no conclusions of law on Margaret's testimony about Ken's additional earnings.

Indisputably, the trial court made no additional findings regarding Ken and Margaret's income. Nonetheless, the lack of findings regarding their income appears irrelevant in the matter at hand.

The primary issues in this matter concerned the disposition of property and evidentiary issues. The evidentiary issues about leading questions and the admission of exhibits clearly have no relevance to the parties' income. Whereas in assigning property pursuant to KRS 403.190, the only discussion of the parties' earning ability is found in KRS 403.190(1)(d), which directs the trial court to consider "[e]conomic circumstances of each spouse when the division of property is to become effective"

Here, the trial court divided the marital property equitably and assigned Margaret her extensive non-marital assets. Further, Margaret established no connection between the trial court's failure to address this evidence and the

disposition of the property, or any other potential marital demand. Moreover, we would be remiss if we did not highlight that the proffered evidence, particularly Petitioner's Exhibit 9, is quite flimsy. This exhibit lists Ken's checking accounts. It maintains that the first eight checking accounts received over \$200,000 in 2011. The exhibit provides a calculation supposedly showing that Ken had an additional sources of income in 2011. Nonetheless, we have no authenticated evidence of the deposits, transfers, and payments from these checking accounts. In essence, the exhibit does not support Margaret's allegations.

Margaret also provided Petitioner's Exhibit 21. This exhibit represented another checking account with deposits and withdrawals by Ken. Margaret alleges that Ken received cash deposits into this account of \$33,000 but the amount shown does not equal this amount. While Margaret maintains that these two exhibits clearly show that Ken is receiving income from another source and that this amount should be included in his earning capacity, the second exhibit just show a lot of money in and out. These parties had a variety of marital and non-marital assets. And they kept their checking accounts, assets, and payments completely separate during the marriage.

In this matter, the trial court's findings were not clearly erroneous because Margaret did not provide substantial evidence, that is, evidence when taken alone or in light of all the evidence had sufficient probative value to induce conviction in the mind of a reasonable person. Nor did it abuse its discretion in ascertaining the parties' incomes. Finally, as previously expressed, Ken and

Margaret's earning capacity, without reference to any disputed issue, is irrelevant. Thus, we hold that the trial court did not make an erroneous finding or abuse its discretion in not addressing this inchoate and irrelevant information.

IV. *Post-decree Appeal*

Ken styles this appeal as an appeal of a post-decree motion for contempt. On June 9, 2015, Margaret filed two motions. The first motion was a motion to hold Ken in contempt and to enforce previous orders including the attorney fees associated with the motion. The previous orders included an order that the parties equally divide the expenses related to the marital residence.

The second motion requested an order that Ken pay his share of the expenses for getting the marital residence ready for sale. The parties lived in side-by-side condominiums during the marriage, but after the separation, a wall was built between the two condominiums. Following the entry of the divorce decree, Ken vacated his property. However, according to the motion, he had left furniture, clutter, and trash. Furthermore, the property had not been maintained, and consequently, Margaret had to clean and repair the condominium.

The matter was set for two different hearing dates. Under the Kenton Family Court scheduling system, hearings are double-booked and set for two alternate dates. In the case at bar, the trial court scheduled this hearing second on October 23rd, if a custody hearing did not happen. The custody hearing did not take place, and hence, the parties' hearing was held on October 23, 2015. But Ken, apparently thinking the first hearing would occur, did not appear. Nonetheless, his

attorney was present. And Ken's attorney moved to continue the hearing to the next scheduled date.

The trial court denied the request for a continuance. It then conducted a hearing, and subsequently, on November 6, 2015, entered an order granting a portion of Margaret's motions. Ken now appeals from this order. Later, Ken filed a motion to consolidate this appeal with the early appeal and cross appeal. Our Court granted the motion to consolidate the appeals.

On appeal, Ken argues that the trial court abused its discretion by failing to grant the motion for a continuance and arguing that the motion for contempt was procedurally flawed. He contends it was defective because he was not permitted to explain the reason he should not be held in contempt or correct it. Margaret filed no response to this appeal.

1. *Continuance*

The factors considered to review a trial court's denial of a continuance are the length of delay; previous continuances; inconveniences to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice. *Guffey v. Guffey*, 323 S.W.3d 369, 371 (Ky. App. 2010).

A "trial court has a broad discretion in granting or overruling a motion for continuance and [an appellate court] will not interfere in the exercise of that discretion unless it is clearly abused." *Stallard v. Witherspoon*, 306 S.W.2d 299,

(Ky. 1957). And as previously cited, the test for abuse of discretion is “whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principals.” *English*, 993 S.W.2d at 945.

Here, Ken’s reasoning regarding the trial court’s abuse of discretion in denying the motion for continuance is flawed. The following sentence is found in his brief:¹⁰ “All of the parties and counsel must be prepared as the ‘second out’ and appear on the ‘second out’ date.” The hearing was scheduled on October 23rd, and consequently, all the parties and counsel were to be prepared and to appear on that date. The trial court did not abuse its discretion by having the hearing on the scheduled date. The fact that Ken knew and was supposed to attend, negates any validity to the reasoning that the denial of the “continuance” was an abuse of discretion. Accordingly, the trial court did not err.

2. *Motion for Contempt*

Ken next argues that because Margaret styled the first motion as a “motion for contempt,” rather than a “motion for show cause” he was not given an opportunity to explain or purge himself of the contempt, the trial court erred. This is incorrect. First, although he was not present, his attorney was. Second, Ken had notice of the hearing, so his non-appearance was voluntary. Finally, and most significant, is that, in fact, he was not held in contempt. In part, the order clearly holds and states (in bold): “However the Court does not find Mr. Wolfe in

¹⁰ Page numbers were not provided.

contempt.” The trial court did not abuse its discretion in granting Margaret’s motions.

CONCLUSION

We have affirmed the trial court on all issues other than concluding it made erroneous finding that Ken’s retirement accounts were non-marital. We have remanded this issue to the trial court for new findings on this issue only, and after making these findings, an appropriate assignment of the assets. Thus, the orders of the Kenton Family Court are affirmed in part, reversed in part, and remanded.

ALL CONCUR.

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