NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA 08-995

	Opinion Delivered MAY 20, 2009
BRUCE A. KELLER APPELLANT	APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT, [NO. DR2007-1798-5]
V.	HONORABLE GARY L. CARSON, JUDGE
SANDRA E. KELLER APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Bruce A. Keller and appellee Sandra E. Keller were married in May 1986 and separated in September 2007, at which time Ms. Keller filed for divorce. After a hearing, the trial court entered a divorce decree on June 20, 2008, awarding Ms. Keller custody of the parties' two children, who were then ages eleven and twelve. Mr. Keller was ordered to pay $705 in monthly child support, and $900 in alimony until Ms. Keller remarries. Mr. Keller was also ordered to maintain life insurance and health insurance for the benefit of the children, and to pay any additional medical, dental, and vision expenses. There was a checking account in Mr. Keller's name that held $28,000 on the parties' date of separation, and the trial court ordered Mr. Keller to pay Ms. Keller $5526, which represented half of Mr. Keller's expenditures from the account for which Ms. Keller received no benefit. The

parties owned no real property and agreed that each retain all personal property currently in their possession. Finally, the trial court awarded Ms. Keller $5000 in attorneys fees.

Mr. Keller now appeals from the decree of divorce, raising two arguments for reversal. First, he argues that the trial court erred in treating the checking account as marital property. Next, Mr. Keller contends that the trial court abused its discretion in awarding attorney's fees. We affirm.

Ms. Keller testified that she was diagnosed with fibromyalgia in 1997, and has not worked since 2000. Mr. Keller was employed through the end of 2003, and has not worked since then as a result of being disabled. Mr. Keller receives Veterans Administration benefits, which according to Ms. Keller covers his medical bills and prescriptions.

Mr. Keller testified that after his employment was terminated, it took a couple of years before he was declared 100% disabled. He cashed out a 401k worth about $35,000 in late 2003, which he said the parties used to cover their living expenses. Mr. Keller received net monthly income of $4242 from VA benefits and social security during the latter part of the parties' marriage, and stated that his will be reduced to $4092 upon divorce. Because of his permanent disability, Ms. Keller and their two children receive a total of $735 in monthly social security benefits, which Mr. Keller said will remain intact after the divorce.

Mr. Keller stated that as a result of the parties' separation, he was required to purchase a car, rent an apartment, and furnish the apartment. He provided a lengthy list of expenses he incurred from the time of separation until the divorce hearing, and he paid for these

expenses out of his checking account. That account contained $28,000 when the parties separated, and Mr. Keller testified that the balance has now been reduced to $1961.

Mr. Keller's first argument on appeal is that the trial court erred in awarding Ms. Keller any amount from the $28,000 checking account in his name because the account was not marital property. Mr. Keller relies on Ark. Code Ann. § 9-12-315(b)(6) (Repl. 2008), which provides:

> (b) For purposes of this section, "marital property" means all property acquired by either spouse subsequent to the marriage except:
> (6) Benefits received or to be received from a workers' compensation claim, personal injury claim, or social security claim when those benefits are for any degree of permanent disability or future medical expenses[.]

Mr. Keller acknowledges that neither party put on specific testimony about the source of the $28,000 checking account. However, Mr. Keller testified that his only source of current income is from VA disability benefits and social security benefits, and he asserts that such benefits are excluded from the definition of marital property under the above provision. He submits that if the sole source of the checking account balance was from his disability benefits, then the account is his nonmarital property and should not be divided between the parties. Mr. Keller asserts that the record is not fully developed on this issue, and requests that we reverse and remand to take more evidence and testimony as to the source of the checking account.

The record does not reflect that Mr. Keller made this argument to the trial court. In both opening statement and closing argument appellant's counsel made reference to the $28,000 checking account, and indicated that for the most part the account no longer exists

but had been converted into assets. Instead of arguing that the account was nonmarital, in closing argument appellant's counsel invited the trial court to divide some of the property he bought with the checking account with Ms. Keller. At no time did Mr. Keller ask the trial court to declare the account to be his separate property. It is well settled that where the abstract does not reflect that the argument was made to the trial court, the appellate court need not reach the merits of the argument on appeal. *See Collins v. Collins*, 347 Ark. 240, 61 S.W.3d 818 (2001).

Furthermore, there is a presumption that all property acquired during a marriage is marital property. *McDermott v. McDermott*, 336 Ark. 557, 986 S.W.2d 843 (1999). The burden is on the party who asserts an interest in property to establish that it is in fact separate property not subject to division. *Aldridge v. Aldridge*, 28 Ark. App. 175, 773 S.W.2d 103 (1989). In this case the parties were married for twenty-two years, and Mr. Keller failed to put on proof to meet his burden of showing that the checking account was not subject to division as his nonmarital property. In fact, he concedes on appeal that there was a lack of evidence to establish the character of the checking account. Therefore, the trial court properly followed the presumption that the account was a marital asset.

With respect to the division of property, we review the trial court's findings of fact and affirm them unless they are clearly erroneous. *Farrell v. Farrell*, 365 Ark. 465, 231 S.W.3d 619 (2006). In the present case, the trial court concluded that Ms. Keller was entitled to an offset for the money spent by Mr. Keller from the checking account that did not benefit Ms. Keller. These expenses included $5000 spent by Mr. Keller in attorney's fees as well as

$6052 spent on other expenditures since the parties' separation. The trial court awarded Ms. Keller one-half of the aggregate amount, which was $5526. We find no clear error in the trial court's decision to award Ms. Keller a share of the presumptively marital account.

Mr. Keller's remaining argument is that the trial court erred in awarding Ms. Keller $5000 in attorney's fees given the circumstances of this case. However, we disagree.

Arkansas Code Annotated section 9-12-309(a)(2) (Repl. 2008) provides that in the final divorce decree, the trial court may award the wife or husband a reasonable attorney's fee. A trial court has considerable discretion to award attorney's fees in a divorce case. *McKay v. McKay*, 340 Ark. 171, 8 S.W.3d 525 (2000). In determining whether to award attorney's fees, the trial court must consider the relative financial abilities of the parties. *Id.*

There was evidence from which the trial court could conclude that neither party had any reasonable expectation of employment, and that the only source of income between them was derived from Mr. Keller's disability benefits. When factoring in the child-support and alimony awards, the resulting post-divorce household incomes of the parties are comparable. However, Ms. Keller has the responsibility of being the primary custodian of the children. Furthermore, during the parties' separation, Mr. Keller had access to a $28,000 checking account, while Ms. Keller qualified for food stamps. Moreover, during the seven-month period that elapsed between separation and final hearing, Mr. Keller received $4,242 of disability benefits each month, less $705 of child support that he paid to Ms. Keller, for a net income of $3,537 per month. During these seven months Ms. Keller received $735 per month as social security dependents' benefits plus child support of $705 for a total of $1440

per month, resulting in a difference of incomes between the two households of $2100 per month or $14,700 over the seven-month period. Consequently, we conclude under these circumstances that the trial court's award of attorney's fees to Ms. Keller, which were incurred during these seven months, was not an abuse of discretion even though it results in Mr. Keller paying Ms. Keller's attorney a fee of $5000 as well as the $5000 he paid to his own.

Affirmed.

BAKER, J., agrees.

HART, J., concurs.

HART, J., concurring. I agree that this case must be affirmed, but I write separately to state that I do not believe it was equitable to make Bruce pay Sandra' s attorney fees. After the trial court split all of the parties' property evenly, and awarded Sandra alimony, which equalized the parties' income, Bruce clearly was not in a superior financial position. Although courts have the inherent power to award attorney' s fees in domestic relations proceedings, they are not required to do so, *see Williford v. Williford*, 280 Ark. 71, 655 S.W.2d 398 (1983), and unless the trial judge finds it to be equitable, there is no compelling reason for the husband to automatically pay the wife' s attorney' s fees. *Wilson v. Wilson*, 294 Ark. 194, 741 S.W.2d 640 (1987). Furthermore, in *Jablonski v. Jablonski*, 71 Ark. App. 33, 25 S.W.3d 433 (2000), this court held that when determining whether to award attorney' s fees, the trial judge must consider the relative financial

abilities of the parties. There is absolutely no indication that the trial judge did that here. Although the trial judge's decision on whether to award attorney fees will not be reversed absent an abuse of discretion, *id.*, by the same token, an apparent failure to exercise discretion is reversible error. *Tortorich v. Tortorich,* 50 Ark. App. 114, 902 S.W.2d 247 (1995).

Nonetheless, I believe this case must be affirmed because Bruce failed to preserve this issue by arguing to the trial court that an award of attorney fees in this case was inequitable. It is axiomatic that we cannot address an issue raised for the first time on appeal. *Dunaway v. Garland County Fair & Livestock Show Ass'n, Inc.*, 97 Ark. App. 181, 245 S.W.3d 678 (2006).