

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001210-MR

NICK A. COOLEY

APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RON JOHNSON, JUDGE
ACTION NO. 97-CI-00202

VIRGINIA ANN RIDDLE COOLEY

APPELLEE

AND: NO. 1998-CA-001211-MR

VIRGINIA ANN RIDDLE COOLEY;
LAWSON & LAWSON, P.S.C.;
SUSAN C. LAWSON, ATTORNEY;
LANDRUM & SHOUSE; STOLL, KEENON &
PARK, L.L.P.; HISLE & COMPANY,
CERTIFIED PUBLIC ACCOUNTANTS;
JOE D. WEDDINGTON REAL ESTATE
AND APPRAISAL CO.

CROSS-APPELLANTS

v. CROSS-APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RON JOHNSON, JUDGE
ACTION NO. 97-CI-00202

NICK A. COOLEY

CROSS-APPELLEE

OPINION
AFFIRMING IN PART; REVERSING IN PART;
VACATING IN PART; AND REMANDING

** ** * * *

BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

GUIDUGLI, JUDGE: This is an appeal by Nick Cooley and a cross-
appeal by Virginia Ann Cooley from a judgment of the Harlan
Circuit Court in a dissolution of marriage action. The issues

raised relate primarily to the valuation of the marital estate and the determination of marital and non-marital interests therein. Various other issues, however, are also raised. As to Nick's appeal, we vacate and remand on the issues of Nick's nonmarital interest in Premium Elkhorn Coal Company, Inc. and the valuation of Gossage Farm. As to Ann's appeal, we reverse and remand on the issue of the trial court's failure to award interest on the unpaid balance of her share of the marital property. We affirm as to all other issues.

Nick A. Cooley (Nick) and Virginia Ann Riddle Cooley (Ann) were married on August 18, 1979. They have three children, Stewart, born February 23, 1980; Lindsay, born January 28, 1981; and Mitchell, born July 22, 1983. Nick was a multi-millionaire at the time the parties married, and the parties also accumulated a multi-million dollar marital estate. At the conclusion of the trial proceedings, the marital estate was determined to be almost \$12,000,000.00, and Nick's nonmarital estate was determined to be in excess of \$25,186,225.00. The large estates stem primarily from Nick's coal business operations.

Nick filed a petition to dissolve the marriage on August 17, 1990, in Wayne Circuit Court. Following this, the parties reconciled for a period of time. In the summer of 1992, Ann reinitiated proceedings by amended pleadings. In September 1992 a Special Judge, Judge Daniel Venters, was appointed to preside in the proceedings. Thereafter, the matter again remained dormant until July 1993, when Ann again reactivated the

divorce proceedings by filing a motion for temporary support and for other temporary orders.

In June 1994, the matter was transferred from the Wayne Circuit Court docket to the Pulaski Circuit Court docket. Thereafter, discovery commenced and continued through 1994 and 1995. Also during this time, extensive litigation occurred relating primarily to visitation issues, and Ann sought to have Judge Venters disqualified from presiding in the case. Ultimately, Judge Venters elected to have himself disqualified, and in April 1995 Judge Ron Johnson was appointed as Special Judge.

The matter was tried before Judge Johnson in January 1996. The initial Judgment of the trial court was entered on February 12, 1996, granting the dissolution and addressing issues of custody, visitation, and child support. Pending the filing of expert evidentiary depositions, the trial court reserved rulings as to valuation and distribution of property and maintenance.

The depositions were completed, and in May and June 1996, respectively, Nick and Ann filed their memoranda as to all issues of valuation, tracing, and the proposed distribution of the marital estate. The trial court then appointed a Special Domestic Relations Commissioner and referred the matter to him. The Commissioner's report was filed on July 9, 1997, and each party excepted thereto.

On October 15, 1997, the trial court entered an order accepting the Commissioners Report in part, modifying it in part, and reserving several issues for further consideration. The order

distributed the marital property 70% to Nick and 30% to Ann. On January 9, 1998, the trial court entered a "Final Judgment" wherein it ruled on all outstanding issues, including those relating to the valuation and distribution of assets. Each party then filed a post-judgment motion to alter, vacate, or amend. By order dated March 24, 1998, the trial court ruled on the motions and made substantial modifications to its original judgment. Nick and Ann then filed these appeals.

Issues Raised In Nick Cooley's Appeal

Premium Elkhorn Coal Company, Inc.

Nick contends that the trial court erred in determining that 50% of his 100% interest in Premium Elkhorn Coal Company, Inc. (Premium Elkhorn), was marital property.

At the time the parties were married, in August 1979, there were 200 shares of outstanding stock in Premium Elkhorn. One hundred (100) shares of that stock were owned by Nick, and one hundred (100) shares were owned by Nick's sister, Carol Cooley Martin. On December 31, 1983, an agreement was entered into under which Premium Elkhorn would purchase Martin's 100 shares of stock, thereby retiring Martin's stock and leaving Nick as the sole shareholder in the corporation. Under the terms of the agreement, Martin was to be paid \$500,000.00 immediately, with an additional \$3,150,000.00 to be paid over time based upon a percentage of the coal sales of Premium Elkhorn. Pending full payment, the stock certificates were required to be held in

escrow, but Nick was, with certain exceptions, generally given the right to vote the stock in any transaction affecting the normal course of business. In addition, as the company's sole shareholder, Nick was entitled to all of the company's profits.

In his July 9, 1997, report, the Commissioner determined that the 1979 value of Premium Elkhorn was \$10,059,595.00, with Nick's 50% share valued at \$5,029,798.00; that the present value of the corporation was \$11,041,105.00; that Nick was now the sole owner of Premium Elkhorn; that there had been an increase in the value of Nick's interest of \$6,011,307.00; and that the increase in value was marital property, of which Ann should be awarded 50%, or \$3,005,803.50.

Both sides excepted to the Commissioner's recommendation, and in its October 15, 1997, order the trial court reserved this issue for subsequent determination. In its June 9, 1998, order the trial court determined that there had been no increase in the value of Premium Elkhorn because the significant depletion of the company's coal reserves between 1979 and 1996 precluded the possibility that there had been an increase in the company's value. Ann challenged this determination in her post-judgment motion to alter or amend.

In its March 24, 1998, post-judgment order, the trial court granted Ann's motion to amend on the basis that its June 9 order had not considered that during the marriage Nick's interest in Premium Elkhorn increased from 50% to 100%. Upon reconsideration, the trial court determined that the 50% interest in Premium Elkhorn which accrued to Nick as a result of the

retirement of Martin's stock was marital property. The trial court accepted Nick's valuation of Premium Elkhorn of \$11,011,767.00. 50% of this amount was restored to Nick as his non-marital property, and the remaining 50%, or \$5,505,883.50, was divided 70% to Nick and 30%, or \$1,651,765.00, to Ann.

Nick raises three arguments in opposition to the trial court's treatment of Premium Elkhorn. First, Nick argues that "[t]he undisputed evidence is that the asset owned by Mr. Cooley in 1979 consisting of 100 shares of Premium Elkhorn Coal Corporation stock had a value greater than the value of the entire corporation presently." Nick's contention that the evidence is "undisputed" does not appear to be accurate. To the contrary, as illustrated by Exhibit 4 of Nick's brief, it appears to be Ann's contention that the value of Nick's 1979 50% interest was \$5,059,595.00 and that the value of his 1995 100% interest was \$16,070,903.00.

Nick's second argument advocates a "Brandenburg approach" to this issue.¹ Such an approach was used with respect to several of the other assets in this case,² and we agree with Nick that this would be an appropriate method to use in separating out the ownership of Premium Elkhorn into its marital and nonmarital components. The trial court did, in fact, use a Brandenburg approach; however, it does not appear that the trial

¹See Brandenburg v. Brandenburg, Ky. App., 671 S.W.2d 871 (1981).

²See, for example, the discussion of Transfinancial CD 5118 at pages 18-20, infra. Included therein is a discussion of the "Brandenburg approach" as the parties and trial court have used that term in this case.

court sufficiently broke down the Premium Elkhorn transaction into its component parts.

It is undisputed that the 50% interest in Premium Elkhorn that Nick owned at the time of the marriage is his nonmarital interest. The trial court assigned Nick this 50% using the October 1995 valuation of \$11,011,767.00, a valuation provided by Nick's experts. At issue is whether there is any portion of the other 50% interest (the Martin interest) which is nonmarital. This requires a separate examination of (1) the initial \$500,000.00 payment to Martin; (2) the payments made to Martin between December 1, 1983, and the 1995 valuation; and (3) post-divorce (post valuation date) payments to Martin. If some portion of these components is nonmarital, then Nick should rightly be credited with a nonmarital interest in the Martin interest.

The initial payment was made in conjunction with the acquisition of the stock, presumably sometime around December 31, 1983. This was four years and three months into the marriage. By then a large volume of marital funds had flowed into and through the company. The 1979 Premium Elkhorn Balance Sheet,³ reflects that at that time the company had current assets in excess of \$595,000.00, including \$566,198.00 in cash. We do not have a December 1983 Balance Sheet, however, it appears that under a Brandenburg approach, some percentage of the initial \$500,000.00 payment to Martin may be traceable to the 1979 nonmarital liquid assets. We therefore remand this issue for a

³See Appellant Brief Appendix 4.

determination as to whether any percentage of the initial \$500,000.00 payment to Martin is attributable to Nick's nonmarital interest in the company, if any. The analysis should take into consideration the tracing rules of Allen v. Allen, Ky. App., 584 S.W.2d 599 (1979). The source of the payments made to Martin between December 1, 1983, and the valuation date, was marital funds, and that portion of the Martin interest acquired by the payment of those funds is marital property. During this time Nick was the sole stockholder of Premium Elkhorn. Nick was entitled to all of the profits of the company, and those profits were marital income. Payments to Martin during this period were indexed to company profits. It follows that the portion of the Martin interest acquired with profits generated during this time period is marital property.

Finally, there was a balance owing to Martin at the valuation date of \$762,609.00. Since this amount will be, or has been, paid-off post-divorce, it will be, or has been, paid off with nonmarital funds. This portion of the Martin interest is nonmarital property. Nick's valuation, the valuation accepted by the court, takes this into account. The October 1995 valuation of Premium Elkhorn includes a deduction for the remaining principle owed to Martin for the purchase of her interest.⁴ This deduction credits Nick for the nonmarital portion of Premium Elkhorn which will, or has been, paid for out of post-divorce nonmarital funds.

⁴ See Appellant Brief, Appendix 5, Note 7.

Based upon the foregoing, with the exception of the initial payment, the trial court's assignment of the marital and nonmarital components of Premium Elkhorn was neither clearly erroneous nor an abuse of discretion. This issue is remanded for a determination as to whether there is a nonmarital component included in the initial \$500,000.00 payment to Martin.

Gossage Farm; Shearer Farm; McCutchen Properties; Conley Bottom/Top Stop.

Next, Nick contends that the trial court erred in its valuation and distribution of certain tracts of real property. Specifically, Nick objects to the trial court's treatment of four tracts of real property: the Gossage farm; the Shearer farm; the McCutchen Farm; and Conley Bottom/Top Stop.

Gossage Farm. It is undisputed that the Gossage farm is 100% marital property. The property was appraised by Ann's expert, Joe Weddington, Jr., at \$160,000.00. Nick, acting as his own expert, appraised the property at \$100,000.00. The Commissioner did not attempt to resolve the discrepancy, but instead recommended that the property be sold as "the most effective and accurate means of obtaining the fair market value of the property."

In its January 9, 1998, order the trial court stated the it "finds that the fair market value of this property is \$125,000.00. Despite the flaws in Mr. Weddington's assumption of acreage, his appraisal, after Court's adjustment, is more reliable in all other respects than Mr. Cooley's inexperienced

effort." In its March 28, 1998, order, the trial court sustained Ann's motion to amend the valuation of the Gossage property to the value as appraised by Weddington. The trial court stated that this "is done after revisiting the proof on the value of this property and concluding that the Court did intend to use Mr. Weddington's figure as the more reliable one, in this instance, as opposed to the figure argued by Mr. Cooley, who acted as his own appraiser."

Weddington based his appraisal on a 249-acre tract valued at \$642.57 per acre. However, according to the deed, the Gossage farm is 184 acres. The trial court's January 9, 1998, order recognized this "flaw" in Weddington's appraisal, and seemed to indicate that it was accepting Weddington's per acre valuation adjusted for Weddington's overstatement in acreage.

It is unclear why, in its March 28, 1998, order the trial court decided to accept Weddington's appraisal of \$160,000.00 when that value was based on acreage inconsistent with the deed and the inconsistency was previously identified as a flaw by both the Commissioner and the trial court. Nick attributes the trial court's valuation to a "clerical error." Because of the confusion surrounding the trial court's valuation of the Gossage Farm, we vacate as to this issue and remand for additional findings as to how the trial court came to accept an appraisal premised upon an incorrect acreage assumption and, if necessary, a correction of that determination.

Shearer Farm. The Shearer Farm is a large tract of real estate in excess of 700 acres located in Wayne County. The

trial court accepted Nick's valuation of the farm of \$595,000.00. Nick contends that the trial court was clearly erroneous in accepting Ann's marital property calculations rather than his own. In her cross-appeal, Ann challenges the valuation of the farm.⁵

Before the trial court, Nick argued that the Shearer property contained a marital component of 23.29% and a nonmarital component of 76.81%. Ann's experts argued that those percentages were 36.42% and 63.58%, respectively. The Commissioner, determined that the Shearer property had a marital component of 19.39% and a nonmarital component of 80.71%.

In its order of October 15, 1997, the trial court stated, "[Ann] objected to the recommendation of the Commissioner that [Nick's] non-marital [sic] interest in this property was 19.39%. The Court will ascertain subsequently the non-marital portion of Mr. Cooley in and to this property after a review of the testimony in this case." In its order of January 9, 1998, the trial court stated that it "confirms the Commissioner's finding of [Nick's] non-marital interest of 19.39 [sic] percent" In its order of March 24, 1998, the trial court stated that "[Nick's] motion to revise the marital and non-marital percentages relating to the Shearer Farm is GRANTED. However, the Court adopts the expert testimony provided by [Ann] concerning the marital and non-marital percentages relating to this property, with 63.58% being Mr. Cooley's non-marital percentage and 36.42% being the marital percentage."

⁵See page 45, *infra*.

The experts employed by Nick and Ann to do the tracing calculations with respect to the Shearer property arrived at conflicting marital percentages. The trial court was in the best position to judge the credibility of the experts and to resolve the dispute between them. CR 52.01; Chalupa v. Chalupa, Ky. App., 830 S.W.2d 391, 393 (1992). The professionals made different assumptions regarding the tracing of the proceeds from the sale of the Cooley Coal and Land Company, and the professional analysis of the transaction by Ann's experts supports the trial court's decision. There is substantial evidence in the record to support the trial court's finding as to the marital component of Shearer Farm, and the finding was therefore not clearly erroneous. Janakakis-Kostun v. Janakakis, Ky. App., 6 S.W.3d 843, 852 (1999). We will not disturb the trial court's conclusion as to the marital and nonmarital components of the Shearer property. Heller v. Heller, Ky. App., 672 S.W.2d 945, 947 (1984).

McCutchen Properties. The McCutchen properties consist of a 260-acre farm purchased during the marriage, and three smaller adjacent tracts acquired thereafter. For purposes of appraisal and Brandenburg calculations, Ann lumped the four properties together. Nick's experts appraised the tracts separately. In his report, the Commissioner mistakenly determined that the principal tract was Nick's nonmarital property, and this recommendation was rejected in the trial court's order of October 15, 1997.

In its order of January 8, 1998, the trial court found that the minor tracts, valued at \$53,500.00, were 100% marital property. With regard to the principal 260-acre tract, the trial court determined Nick's nonmarital portion to be 59.3%, which was the percentage as determined by Ann's expert. \$250,000.00 was originally paid for the property, so Nick's nonmarital portion of the original purchase price was determined to be \$148,250.00. ($\$250,000.00 \times 59.3\%$).

The trial court determined the current fair market value of the property to be \$425,000.00. The trial court concluded that "[t]herefore, the non-marital portion of the fair market value of the McCutchen Farm is 35% . . . making that part assignable to [A]nn to be 30% of 65%[.]" In his brief, Nick expresses confusion as to where the 35% figure came from. It came from the rounding of the calculation $\$148,250.00/\$425,000.00$.

As we interpret its order, the trial court determined that the only nonmarital property attributable to the entirety of the McCutchen properties was \$148,250.00. It is undisputed that the three minor properties were 100% marital. As to the appreciation in the principal 260-acre farm, the trial court considered the entire \$175,000.00 ($\$425,000.00 - \$250,000.00$) in appreciation which occurred during the marriage to be attributable to "active" appreciation due to the joint efforts of the parties. Since the appreciation was not "passive" appreciation, it was not subject to the Brandenburg formula. In other words, Nick's original marital portion did not appreciate,

but, rather, remained at \$148,250.00. Goderwis v. Goderwis, Ky., 780 S.W.2d 39, 40 (1989).

Significant improvements were made to the "barn house" during the marriage through the joint efforts of the parties. This would account for, and support, the trial court's conclusion that the appreciation to the property was active appreciation. We will not disturb the trial court's valuation and assignment of marital property as to the McCutchen Properties. Heller, supra.

Conley Bottom/ Top Stop. The Conley Bottom/Top Stop properties is a collective reference used by the parties in the course of the valuation process for five separate tracts of real property located in the Conley Bottom section of Wayne County. The property includes, among other things, a boat dock, a convenience store, boat storage facilities, and several tracts upon which are located houses.

Ann's expert valued the properties at \$800,000.00. Nick's expert valued the properties at \$498,500.00. The Commissioner recommended that the property be sold, but this was rejected by the trial court in its order of October 15, 1997. In its January 9, 1998, order the trial court found the fair market value of the property to be \$600,000.00, stating that "[t]he Court sympathizes with the Commissioner and is equally perplexed by [the] great range between the two valuations, but does find that the appraisal made by Mr. Zimmerman [Nick's expert] is not as conservative as Mr. Weddington's [Ann's expert] is liberal."

Nick's argument on appeal relates primarily to the lack of credibility of Mr. Weddington. Nick cites to errors allegedly

made by Weddington in his appraisal, including his attribution of a nonexistent residence to a tract of property, his overvaluation of the convenience store, and his overvaluation of the boat dock. The trial court appears to have largely agreed with Nick as we note that the trial court came down \$200,000.00 from Weddington's appraisal while coming up only \$101,500.00 on Nick's appraisal. In effect, the trial court found Nick's appraisal to be 2/3 more credible than Ann's. Since the trial court valued the property within the range as appraised by the competing experts, we discern no abuse of the trial court's discretion. Roberts v. Roberts, Ky. App., 587 S.W.2d 281 (1979).

Transfinancial CD 5118 and Transfinancial CDs 10784, 10785, and 10786.

Next, Nick contends that the trial court erred in allocating the marital and nonmarital components of certain certificates of deposits.

Transfinancial CD 5118. CD 5118 was acquired on June 5, 1980. It represents a rollover of CD 4132, which was purchased on March 6, 1980, for \$400,000.00. According to Nick's tracing, the funds used to purchase CD 4132 came from one of his personal accounts; that account contained \$154,000.00 in August 1979 at the time the parties married; \$707,815.00 in nonmarital funds representing the sale of Nick's interest in Chapparal Coal Company was deposited into the account on September 4, 1979; and additional deposits totaling \$439,000.00 were deposited through March 6, 1980. As we understand Nick's tracing, no other

deposits or withdrawals were made, and therefore the account balance on March 6, 1980, was \$1,300,815.00, \$816,815.00 (66.25%) of which was his nonmarital property and \$439,000.00 (33.75%) was commingled marital property. It is Nick's position that there was in excess of \$400,00.00 in his nonmarital funds in the account when CD 4132 was purchased on March 6, 1980, from the account, and therefore CD 4132 was nonmarital and, similarly, roll-over CD 5118 is nonmarital.

The Commissioner agreed with Nick's tracing and determined that CD 5118 was Nick's nonmarital property. In its order of October 15, 1997, the trial court rejected the Commissioner's recommendation and, instead, using what it termed a "Brandenburg approach," allocated 33.75% as marital property and 66.25% as Nick's nonmarital property. The trial court did not abuse its discretion in so doing.

Brandenburg v. Brandenburg, Ky. App., 617 S.W.2d 871 (1981) sets forth guidelines for the apportionment of property into marital and nonmarital components. The approach is most commonly used to allocate appreciated equity between its marital and nonmarital components by establishing base percentages for each component. However, the approach has also been used to establish the base percentages irrespective of any appreciation in the asset. See Lampton v. Lampton, Ky. App. 721 S.W.2d 736 (1986) (Brandenburg apportionment method used to allocate gifted stock into marital and nonmarital components).

In support of his position that CD 5118 is 100% nonmarital, Nick relies on Allen v. Allen, Ky. App. 584 S.W.2d

599 (1979). In Allen we determined that tracing was satisfied, as far as money in a bank account was concerned, when it was shown that nonmarital funds were deposited into an account and commingled with marital funds and the balance of the account was never reduced below the amount of the nonmarital funds deposited. Nick attempts to use Allen beyond its intended scope. The tracing approved in Allen begins and ends with a single money account and does not reach the tracing beyond the account as attempted here by Nick. For example, if the bank account from which CD 4132 was purchased had never fallen below \$816,815.00, the total amount of nonmarital funds traceable to the account, Nick would have been entitled to apply Allen to prove that amount as his nonmarital funds. But once his nonmarital funds were mixed with marital funds, if a purchase is made from the account, it cannot be said that exclusively marital, or nonmarital, funds were used in the purchase.

Transfinancial CDs 10784, 10785, and 10786. Transfinancial Bank CDs 10784, 10785, and 10786 were acquired in July 1983. Each CD is for \$100,000.00.

Nick contends that in May 1983 he sold 750 shares of First Guaranty Bank nonmarital stock for \$487,500.00; that the proceeds from this sale were deposited into his account at First Guaranty Bank of Martin (which subsequently changed its name to Transfinancial Bank); that this deposit brought the balance in the account to \$617,909.33; that on July 23, 1983, a debit memo was entered charging the account \$300,000.00 for the three CDs; and that since the purchase price of the CDs was less than his

recent deposit, pursuant to Allen v. Allen, supra, he had traced the purchase of the CDs to nonmarital funds and, therefore, the CDs were nonmarital property.

The Commissioner concluded that Nick had not adequately traced his First Guaranty Bank stock sale into the three CDs. The Commissioner noted that a significant amount of marital funds had flowed into the account subsequent to the marriage and that, most importantly, Nick had failed to adequately document the sale of the First Guaranty Bank stock in terms of the date of sale, the amount received, and the deposit of the stock proceeds into the First Guaranty account. The Commissioner stated that "no documentary evidence was produced to establish the date or sales price of the stock. The Commissioner finds this to be out of character for the petitioner and finds it difficult to believe that a transaction supposedly valued at nearly one-half million dollars was not thoroughly documented." In his October 15, 1997, order the trial court accepted the Commissioner's recommendation, stating that "[t]he Court finds [Nick's] proof was not clear and convincing that these CD's were his non-marital property[.]"

As discussed in the section of this opinion addressing CD 5118, even if Nick had traced the proceeds from his nonmarital stock sale into the account, Allen does not support a determination that the CDs purchased from the account were 100% nonmarital. Further, just because the nonmarital stock proceeds were the last funds deposited, that is no basis to presume that those funds were, exclusively, used to purchase the CDs to the exclusion of the marital funds in the same account.

If Nick, contrary to the finding of the trial court, did in fact trace \$487,500.00 in nonmarital proceeds into the account, then a Brandenburg approach similar to that used in evaluating CD 5118 would be appropriate. All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property. KRS 403.190(3). The presumption must be rebutted by clear and convincing evidence. Brosick v. Brosick, Ky. App. 974 S.W.2d 498, 502 (1998). The remaining issue, therefore, is whether the trial court was clearly erroneous, under the clear and convincing standard, in determining that Nick had failed to trace the proceeds of the nonmarital stock sale into the First Guaranty bank account.

In his brief, Nick asserts that his documentation of the \$487,500.00 deposit from his sale of nonmarital stock was attached as Exhibit 2 of Mike Caudill's testimony. We have carefully reviewed Exhibit 2 of Caudill's February 6, 1996, deposition, and we agree with the Commissioner and the trial court that those documents do not clearly and convincingly trace the sale of the nonmarital stock sale into the First Guaranty bank account from which the three CDs were bought. In particular, we cannot locate within this exhibit the major source of proof cited by Nick, namely a February 6, 1996, deposit ticket documenting the \$487,500.00 deposit. If such a document otherwise exists in the record, Nick should have provided a page number cite. Nick has failed to meet his tracing burden with respect to these three CDs. There was no reversible error in the

trial court's determination that CDs 10784, 10785, and 10786 were nonmarital property.

Dissipation of Assets.

Nick's final argument is that the trial court erred in failing to account for the marital estate assets dissipated, usurped, or concealed by Ann during the pendency of the action. Nick contends that Ann persistently sought to effectively embezzle from the marital estate as it was being collected and valued. The only allegedly dissipated assets Nick identifies with sufficient specificity for us to review are those associated with the marital business, Denim Mill, Inc. Denim Mill was a corporation started in the late 1980's. It was managed by Ann and sold western-style clothing she designed.

At the time of the cessation of business by Denim Mill, Inc., it had both inventory and cash assets. Nick apparently took some, or all, of the business inventory. Ann charges that Nick has never accounted for the assets he took. While in his brief Nick states that Ann admits to taking \$169,245 from Denim Mill, as we understand her brief and the issue as addressed below, Ann admits to having taken only \$99,031.00 in cash assets from the business.

While Ann admits she took these funds from Denim Mill, she contends that she used the money to provide food, housing and other expenses for herself and the children during the period following the parties' separation in January 1993 and prior to an award of temporary spousal maintenance and child support in July

1994. The Commissioner agreed with this, stating "the Commissioner finds that with respect to any assets of Denim Mill, Inc., taken by [Ann], these were used for her support, and that of her children, at a time when [Nick] was not contributing to their support." In its order of October 15, 1997, the trial court adopted the recommendations of the Commissioner in their entirety with regard to Denim Mill.

The court may find dissipation when marital property is expended (1) during a period when there is a separation or dissolution impending; and (2) where there is a clear showing of intent to deprive one's spouse of her proportionate share of the marital property. Robinette v. Robinette, Ky.App., 736 S.W.2d 351, 354 (1987); Brosick v. Brosick, Ky. App., 974 S.W.2d 498, 500 (1998). The trial court determined that Ann used the assets which she took from Denim Mill for the support of her and her children, and that her intent was not to deprive Nick of his proportionate share of the marital property. The record discloses that during the parties separation from January 1993 through July 1994, Ann had custody of the children, was not working, and was not receiving court ordered maintenance or child support. While \$99,031.00 seems like an excessive amount for support during this period, in relation to Ann and her children's normal life-style, it was not. The trial court's findings with respect to this issue were not clearly erroneous. CR 52.01. We cannot say that Nick has met his burden of making a clear showing that Ann's taking of the assets from Denim Mill was with the

intent to deprive him of his proportionate share of the property and was not for her and the children's support.

Issues Raised In Virginia Cooley's Cross-Appeal Proportional
Division of Marital Property

Ann contends that the marital estate was not divided in just proportions. The Commissioner recommended that the property be divided fifty-fifty. While, certain of the property was divided fifty-fifty, namely such property in which Ann contributed to the accumulation of in addition to her role as a homemaker, the trial court generally awarded 70% of the marital property to Nick, and 30% of the marital property to Ann. Ultimately, of an \$11,966,307.00 marital estate, Nick was awarded \$8,011,092.00, or 66.95%, and Ann was awarded \$3,955,215.00, or 33.95%. Ann contends that the trial court's award was an abuse of discretion in that it failed to adequately consider her contributions as a homemaker; penalized or degraded her primary function in the marriage; and diminished her role as a wife to a junior partnership. Ann contends that all the marital property should have been distributed on a fifty-fifty basis.

KRS 403.190(1) requires the trial court to divide the marital property . . . in just proportions considering all relevant factors including:

- (a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
- (b) Value of the property set apart to each spouse;
- (c) Duration of the marriage; and
- (d) Economic circumstances of each spouse when the division of property is to become

effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

With certain exceptions, "'marital property' means all property acquired by either spouse subsequent to the marriage[.]" KRS 403.190(2).

The trial court explained its decision to, generally, award Ann 30% of the marital property as follows:

Kentucky law does not presume or require an equal division of all marital assets. [Ann] testified that most of her time during the marriage was devoted toward raising the three children of the parties. [Ann] testifies she was not really aware of much regarding the businesses that were operated during the marriage. [Nick] was in the coal business prior to 1979 when the parties were married, which made him a multi-millionaire prior to the marriage. [Ann's] primary contribution to the marriage was as a mother and housewife. The contributions of [Ann] as a mother and housewife, from an economic standpoint, do not justify an equal division of all the marital property, even though raising children is a lot of hard work. The Cooley family is dysfunctional. Mr. Cooley did not exert much effort in raising the children, but he is not totally to blame. [Ann] intentionally or unintentionally had an impact on her children's negative attitude toward their father. But for [Ann's] activities as a housewife and mother, [Ann] did little to increase the marital estate. Accordingly, the Court does not agree with the Commissioner that [Ann] should receive 50% of the marital estate in its entirety.

The Court is inclined to award the Respondent 30% of the marital value of the coal business assets, if any, and 30% of the marital business real estate in which [Ann] did not contribute outside her contributions as a wife, mother and homemaker. However, there are certain assets of a personal nature and other business assets in which [Ann] participated and for those a 50-50 distribution is appropriate.

There is no statutory basis requiring that property be divided equally. Wood v. Wood, Ky. App., 720 S.W.2d 934, 935 (1986) (award of \$1,024,525 to husband and \$512,000, including \$300,000 cash, to wife upheld). "This court cannot disturb the findings of a trial court in a case involving dissolution of marriage unless those findings are clearly erroneous." Cochran v. Cochran, Ky. App., 746 S.W.2d 568, 569-570 (1988); Johnson v. Johnson, Ky. App., 564 S.W.2d 221 (1978). The division and valuation of property is within the sound discretion of the trial court. Cochran at 570.

Wood, supra, supports the trial court's percentage distribution to Ann. In Wood the wife received a one-third distribution of the marital property, including a \$300,000.00 cash award. Here, the trial court set forth its reasons for its award to Ann, and those reasons were consistent with the factors set forth in KRS 403.190. While Ann sets forth reasonable arguments as to why the trial court should have awarded her fifty percent of the marital property, and even though we may agree with those arguments, we cannot say that the trial court's award to her, which was nearly \$4 million, of which a sizable sum was cash, was either clearly erroneous or an abuse of discretion.

Auction of Recreational Property.

Ann contends that the trial court erred by ordering a public auction of certain recreational property. At the time of their separation, the parties had an extensive array of recreational property, including various motorcycles, jet skis,

Honda 4-tracks, ski boats, a houseboat, and a motor home. By order entered on June 14, 1996, the trial court ordered that all recreational vehicles belonging to the parties at issue in the case be sold at the Courthouse door of the Pulaski County Courthouse.

In the course of the discovery process, the parties had stipulated as to the value of the recreational property. At auction, the property sold for less than the stipulated values. The gross proceeds from the auction were \$247,900.00 less expenses of \$7,215.80. According to Ann's calculations, her distribution of one-half of the proceeds at the auction price yielded her \$13,948.50 less than she would have received if the distribution had been based upon one-half of the stipulated values. Nick purchased all but two of the recreational items sold at the auction. Ann attended the auction, but did not bid on any of the items. Ann contends that Nick's windfall at her expense should be remedied by requiring an additional \$13,958.50 award in her favor so as to reflect the distribution of the recreational property at the stipulated values.

There was an ongoing dispute throughout the litigation as to the utilization of the recreational property. A long series of motions concerning the use of the property were filed in the case. The trial court eventually ordered the auction to put an end to the time-consuming, expensive, and acrimonious litigation surrounding the property. Ann did not object to the judicial sale and attended the auction. Ann's dissatisfaction with the sale arose after the fact when the auction did not bring

as much in proceeds in comparison with what the parties had stipulated the values of the property to be. Nick's participation in, and domination of, the auction also appears to be a reason for Ann's dissatisfaction. However, the record discloses that the auction was carried out in accordance with the requirements of a judicial sale. The auction was adequately advertised, and it appears that it was well attended.

While Ann does not seek to have the judicial sale set-aside, but, rather, seeks only to be compensated at the stipulated values of the property, we believe it would be useful to reference the standards applicable to the setting aside of a judicial sale by way of illustrating the deference normally accorded such a sale. Inadequacy of price alone is not a sufficient ground for setting aside a judicial sale, where the interested parties labor under no disabilities, unless the inadequacy is so great as to shock the conscience or create the presumption of fraud. Gross v. Gross, Ky., 350 S.W.2d 470, 471 (1961). A judicial sale ought not to be lightly disapproved where it was conducted in a fair and regular manner, and confirmation ought not to be refused except for substantial reasons. Id. It is within the sound discretion of the trial court to confirm or vacate a sale and its exercise of that discretion will not be disturbed unless it appears to the appellate court to have been abused in the judicial sense. Id.

It is a reasonable possibility that the parties' initial stipulations as to the value of the property overstated the actual value of the property. On the whole, when considering

such factors as the possibility of additional expensive litigation concerning the property and the possibility that the parties' stipulated valuations may have been overstated, we cannot say that the trial court erred in ordering the recreational assets sold and basing its corresponding distribution upon the values brought at auction.

Interest on Cash Judgment.

Ann contends that the trial court erred as a matter of law when it refused to award her interest on the judgment. The trial court entered its "Final Judgment" on January 9, 1998. After consideration of the trial court's March 24, 1998, order on post-judgment motions, Ann was to receive a total distribution of marital property of \$3,955,214.56.

The unpaid balance of a marital property award should bear interest at the statutory rate for judgment interest as prescribed by KRS 360.040. Ridge v. Ridge, Ky., 572 S.W.2d 859 (1978); Johnson v. Johnson, Ky. App., 564 S.W.2d 221 (1978); Hardin v. Hardin, Ky. App., 711 S.W.2d 863 (1986).⁶ In its order of March 24, 1998, the trial court denied Ann's request to add a provision for interest on the Judgment. There being no reason why an award of interest on the judgment would be inequitable to

⁶However, if factors are present which would make an interest award inequitable, it may be disallowed. See Young v. Young, Ky., 479 S.W.2d 20 (1971); Courtenay v. Wilhoit, Ky. App., 655 S.W.2d 41 (1983); and Louise E. Graham & James E. Keller, 16 Kentucky Practice Domestic Relations Law, (2d ed. 1997) § 19.7, p. 88.

Nick, that ruling is reversed and remanded for an award of interest consistent with Ridge and KRS 360.040.

Child Support.

Ann argues that the amount of child support awarded erroneously failed to continue the children's lifestyle they had during the marriage. Whereas Ann had sought \$6,000.00 per month in child support, the trial court awarded her \$5,000.00 per month. Stewart was born in February 1980 and Lindsay was born in January 1981. Since Stewart and Lindsay have attained the age of eighteen and graduated from high school, this issue is moot as to them. Undoubtedly additional child support proceedings have occurred during the pendency of this matter in this court. Nevertheless, we will address the issue.

Nick's annual gross income is \$737,000.00 per year, or in excess of \$61,000.00 per month. The combined monthly income of the parties far exceeds the uppermost limits of the child support guideline tables as set forth in KRS 403.212. The trial court may use its judicial discretion in determining child support in circumstances where combined adjusted parental gross income exceeds the uppermost levels of the guideline table. KRS 403.212(5).

It is evident that the trial court applied careful consideration to the matter of child support. The trial court took into consideration that Nick was to be responsible for all of the dental and medical expenses of the children, and, in its judicial discretion, awarded Ann \$5,000.00 in monthly child

support rather than the \$6,000.00 she had requested. In regard to this the trial court stated that, "[a]n amount higher than [\$5,000.00], at the present time and under the present circumstances, would be pure and unmitigated extravagance." Contrary to Ann's contention, it appears that the trial court did take into consideration the children's lifestyle during the marriage.

We cannot say that the trial court abused its judicial discretion in awarding Ann \$5,000.00 per month in child support for the three children.

Trust Information.

Ann contends that the trial court erred by failing to require Nick to produce trust information regarding the children. The paternal grandparents established trusts for Stewart and Lindsay. A comparable trust was later set up for Mitchell. In the course of the proceedings, Ann requested information relating to the trust and periodic updates regarding the status of the trusts. Nick refused to provide her this information. As authority for her entitlement to have access to the trust information, Ann relies on KRS 386.715 which provides that "[t]he trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration."

In its July 10, 1996, order the trial court denied Ann's motion to provide her with information relating to the trusts; however, the trial court stated that it "notes that [Nick] has represented to the Court in response to Mrs. Cooley's

motion that the trusts contain sufficient assets to provide for the college education for the parties' children at the institution of their choice. To the extent that Mr. Cooley has made such representation, he is bound thereby and is bound by his representation to that effect."

Judicial proceedings may be initiated by interested persons concerning the internal affairs of trusts. KRS 386.675. Proceedings which may be maintained under this section are those concerning the administration and distribution of trusts, the declaration of rights and the determination of other matters involving trustees and beneficiaries of trusts. Id. Proceedings under KRS 386.675 are initiated by filing a petition in the court and giving notice pursuant to KRS 386.665(3) to interested persons. KRS 386.700.

Stewart and Lindsay are emancipated and it would appear that the issue is moot as to them. They may share their trust account information with Ann as they deem appropriate. As to Mitchell, it would appear that if Ann, as a third party to the trust, seeks to access information relating to Mitchell's trust accounts, the appropriate method would be as set forth in the above statutes. For purposes of this divorce action, we discern no abuse of discretion in the trial court's disposition of the issue.

Attorney and Expert Fees.

Ann contends that the trial court abused its discretion by failing to award her requested attorney fees and expert fees.

In the course of the divorce proceedings, Ann incurred attorney fees and expert fees of \$340,992.44. Nick contends that he has paid \$232,000.00 of these fees; Ann contends that Nick has paid approximately \$216,000.00 of the fees. It is Ann's position that Nick should be responsible for all of her legal and expert fees, primarily because of the discrepancy in financial resources and because of Nick's alleged dilatory tactics in the course of the proceedings.

"The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment." KRS 403.220. "The allocation of court costs and attorney fees is entirely within the discretion of the trial court." Tucker v. Hill, Ky. App. 763 S.W.2d 144, 145 (1988). "All that is expressly required is that the trial court consider the financial resources of the parties when ordering a party to pay a reasonable amount in attorney's fees." Poe v. Poe, Ky. App. 711 S.W.2d 849, 852 (1986).

In its January 9, 1998, Final Judgment, the trial court stated, "All those sums heretofore awarded Ms. Cooley for attorneys fees and litigation expenses, pendente lite, shall constitute what the Court believes, in its sound discretion to be a fair and equitable amount sufficient to meet her reasonable needs in that regard and to balance the resources. The part of

the marital estate hereinafter awarded to her and that already awarded and distributed to her is more than adequate to meet her obligations incurred as a result of defending this litigation."

Even using Ann's figures, Nick has been required to pay in excess of 63% of her attorney and expert fees. While Ann charges that Nick caused her to incur substantial fees because of his dilatory tactics, Ann has not been a model of virtue in regard to her litigation decisions. Ann's distribution of the marital property, which she is to receive primarily in cash, is almost \$4,000,000.00, and this was specifically considered by the trial court in its decision to award attorney and expert fees. Ann has failed to successfully demonstrate any abuse of the trial court's discretion in regard to its awarding of attorney and expert fees.

Failure to Strike or Exclude Evidence.

Ann contends that the trial court erred by denying her motions to strike or exclude certain evidence.

Pikeville National Bank Certificates of Deposit Nos. 515, 492, and 19612. These three CDs total \$1,200,000.00. The CDs were purchased on October 10, 1981, during the marriage. Ann claimed that the CDs were marital property, while Nick claimed they were nonmarital. The Commissioner determined that Nick had established, through tracing, that the CDs were nonmarital property. This recommendation was accepted by the trial court. Ann timely filed a motion to exclude certain of Nick's tracing evidence as untimely filed. The substance of Ann's argument is

that all evidence relating to nonmarital property claims was due by October 10, 1995, and that Nick did not file certain documents substantiating the claim until March 12, 1996. It appears clear from the record that Nick did not claim for the first time that these CDs were nonmarital until after October 10, 1995; rather, Nick presented tracing evidence relative to these CDs in his case in chief through the testimony of Mike Caudill.

CR 43.02(d) authorizes the trial court to permit the introduction of evidence in chief at the rebuttal stage upon "good reasons in furtherance of justice." Commonwealth, Dept. of Highways v. Ochsner, Ky., 392 S.W.2d 446, 448 (1965). Here, evidence was presented that Nick did not have the March 1996 documents prior to the close of his case in chief, but, rather, the bank did not provide him with those documents until afterward. There having been a showing of good reasons in furtherance of justice in this instance, it is our opinion that there was no abuse of discretion. Id.

Coal Valuation. Ann contends that Nick did not present any qualified testimony concerning the value of coal owned or leased by his various companies immediately prior to the marriage during his case in chief. She contends that rebuttal testimony relating to coal value presented by Nick, Milton Goolsby, and Marvin Parrish should have been offered in Nick's case in chief and should therefore be stricken. With the exclusion of this evidence from the record, Ann argues, the value of Unit Coal Corporation must be reconsidered. We disagree.

An issue in the valuation of Unit Coal was the value of its coal holdings at the time of the marriage and at the time of divorce. Nick introduced his valuations through the testimony of Ertel L. Whitt, while Ann introduced her valuations through Joe Weddington, Sr. Following Weddington's testimony, in the course of rebuttal, additional evidence was presented regarding the value of coal by Nick, Goolsby, and Parrish. Weddington had specifically referred to Parrish in his testimony, so his testimony in rebuttal was proper. In addition, the testimony of Nick and Goolsby was directed toward rebutting Weddington's valuations, hence we believe it was not an abuse of discretion for the trial court to decline to strike this testimony.

Personal Property and Real Property. Ann argues that certain testimony relating to the value of the parties' household furnishings and Nick's testimony relating to the condition and values of various tracts of real estate should be stricken because the testimony could have been offered in chief rather than in rebuttal. The parties clearly had an enormous task in addressing all of the property issues in this case. While it appears that portions of this testimony was proper rebuttal, to the extent that any of this testimony should have been presented in Nick's case in chief, we discern no abuse of discretion in the trial court's decision not to strike the testimony. Ochsner, supra; CR 43.02(d).

Expert Testimony. Ann contends that the testimony of Ertel L. Whitt, Jr. should have been stricken on the basis that

he "is a mining engineer, but not a mineral appraiser." Ann contends that Whitt "had absolutely no qualification regarding the value of coal in 1979 and he clearly lacked the knowledge, skill, experience, training or education to value the multi-million dollar coal properties held by Unit Coal or Premium Elkhorn."

Kentucky Rule of Evidence 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." "It is within the discretion of the trial judge to decide the qualifications of expert witnesses, and such a ruling is seldom disturbed on appeal." Gentry v. General Motors Corp., Ky. App., 839 S.W.2d 576, 578 (1992); Murphy by Murphy v. Montgomery Elevator Co., Ky. App., 957 S.W.2d 297, 298 (1997). "[T]he initial decision as to whether a witness is a qualified expert and the limits of his expertise are matters within the sound discretion of the trial court." Commonwealth v. Craig, Ky., 783 S.W.2d 387 (1990); Cormney v. Commonwealth, Ky. App., 943 S.W.2d 629, 634 n 2 (1996).

In his testimony Whitt sets forth credentials that establish that he has experience in the coal mining business. Whitt testified that he has been involved in the mining industry since 1972 and has kept himself familiar with the value of coal, both in place and delivered. Whitt further testified that he has

regularly been involved in the valuation of coal in place for clients, that he has testified as an evaluator of coal in litigation in various forums, and that the determination of the fair market value of coal in place is a regular and recurring part of his professional business. While Ann believes Whitt was incompetent to testify as to the value of coal in 1979, her criticisms of his credentials go to the weight of his testimony and not its admissibility.

Unit Coal Corporation.

Next, Ann argues that the trial court erroneously concluded that Unit Coal Corporation and its subsidiaries were Nick's nonmarital property. Unit Coal is the parent of various subsidiary coal or coal related companies. Unit Coal was the couple's primary source of income during the marriage and Nick was actively involved in its management. As a result, any increase in the value of the corporation would be a marital asset subject to division. Goderwis v. Goderwis, Ky., 780 S.W.2d 39 (1989).

Ann's experts, primarily Joe Weddington, Sr., determined that the value of Unit Coal and its subsidiaries was \$10,067,155.00 at the time of the marriage, and \$16,649,861.00 in 1995, for an increase during the marriage of \$6,582,706.00. Nick's expert, Ertel Whitt, Jr., determined that the value of Unit Coal and its subsidiaries decreased by \$181,460.00 during the marriage, from \$14,095,213.00 to \$13,913,753.00.

The Commissioner accepted the appraisal offered by Nick's expert, and the trial court, in turn, accepted the Commissioner's recommendation. Ann contends the trial court erroneously accepted Nick's appraisal, particularly because the trial court failed to consider various subleases that were generating revenues inconsistent with the valuation of Nick's expert.

The valuation of Unit Coal was a matter to be decided by expert testimony. Each side accordingly presented expert valuations as to the value of Unit Coal. The valuations were in significant disagreement, and the trial court chose to believe Nick's expert. The Commissioner, in his report, explained his rationale for choosing to reject the valuation of Ann's expert, Joe Weddington, Sr., as follows:

Mr. Weddington stated that it was his opinion that in 1979 the recoverable reserves on the leaseholds held by Unit Coal Corporation were valued at \$0.50 per ton. However, Mr. Weddington also testified that at that same time he was leasing his own coal for a guaranteed minimum of \$2.50 per ton. He also admitted that he had testified in various court proceedings in state and federal court that during the late 1970s and early 1980s that it was his opinion that the value of recoverable reserves in place was \$2.00 per ton, or greater. This is an inconsistency which the Commissioner cannot reconcile, and which, in his opinion, renders the testimony of Mr. Weddington not credible. The Commissioner would add that the respondent stresses the high quality of the coal reserves (low sulphur, high B.T.U.) That too, would seem to detract from the credibility of Mr. Weddington's valuation of the reserves in 1979.

The primary cause for the difference in the expert valuations was the price of coal in 1979 at the time of the

marriage. A trial court's judgment and valuations in a divorce action will not be disturbed on appeal unless it is clearly contrary to the weight of the evidence, Heller v. Heller, Ky. App., 672 S.W.2d 945, 947 (1984); Underwood v. Underwood, Ky. App., 836 S.W.2d 439, 444 (1992); Clark v. Clark, Ky. App., 782 S.W.2d 56, 58 (1990). Under CR 52.01, the Appellate Court's review of the trial court's decision is limited to reversing only clearly erroneous findings, keeping in mind that the trial court had an opportunity to hear evidence and observe witnesses so as to judge credibility. Chalupa v. Chalupa, Ky. App., 830 S.W.2d 391, 393 (1992); Bealert v. Mitchell, Ky. App., 585 S.W.2d 412 (1979). Disagreeing with a finding is not sufficient to rule the finding as clearly erroneous. In view of the testimony of Mr. Whitt and the inconsistencies in the testimony of Mr. Weddington, the valuation accepted by the trial court was not clearly contrary to the weight of evidence. We must affirm the trial court's valuations of Unit Coal.

Shearer Farm, Valley Farm Center, Monticello 4M.

Ann's final argument is that the trial court clearly erred in its valuation of certain tracts of real property.

Shearer Farm. The Shearer Farm was purchased for \$475,000.00 on February 15, 1984. According to Ann, at least \$45,000.00 was expended during the marriage on improvements. Ann's expert, Joe Weddington, Jr., appraised and valued the Shearer Farm at \$800,000.00. Nick's expert, David Meece, valued the property at \$595,000.00. The trial court determined that the

appraisal of Mr. Meece was the more credible of the two appraisals and accordingly valued the property at \$595,000.00. Nick successfully traced nonmarital funds into the acquisition of the Shearer Farm. 36.42% of the value was determined to be marital property. Based upon the trial court's award to Ann of 30% of the marital property, Ann was awarded a cash distribution of \$65,009.70 as her marital share of the Shearer Farm.

Ann contends that the trial court erred by accepting Nick's appraisal to the exclusion of her appraisal. Citing Robinette v. Commonwealth of Kentucky, Department of Highways, Ky., 380 S.W.2d 78 (1964), Ann argues that Nick's appraisal failed to consider the property's value at its highest and best use, specifically, its value as a commercial property. Ann's expert, Weddington, determined that 50 acres of the property could be developed for industrial or commercial purposes, and, upon factoring this into the analysis, those 50 acres were appraised at \$10,000.00 per acre.

Nick rebutted Weddington's analysis by presenting evidence that it would cost in excess of \$3.9 million to landfill and excavate the property to develop it for commercial use. The trial court ultimately accepted the appraisal of Nick's expert. The trial court stated that it "finds that the fair market value of the property given by [Nick's] appraiser, Mr. David Meece, when coupled with the testimony regarding the additional cost of landfill and excavating given by Mr. Bobby Garen, is the more reliable of the two appraisals, and, therefore, finds the fair market value of the tract as a whole to be \$595,000.00."

A trial court's valuation in a divorce action will not be disturbed on appeal unless it is clearly contrary to the weight of the evidence, Heller v. Heller, supra. The trial court's valuation was consistent with Nick's expert appraisal and was, therefore, not clearly contrary to the weight of the evidence.

Valley Farm Center. Valley Farm Center is a feed and farm supply store located in Wayne County. The property was acquired in 1985 for \$228,000.00. The parties agreed that Nick's nonmarital portion of the property was 25.2%. Nick's expert appraised the property at \$450,000.00, while Ann's expert valued the property at \$576,000.00. The Commissioner rejected Ann's valuation on the basis that Ann's expert had relied upon "certain speculations on his part." The Commissioner valued the property at \$445,237.00, and this valuation was subsequently accepted by the trial court.

The expert testimony and appraisal of Nick's expert supported the trial court's decision. While we may have chosen to believe Ann's expert, nevertheless the trial court's decision was not clearly contrary to the weight of the evidence, and we have no basis to reverse its valuation of this property.

Monticello 4M Real Estate. The Monticello 4M Real Estate property was acquired by Nick prior to the marriage. Nick's expert valued the property at \$255,000.00 while Ann's expert valued the property at \$310,000.00. The trial court valued the property at \$275,000.00. In so doing the trial court stated that it "finds that [Nick's] appraisal is far less

conservative than [Ann's] is liberal". In her brief, Ann does little more than argue that her expert should have been believed over Nick's expert. It is not our function to second guess the trial court's decision as to which expert to believe. There being credible expert testimony to support the trial court's valuation, we will not disturb it.

For the foregoing reasons the judgment of the Harlan Circuit Court is affirmed in part, vacated in part, reversed in part, and remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEF AND REPLY BRIEF FOR
APPELLANT/CROSS APPELLEE:

Gordon J. Dill
Ashland, Kentucky

BRIEF FOR APPELLEE/CROSS
APPELLANTS:

Susan C. Lawson
Harlan, Kentucky