

RENDERED: JULY 9, 2004; 10:00 a.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2002-CA-001145-MR  
AND  
CROSS-APPEAL NO. 2002-CA-001161-MR

JANET R. MORROW

APPELLANT/CROSS-APPELLEE

APPEALS FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE STEPHEN M. GEORGE, JUDGE  
ACTION NO. 00-FC-006989

WILLIAM E. MORROW, III

APPELLEE/CROSS-APPELLANT

AND: NO. 2002-CA-001807-MR

WILLIAM E. MORROW, III

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE STEPHEN M. GEORGE, JUDGE  
ACTION NO. 00-FC-006989

JANET R. MORROW

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM AND VANMETER, JUDGES; AND EMBERTON, SENIOR  
JUDGE.<sup>1</sup>

VANMETER, JUDGE: Janet R. Morrow ("Janet") appeals the judgment  
of the Jefferson Family Court awarding William E. Morrow, III

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky constitution and KRS 21.580.

("William") maintenance. William cross-appeals raising five points of error. For the reasons stated hereafter, we affirm.

Janet and William were married on January 31, 1976, in Louisville, Kentucky. The couple divorced by Decree of Dissolution of Marriage on November 17, 1986. Subsequently, the couple reconciled and the court entered a Judgment of Annulment of Divorce on June 6, 1987. However, in March 2000 the couple separated and Janet filed a Petition for Dissolution of Marriage in the present action on September 14, 2000.

William was employed as a police officer with the City of Barbourmeade Police Department until he was terminated. After two years of litigation, William was eventually reinstated in the police department. Some time after the reinstatement William was unemployed again.<sup>2</sup> In 1992, William suffered the first of four heart attacks and subsequently underwent quintuple by-pass surgery. William's fourth heart attack occurred in 1998. At the time of this trial in October of 2001, William received Social Security Benefits for total disability and Medicare A & B insurance coverage. While covered on Janet's health insurance plan, William testified that his prescription drug costs amounted to \$510.00 per month.

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<sup>2</sup> The record is unclear exactly where and for how long William was employed after serving as a police officer.

The standard of living enjoyed by the parties during the marriage was mainly due to very generous family contributions given by both families. Even though Janet was steadily employed throughout the marriage, the couple's parents would often pay the bills, college expenses for their children, and the mortgage. The record indicates that William's parents provided more financial support than Janet's parents.

On January 16, 2002, the Jefferson County Family Court entered a Decree of Dissolution of Marriage and its Findings of Fact and Conclusions of Law. The trial court awarded Janet the sole care, custody and control of their minor son, Nathan. Janet receives \$412.00 per month from the Social Security Administration toward Nathan's expenses, which satisfies William's obligation to pay child support pursuant to the Kentucky Child Support Guidelines. The apportionment between non-marital and marital property were determined pursuant to *Brandenburg v. Brandenburg*, Ky. App., 617 S.W.2d 871 (1981). William was awarded maintenance to cover the expenses for his health program. On April 26, 2002, the trial court entered an Order sustaining in part and denying in part each party's motion to amend, alter or vacate the judgment. This appeal followed.

Janet first argues that the trial court erred in awarding William maintenance because he was procedurally prohibited from seeking a maintenance award. The trial court

ultimately awarded William \$600.00 per month in maintenance until the death of either party, the remarriage or co-habitation of William, the expiration of eight (8) years, or until further ordered by the court.<sup>3</sup> Specifically, Janet contends that William did not raise the issue of maintenance either by a counterclaim under CR 13.01,<sup>4</sup> or during the pendency of the action, which Janet argues, deprived her of fair notice.

However, the record indicates that William in fact did request maintenance prior to the trial. William first raised the issue in his Mandatory Case Disclosure ("MCD") entered on March 21, 2001, in which he listed maintenance as an issue in dispute. Attached to the MCD were William's bank records, medical statements and hospital bills. Second, in a hearing held on July 2, 2001, the trial court specifically asked both parties if maintenance was an issue to be tried. Counsel for William replied in the affirmative stating that maintenance was an issue, but only to the extent that it will allow William to continue the same health program. There was no objection

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<sup>3</sup> The trial court originally awarded William \$400.00 per month as maintenance, until the death of either party, William's remarriage or co-habitation, the expiration of five (5) years, or until further ordered by the court.

<sup>4</sup> Kentucky Rules of Civil Procedure ("CR") 13.01 states in pertinent part: "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . ."

made by Janet's attorney. Clearly, Janet received notice that William was seeking an award of maintenance prior to trial.<sup>5</sup>

Even though William failed to file the request for maintenance by a counterclaim, CR 15.02 allows for amendment of a party's pleadings at any point, even after trial, to conform to the evidence. CR 15.02 states in pertinent part: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. . . ." Trial by express consent occurs where the parties, expressly, treat an issue as raised and address proof toward the adjudication of that issue. *Thomas v. Thomas*, Ky., 379 S.W.2d 743, 748 (1964). Where a party fails to object to the introduction of evidence on an issue not raised in the pleadings, she impliedly consents to the trial court of the issue and is therefore bound by the result. *Blakeman v. Joyce*, Ky., 511 S.W.2d 112, 114 (1974).

Here, the issue of maintenance was tried by the implied consent of the parties. William was questioned on cross-examination about his health care, medical debts,

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<sup>5</sup> We were unable to find support for the argument that a respondent's claim for an award for maintenance **must** be plead by a counterclaim. "Matters pertaining to custody, maintenance, support, or property disposition **could be** contained in a paragraphed counterclaim." R. Petrilli, *Kentucky Family Law* §23.22 at 262 (1988) (emphasis added). See also *Underwood v. Underwood*, Ky. App., 836 S.W.2d 439 (1992). Also, under KRS 403.150(4), a responsive pleading to a petition for dissolution is permissive.

prescription costs, and health insurance.<sup>6</sup> Additionally, evidence regarding William's health coverage and unpaid medical debts were submitted in the record prior to and during the trial. As such, upon a careful review of the entire record, it was clear from the narrative statements made during the July 2001 hearing and October 2001 trial that maintenance was an issue before the court by implied consent of the parties, so that any failure by William to plead the issue was waived. CR 15.02. *See, e.g., Leitsch v. Leitsch*, Ky. App., 839 S.W.2d 287, 290 (1992) (the issue of maintenance was properly raised when the claimant testified at the first hearing without an objection); *Nucor Corp. v. General Electric Co.*, Ky., 812 S.W.2d 136, 145-46 (1991) (CR 15.02 was used appropriately when the proof necessary to establish breach of contract was submitted in support of a breach of contract claim without objection); *Pemberton v. Osborne*, Ky., 333 S.W.2d 940, 943 (1960) (where an issue is tried without objection, relief may be given); *Abbott v. Abbott*, Ky. App., 673 S.W.2d 723, 726-27 (1983) (although the issue of modification of child support was raised in an irregular manner, the circuit court approved the issue by

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<sup>6</sup> Janet argues that the trial court abused its discretion by relying on evidence, such as an expense list, that was not formerly introduced in trial. However, as explained above, given the fact that Janet was put on notice that maintenance was an issue in dispute prior to trial, she had ample opportunity to prepare for trial, complete discovery, and to question William about his medical expenses and his ability to provide for his reasonable needs. Thus, the trial court did not abuse its discretion in relying on evidence submitted in the record.

express or implied consent, as any procedural irregularity was waived by the parties).

Next, Janet argues that William failed to prove that he lacked sufficient property to meet his "reasonable needs" as required by KRS 403.200. An award of maintenance is a matter within the discretion of the court, and the party seeking maintenance must satisfy the two-prong test contained in KRS 403.200 (1)(a) and (b).<sup>7</sup> *Drake v. Drake*, Ky. App., 721 S.W.2d 728, 730 (1986). In making the maintenance determination under KRS 403.200:

"[T]he trial court has dual responsibilities: one, to make relevant findings of fact; and two, to exercise its discretion in making a determination on maintenance in light of those facts. In order to reverse the trial court's decision, a reviewing court must find either that the findings of fact are clearly erroneous or that the trial court abused its discretion."

*Russell v. Russell*, Ky. App., 878 S.W.2d 24, 26 (1994) (quoting *Perrine v. Christine*, Ky., 833 S.W.2d 825, 826 (1992)). Since the trial court is in a better position than this court to

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<sup>7</sup> KRS 403.200 states in pertinent part:

- "(1) In a proceeding for dissolution of marriage . . . the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:
- (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and
  - (b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside of the home.

determine maintenance, "the amount of the award of maintenance is within the discretion of the chancellor and the exercise of that discretion will not be set aside unless it is clearly erroneous." *Newman v. Newman*, Ky., 597 S.W.2d 137, 140 (1980). See also *Russell*, 878 S.W.2d at 26; *Gentry v. Gentry*, Ky., 798 S.W.2d 928, 937 (1990). Additionally, an award of maintenance is appropriate "when a party is not able to support themselves in accord with the same standard of living which they enjoyed during the marriage . . . ." *Russell*, 878 S.W.2d at 26. See also *Newman*, 597 S.W.2d at 138-39; *Robbins v. Robbins*, Ky. App., 849 S.W.2d 571, 572 (1993).

Here, the trial court determined that William was unable to provide for his reasonable needs based on the fact that William underwent considerable medical procedures, which resulted in high costs of prescriptions drugs. Preserved at the July 2001 hearing, William requested maintenance only to the extent that he could continue the same health program. At the time that William was covered under Janet's insurance, he paid in excess of \$500.00 per month in prescription costs.

Additionally, satisfying the second-prong of KRS 403.200, the trial court's findings specifically provided that William is totally disabled and that he will not be gainfully employed again. Certainly, "where one is unable due to health problems to be self-supporting, the statute is appropriately utilized to

prevent the 'drastic change' in the standard of living experienced" by the claimant. *Russell*, 878 S.W.2d at 26 (quoting *Leitsch v. Leitsch*, Ky. App., 839 S.W.2d 287, 290 (1992) (citation omitted)).

Likewise, in awarding William maintenance, it is clear from the record that the trial court appropriately considered the factors under KRS 403.200(2), which provides as follows:

- (2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:
  - (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
  - (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
  - (c) The standard of living established during the marriage;
  - (d) The duration of the marriage;
  - (e) The age, and the physical and emotional condition of the spouse seeking maintenance; and
  - (f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

In concluding that William lacked sufficient property to provide for his reasonable needs, the trial court held as follows:

a. Financial resources of the party seeking maintenance: The Respondent is disabled and is receiving \$775.00 per month from the Social Security Administration. He testified that he has monthly prescription expenses in the sum of \$510.00. Also, he claims expenses in the sum of \$1,900.00, but the Court has deducted from that the maid expenses, the social club, and the prescriptions contained therein, and finds that his reasonable monthly living expenses are \$1,430.00. Added to the unreimbursed prescription expenses, the Respondent has monthly expenses in the sum of \$1,940.00.

The Petitioner is employed earning the sum of \$5,166.00 per month gross, or according to her testimony, the sum of \$3,510.00 per month net. She claims monthly living expenses in the sum of \$2,769.00. In addition, the Petitioner receives the sum of \$412.00 per month from the Social Security Administration for Nathan's expenses.

The Respondent is receiving a non-marital interest in the real estate in the approximate sum of \$56,000.00 and is also receiving a net amount from the other assets of approximately \$30,000.00. By his own testimony, his gun collection is worth thousands of dollars, one sub-machine gun having a value of \$50,000.00.

b. Time necessary for the Respondent to obtain employment: There is no reason to believe that the Respondent will ever be gainfully employed based on his medical history and the current total disability award that he is receiving.

- c. Standard of living established during the marriage: This is difficult because the parties exceeded any standard of living which would have been achievable based upon their own earnings. They maintained a standard of living based upon the generosity of family. Family generosity has been consistent for years. The Respondent's family has been quite generous, and there is no reason to believe that it will not continue.
- d. The duration of marriage: The parties have been married for 25 years, which is a relatively long-term marriage.
- e. The Petitioner's ability to pay maintenance and meet her own needs: The Petitioner is responsible not only for her own needs, but also for those of her minor child. That affects her ability to contribute maintenance. However, based upon the Kentucky Child Support Guidelines, the amount of Social Security Disability check that she receives for Nathan is in excess of what would ordinarily be the non-custodial parent's contribution to child support. The result is that the Petitioner will be no better off when Nathan is emancipated and the child support stops.

Even considering such factors as family generosity, the trial court's award of maintenance was within its discretion, as the award was only to the extent that William could maintain similar health coverage. William is unable to support himself through employment and is unable to meet his reasonable needs through self-supporting insurance plans. Accordingly, we do not believe that the trial court's award was clearly erroneous.

On cross-appeal, William raises five points of error. First, William argues that the trial court erroneously awarded

Janet sixty-five percent (65%) of the marital property and William thirty-five percent (35%). William contends that even though Janet consistently earned more income than he did during the marriage, the trial court failed to provide greater weight towards the fact that the financial contributions given by his parents far exceeded Janet's salary and her family's financial contributions combined. However, we find no error.

KRS 403.190(1) provides that a division of marital property shall be made "without regard to marital misconduct in just proportions considering all relevant factors including: (a) Contribution of each spouse to acquisition of the marital property. . . . (d) Economic circumstances of each spouse when the division of property is to become effective . . . ." The statute requires only that property be divided in "just proportions;" it does not require that the division be equal. *McGowan v. McGowan*. Ky. App., 663 S.W.2d 219, 223 (1983); *Quiggins v. Quiggins*, Ky.App., 637 S.W.2d 666, 669 (1982). KRS 403.190(3) provides that all property acquired by either spouse during the marriage is presumed to be marital property, unless there is proof that the property was acquired pursuant to an exception under KRS 403.190(2).<sup>8</sup> And, a party claiming that property, or an interest therein, acquired during the marriage

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<sup>8</sup> KRS 403.190(2) provides that marital property is "all property acquired by either spouse subsequent to the marriage except: (a) Property acquired by gift, bequest, devise, or descent . . . ."

is non-marital bears the burden of proof. *Sexton v. Sexton*, Ky., 125 S.W.3d 258, 266 (2004); *Terwilliger v. Terwilliger*, Ky., 64 S.W.3d 816, 820 (2002).

In the instant matter, the record does not support the argument that the financial contributions from William's parents were non-marital property or property intended solely for William. William "did not produce sufficient proof to overcome the presumption that property acquired during the marriage shall be considered marital property." *Marcum v. Marcum*, Ky., 779 S.W.2d 209, 211 (1989). See also *Sexton*, 125 S.W.3d at 271 n56. Thus, even though the division of marital property was not equal, we find that the trial court did not err. *Johnson v. Johnson*, Ky. App., 564 S.W.2d 221, 222-23 (1978).

Next, William argues that the trial court failed to credit him for the property damage, allegedly caused by Janet, to the marital residence while he lived elsewhere. Specifically, William contends that Janet left the residence in a damaged condition and that he had to pay, in addition to clean-up costs, \$2,100.00 for a new furnace.<sup>9</sup>

The record indicates that an appraisal was conducted after Janet moved out of the marital residence, which included a

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<sup>9</sup> The trial court ultimately held, based on the formula set forth in *Brandenburg v. Brandenburg*, Ky. App., 617 S.W.2d 871 (1981), that William was awarded the home and ordered to satisfy Janet's marital interest of 53.7%, which is \$50,233.00.

list of repairs. Based on the trial testimony and the appraisal, the trial court held that Janet did not intentionally damage or otherwise reduce the homes' value. William has not provided any evidence supporting the contrary. Therefore, the trial court did not err in failing to award William credit for the costs of those repairs.

William also argues that the trial court failed to assign a debt owed to William's late aunt, Abbie Silverman ("Silverman"). A bank obtained a judgment against Janet in the amount of \$6,189.42. Silverman subsequently paid this sum of money. The trial court held that the sum of money was a gift to both parties stating that although William "may believe there is a moral obligation to repay this, the Court finds that Ms. Silverman made a generous gift to these parties and that there is no legal obligation to repay her estate."<sup>10</sup>

"[G]ifts during marriage from third parties to both spouses shall be treated as marital property upon dissolution." *Calloway v. Calloway*, Ky. App., 832 S.W.2d 890, 893 (1992). The donor's intent is the primary factor in determining whether a gift is made to both spouses or made individually. *Sexton*, 125

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<sup>10</sup> "The determination of whether a gift was jointly or individually made is a factual issue, and therefore, subject to the CR 52.01's clearly erroneous standard of review." *Sexton*, 125 S.W.3d at 269. CR 52.01 provides: "Findings of fact 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."

S.W.3d at 268-69. "The donor's testimony is highly relevant of the donor's intent; however, the intention of the donor may not only be 'expressed in words, actions, or a combination thereof,' but 'may be inferred from the surrounding facts and circumstances, including the relationship of the parties,' as well as 'the conduct of the parties.'" *Id.* at 269 (citations omitted).

Here, Silverman did not testify about the sum of money.<sup>11</sup> However, the trial court appropriately considered the surrounding facts, circumstances, trial testimony, and conduct of the parties to find that Silverman paid the sum as a gift. *Id.* As such, the sum is not marital debt. William has offered no proof to support his argument that Janet was obligated to reimburse him for one-half of the money paid by Silverman. Therefore, it follows that the trial court did not err in finding that the sum paid by Silverman was a gift, not a loan.

Next, William argues that he was entitled to a \$3,000.00 non-marital interest in a 1976 Chevrolet Blazer, which he owned prior to the marriage, but subsequently sold for \$3,000.00. This sum was used as a down payment to purchase a Chevrolet Suburban. The proceeds from the Suburban were used for the down payment on the 1996 Chevrolet Tahoe, which the trial court ultimately awarded to William.

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<sup>11</sup> It appears based on the record that Silverman passed away prior to the trial.

Despite William's contention, we find nothing in the record to suggest that the \$3,000.00 was traced to non-marital property. "Tracing" is defined as "[t]he process of tracking property's ownership or characteristics from the time of its origin to the present.'" *Sexton*, 125 S.W.3d at 266 (citing Black's Law Dictionary 1499 (7<sup>th</sup> ed. 1999)). When the original property that is claimed to be non-marital is no longer owned, then the non-marital claimant must trace the previously owned property into a presently owned specific asset. *Id.* See also *Chenault v. Chenault*, Ky., 799 S.W.2d 575, 578 (1990).

Here, William has failed to provide evidence proving that the proceeds he received upon selling the previously owned 1976 Chevrolet Blazer can be traced to the presently owned Tahoe. Accordingly, we find no error.

Finally, William argues that he was entitled to the monthly maintenance payments as soon as the trial court entered the Order.<sup>12</sup> On June 20, 2002, William moved the court to hold Janet in contempt for her failure to comply with the trial court's Orders entered on January 16, 2002, requiring Janet to pay maintenance in the sum of \$400.00 per month, and on April

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<sup>12</sup> William cites *Combs v. Combs*, Ky., 787 S.W.2d 260, 263 (1990), for the proposition that "maintenance payments are vested from the entry of a decree and ordinarily can be modified only upon entry of a subsequent order of the Court to operate prospectively, from the date of entry." However, the present case is clearly distinguishable. In *Combs* the court specifically explained that "[t]his opinion is directed only to the issue of what effect a maintenance recipient's cohabitation has on continued maintenance." *Id.*

25, 2002, requiring Janet to pay maintenance in the sum of \$600.00 per month. At the contempt hearing, the trial court held:

The facts are not in dispute. Ms. Morrow has not paid the [sic] Mr. Morrow any maintenance. Her defense is that Mr. Morrow has not paid her the sum of \$50,233.00 that this Court ordered him to pay her. Each side has appealed this Court's judgment.

Mr. Morrow's motion to hold Ms. Morrow in contempt for failure to pay maintenance is overruled. He does not come into this Court with clean hands, and his debt to Ms. Morrow is increasing at the rate of 12% per year, or more than \$500.00 per month. Mr. Morrow's non-compliance is comparable to Ms. Morrow's non-compliance.

Based on a thorough review of the record, we find that the trial court did not abuse its discretion, as "for the court on its own motion may apply the maxim of unclean hands." *Steuerle v. Tindell*, Ky., 265 S.W.2d 787, 788 (1954).

Therefore, the trial court's judgment is affirmed.  
ALL CONCUR.

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