

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001191-ME

DENNIS R. PEACH

APPELLANT

V. APPEAL FROM ANDERSON CIRCUIT COURT
HONORABLE WILLIAM F. STEWART, JUDGE
CIVIL ACTION NO. 01-CI-00247

LEE ANN PEACH

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: MINTON AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

MINTON, JUDGE: Dennis Peach appeals from the circuit court's order that decided the issues of child custody and support, division of property, maintenance, and attorney fees in a bifurcated divorce proceeding. We affirm the circuit court's order on all issues.

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Dennis and Lee Ann Peach were married on April 11, 1981, and divorced on August 2, 2002. They had two children: Kayla, who became emancipated while the divorce was pending, and Ryan, who is still a minor. A few months after the divorce case was filed in 2001, the court entered an agreed order giving Dennis the exclusive use of the marital home pending the outcome of the case. The agreed order also granted temporary joint custody of both children.² Lee Ann was designated as the primary residential custodian throughout the school year, with Dennis designated as primary residential custodian during the months of June, July, and August. The agreed order further directed Dennis to pay temporary child support to Lee Ann while the children were in her care, and Dennis was ordered to pay temporary maintenance to Lee Ann.

Continuing disputes soon erupted over the temporary joint custody arrangement. And the court ordered Dennis and Lee Ann to participate in family mediation. By agreement of the parties, Dr. John Kravic, a licensed psychologist and a licensed marriage and family therapist, was designated by the court to conduct the mediation. On two separate occasions, Dr. Kravic met with Dennis, Lee Ann, and the children. Dr. Kravic's report to the court noted that "[w]hile each parent had some disparaging remarks about the other during their joint

² At the time of the order, Kayla was still a minor.

interviews . . . Dennis and Lea [sic] Ann still whole-heartedly concurred that joint legal and shared physical custody of their children was the best plan." Dr. Kravic concluded:

In the final analysis, Mr. and Mrs. Peach settled on the original schedule of shared physical custody according an alternating 8day/6day or 6day/8day schedule depending upon whether the children are in school or not. While I expressed my concern that split physical custody arrangements often are difficult and complicated for children to manage, the Peach's [sic] were firm in their joint resolution for equal or near-equal time with their children.

On August 8, 2002, the court granted the divorce, reserving for a later determination all remaining issues, and ordering Dennis and Lee Ann to "follow the recommendation of Dr. John Kravic" and to "confer in an effort to settle as many of the remaining issues as practicable" Shortly after that the court also ordered Dennis to pay Lee Ann child support in the amount of \$325.00 per month.

On April 4, 2004, the Domestic Relations Commissioner tendered proposed findings of fact and conclusions of law. Dennis and Lee Ann each filed exceptions to the DRC's report. The court ultimately confirmed the majority of the DRC's report. A few exceptions were noted in the court's order, including the amount to be paid in child support, the parent who could claim the tax exemption for Ryan's support, and the payment of Ryan's extraordinary medical expenses. This appeal follows.

CUSTODY OF RYAN PEACH

Dennis first argues that the court erroneously granted Lee Ann primary residential custody of Ryan. Specifically, Dennis claims the court should not have adopted Dr. Kravic's recommendations. He argues that the report is not a proper "custody evaluation" but, rather, "a report addressing what the parties had agreed on that particular occasion to do." Because of his apparent disagreement with the court's adoption of Dr. Kravic's report, Dennis asserts that "the parties were free to and did modify that arrangement." Dennis further claims that the court failed to take into account Ryan's wishes when making its custody decision and that the court erroneously chose not to interview Ryan. We disagree with Dennis on all of these points.

Custody issues are primarily governed by KRS³ 403.270.

The pertinent portions of that statute read:

- (2) The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:
 - (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;

³ Kentucky Revised Statutes.

- (b) The wishes of the child as to his custodian;
- (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
- (d) The child's adjustment to his home, school, and community;
- (e) The mental and physical health of all individuals involved;
- (f) Information, records, and evidence of domestic violence as defined in KRS 403.720.

It is within the court's discretion to "seek the advice of professional personnel" with regard to custody issues.⁴ Any advice provided to the court must be "in writing and made available by the court to counsel upon request."⁵ In contested custody proceedings, "the court may order an investigation and report concerning custodial arrangements for the child."⁶ When preparing a report for the court, the investigator "may consult any person who may have information about the child and his potential custodial arrangements"; both parties are permitted to either call or cross-examine the investigator as a witness.⁷

⁴ KRS 403.290.

⁵ *Id.*

⁶ KRS 403.300(1).

⁷ KRS 403.300(1), (2).

KRS 403.290 further provides that “[t]he court may interview the child in chambers to ascertain the child’s wishes as to his custodian and as to visitation.” The decision whether or not to interview a child is completely discretionary and within the province of the trial court.⁸ When taking into account the child’s desires, however, the court must note that it is the welfare, not the wishes, of a child that controls.⁹

Joint custody arrangements necessarily require cooperation by both parties to the agreement. The “essence” of joint custody “contemplates shared decision-making rather than delineating exactly equal physical time with each parent.”¹⁰ When awarding joint custody, “the court must determine, based on the child’s best interest, how the parents will share physical custody of the child.”¹¹ An equal division of time is not required; rather, custody should be shared “in a way that assures the child frequent and substantial contact with each parent under the circumstances.”¹²

In joint custody situations, “the parties will often agree, or the court will designate, that one of the parents will

⁸ Brown v. Brown, 510 S.W.2d 14, 16 (Ky. 1974).

⁹ Shepherd v. Shepherd, 295 S.W.2d 557, 559 (Ky. 1956).

¹⁰ Fenwick v. Fenwick, 114 S.W.2d 767, 777 (Ky. 2003).

¹¹ *Id.* at 778.

¹² *Id.*

act as the 'primary residential custodian.'"¹³ Although the term "has not been statutorily defined in Kentucky, it is generally employed by attorneys and courts alike to refer to the party with whom the child will primarily reside."¹⁴

In his report, Dr. Kravic mentioned the continuing discord between Dennis and Lee Ann; he also noted that Ryan seemed to "idolize" his father and "resent" his mother. Nonetheless, he stated that the parties "whole-heartedly concurred" that joint legal custody of their children was the best plan. This sentiment was later reiterated in the report when Dr. Kravic observed that the Peaches had "settled on the original schedule of shared physical custody according an alternating 8day/6day or 6day/8day schedule depending upon whether the children are in school or not." The custody arrangement that Dr. Kravic ultimately recommended reflected the Peaches' previous agreement.

Dennis does not argue that the arrangement cited in Dr. Kravic's report failed to recite the agreement he and Lee Ann made. Rather, he claims that he and Lee Ann "did not follow through with that arrangement"; therefore, he asserts that the court's order was erroneous.

¹³ *Id.* at 778-779.

¹⁴ *Id.* at 779.

This assumption is flawed. Although Dennis argues that the decision to alter or ignore the court's order was mutual, Lee Ann suggests that Dennis unilaterally chose not to follow the recommended report. Regardless, parties may not choose, either unilaterally or mutually, to disobey a court's order simply because they disagree with its terms. The more appropriate action would be to file a motion to modify or to await the outcome of appellate review instead of choosing to ignore the terms of the court's order.

That said, after reviewing the entirety of Dr. Kravic's report, we do not find any error in the trial court's decision to adopt his recommendations. Because of the ongoing custody battle between Dennis and Lee Ann, the court chose to seek Dr. Kravic's advice. In doing so, the court properly followed the requirements of KRS 403.290 and 403.300. Dr. Kravic appears to have investigated the situation thoroughly and to have written a report that was made available to the court and both parties.

The report filed by Dr. Kravic touched on the factors relevant in KRS 403.270. Although it was clear that there was conflict in the family, Dennis and Lee Ann were agreed that custody should be shared. Accordingly, Dr. Kravic recommended that the parties continue with the same joint custody arrangement upon which they had initially agreed. Dr. Kravic

clearly thought that the continuation of this arrangement would be in Ryan's best interest, and we find no basis in the record to disagree.

We further find no error in the circuit court's designating Lee Ann as Ryan's primary residential custodian. Based on the parties' shared custody agreement, Lee Ann was the primary custodian of Ryan 197.1 days per year, while Dennis was primary custodian 167.9 days per year. Although the difference is slight, the "primary residential custodian" typically refers "to the party with whom the child will primarily reside." Since the court's order requires Ryan to live with his mother for a greater number of days each year, we cannot say that the decision to designate Lee Ann as the primary residential custodian was an error.

Finally, although Ryan's alleged desire to live with his father was not expressly taken into account, we note again that a minor child's welfare, not his wishes, is determinative.¹⁵ And although neither the court nor the DRC opted to interview Ryan, this decision was discretionary.¹⁶ We find no error with either of these decisions. Accordingly, Dennis's arguments are without merit.

¹⁵ Shepherd v. Shepherd, *supra* at 559.

¹⁶ Brown v. Brown, *supra* at 16.

The scope of our review of custody determinations focuses on deciding whether the circuit court's factual findings were clearly erroneous.¹⁷ Admittedly, the joint custody arrangement in this case requires a level of cooperation that the Peaches have never demonstrated during the pendency of this case. But we recognize that there is substantial evidence in this record to support the trial court's conclusion. So we affirm the decision regarding Ryan's custody.

**CHILD SUPPORT, TAX EXEMPTION,
AND EXTRAORDINARY MEDICAL EXPENSES**

Dennis next argues that the court erroneously awarded Lee Ann child support, ordered him to pay 63.35 percent of all of Ryan's extraordinary medical expenses, and awarded Ryan's tax exemption to Lee Ann. We will discuss each argument separately.

Dennis first contends that the circuit court erroneously ordered him to pay Lee Ann \$192.00 per month in child support. Specifically, Dennis argues that the court failed to take into account the fact that Ryan primarily lives with him. He also claims that the court miscalculated Lee Ann's monthly income. The court found that Lee Ann's yearly income was \$20,687.00 (\$1,916.00 per month), while Dennis's income was

¹⁷ Kentucky Rules of Civil Procedure (CR) 52.01.

\$34,283.00 (\$2,654.00 per month).¹⁸ But Dennis argues that the evidence shows that Lee Ann earned an additional \$1,552.00 per month from her part-time job as a grocery store cashier. Therefore, Dennis claims the court should have ordered Lee Ann to pay him \$432.32 per month.

Dennis's argument that he is "owed" child support because Ryan spends more time with him is unfounded. As previously discussed, Dennis does not have the power to alter unilaterally the court's custody order. And until the trial court finds a reason to modify that order, Lee Ann remains Ryan's primary residential custodian.

The record lacks any evidence indicating that Lee Ann makes \$1,552.00 per month as a grocery store cashier. A W-2 tax form included with the parties' exhibits does indicate that Lee Ann made \$1,307.25 at Smith's Grocery. However, as far as this Court is aware, a W-2 reflects an individual's income annually, not monthly. Lee Ann testified that she works approximately six hours a week at Smith's Grocery, making \$6.00 per hour. To make the income estimated by Dennis, Lee Ann would have to work forty hours a week as a cashier and make almost \$10.00 per hour to net \$1,552.00 per month. Considering the fact that Lee Ann already holds another full-time position with the Anderson County PVA,

¹⁸ Both of these figures take into account the amount of maintenance the parties either received or paid.

Dennis's argument is not credible. Therefore, we reject Dennis's argument and find no basis for error in the circuit court's calculation of the parties' incomes.

With regard to a determination of child support, KRS 403.211(1) states that "[a]n action to establish or enforce child support may be initiated by the parent, custodian, or agency substantially contributing to the support of the child." When child support is initially established, the child support guidelines¹⁹ "serve as a rebuttable presumption for the establishment or modification of the amount of child support."²⁰ In a joint custody arrangement, support is calculated in the following manner:

- (a) Two (2) separate child support obligation worksheets shall be prepared, one (1) for each household, using the number of children born of the relationship in each separate household, rather than the total number of children born of the relationship.
- (b) The nonresidential custodian with the greater monthly obligation amount shall pay the difference between the obligation amounts, as determined by the worksheets, to the other parent.²¹

Based on the child support guidelines, along with the disparity in the parties' income and the percentage of time Ryan

¹⁹ KRS 403.212.

²⁰ KRS 403.211(2).

²¹ KRS 403.212(6).

was ordered to spend with each parent, the court determined that Dennis should pay Lee Ann \$192.00 per month in child support. The evidence supports this conclusion.

The circuit court concluded that Lee Ann's income accounted for 36.65 percent of the parties' adjusted gross income, while Dennis's income accounted for 63.35 percent. The court further found that based on the custody arrangement, Ryan spent 54 percent of his time with Lee Ann, and 46 percent of his time with Dennis. The actual amount of child support awarded to Lee Ann was based on a schedule calculating Lee Ann's presumed basic child support obligation to be \$418.00. Because Ryan was scheduled to spend 46 percent of his time with Dennis, the court subtracted 46 percent of \$418.00 from the amount of Lee Ann's obligation. This resulted in a sum of \$192.00. There is no error in this calculation. So we affirm the circuit court's decision regarding the amount of monthly child support Dennis must pay to Lee Ann.

Second, Dennis claims the court erroneously ordered him to pay 63.35 percent of Ryan's extraordinary medical expenses. Specifically, Dennis argues the court erred by not allocating to Lee Ann "the payment of the first \$100.00 of [Ryan's] medical expenses as mandated by KRS 403.211(8)."

KRS 403.211(8) states that "[t]he cost of extraordinary medical expenses shall be allocated between the

parties in proportion to their combined monthly adjusted parental gross incomes. 'Extraordinary medical expenses' means uninsured expenses in excess of one hundred dollars (\$100) per child per calendar year." The statute further defines "extraordinary medical expenses" to include reasonably necessary costs for services such as surgery and optometry, as well as professional counseling or psychiatric therapy.

As previously established, the court found that Dennis's income accounts for 63.35 percent of the parties' combined adjusted gross income. So the court properly concluded that Dennis was responsible for 63.35 percent of Ryan's extraordinary medical expenses. The failure to state explicitly that Lee Ann was responsible for payment of the first \$100 of Ryan's medical expenses was not error. The statute says that "extraordinary medical expenses" are those expenses in excess of \$100.00. The addition of language directing Lee Ann to pay the first \$100.00 would have been superfluous. Thus, we find no fault with the court's allocation of Ryan's extraordinary medical expenses.

Finally, Dennis argues that the court erroneously allocated Ryan's income tax exemption to Lee Ann. Dennis contends that the court erred because Ryan primarily resides with him and because Lee Ann is currently not paying any child support.

When apportioning a dependent's tax exemption, the court must "allocate the exemption so as to maximize the amount available for the care of the [dependent]." ²² Although the allocation of the tax exemption is within the discretion of the circuit court, it "is to be guided in the exercise of its discretion by making an allocation which will best maximize the benefit of the exemption" ²³

Considering the fact that Lee Ann was designated as the primary residential custodian of Ryan, the court did not abuse its discretion by allocating Ryan's tax exemption to her. Again, Dennis's argument that he should receive the exemption because Ryan spends more time with him is without merit. Until there is a court order to the contrary, Lee Ann is the primary residential custodian of Ryan. Therefore, the court's decision to allocate the exemption to Lee Ann was not an abuse of discretion.

DENNIS'S NON-MARITAL INTEREST
IN THE PARTIES' REAL ESTATE

Dennis's third argument is that the court erred by allocating to him only a \$5,000.00 non-marital interest in the parties' real estate. Rather, he claims the court should have allocated a \$12,000.00 non-marital interest to him.

²² Hart v. Hart, 774 S.W.2d 455, 457 (Ky.App. 1989).

²³ Pegler v. Pegler, 895 S.W.2d 580, 581 (Ky.App. 1995).

Before the marriage, Dennis owned a mobile home and a tract of land. The mobile home had an initial value of \$3,500.00; it was later sold for the same price. The tract of land was initially appraised at \$1,500.00. But the land now has a fair market value of \$8,500.00. The court found that Dennis was entitled to the sale price of the mobile home (\$3,500.00), plus the initial value of the land (\$1,500.00), for a total of \$5,000.00 in recognition of his non-marital interest. But Dennis argues that the court should have awarded him the value of the mobile home, plus the current value of the land (\$8,500.00), for a total non-marital interest of \$12,000.00. We disagree.

KRS 403.190 requires the court to utilize a three-step process when dividing property: "(1) characterizing each item of property as marital or nonmarital; (2) assigning each party's nonmarital property to that party; and (3) equitably dividing the marital property between the parties."²⁴ If property is acquired subsequent to marriage, it is assumed to be marital.²⁵

In Travis v. Travis,²⁶ the Kentucky Supreme Court discussed the process for dividing marital property when there is an increase in the property's value:

²⁴ Hunter v. Hunter, 127 S.W.3d 656, 659 (Ky.App. 2003).

²⁵ *Id.* at 660.

²⁶ 59 S.W.3d 904 (Ky. 2001).

When the property acquired during the marriage includes an increase in the value of an asset containing both marital and nonmarital components, trial courts must determine from the evidence "why the increase in value occurred" because "where the value of [non-marital] property increases after marriage due to general economic conditions, such increase is not marital property, but the opposite is true when the increase in value is a result of the joint efforts of the parties." KRS 304.190(3), however, creates a presumption that any such increase in value is marital property, and, therefore, a party asserting that he or she should receive appreciation upon a nonmarital contribution as his or her nonmarital property carries the burden of proving the portion of the increase in value attributable to the nonmarital contribution. By virtue of the KRS 403.190(3) presumption, the failure to do so will result in the increase being characterized as marital property.²⁷

It is undisputed that the parties built their marital home on Dennis's original tract. And although Dennis argues that "[i]t is well settled that the increased value of [nonmarital] property acquired before the marriage remains [nonmarital] if the increase is not the result of the parties' efforts," he fails to point to any evidence in the record that the increase in the value of the land was solely attributable to him. In contrast, Lee Ann argues that the increase in value was a joint effort since the parties "jointly borrowed funds, jointly landscaped, jointly built a home, garage, driveway,

²⁷ *Id.* at 910-911 (citations omitted).

etc." to transform the land from "the bare piece of western Anderson County hillside once deeded."

The circuit court agreed with Lee Ann's assessment that the increase in the land's value was attributable to the joint efforts of both parties; and because there is no evidence in the record to support Dennis's contention that the increase in value was the product of his efforts alone, he failed to meet his burden of proof. Therefore, the circuit court's findings were proper.

DIVISION OF SPECIFIC PERSONAL PROPERTY

Fourth, Dennis contends that the circuit court erroneously divided certain items of personal property. Dennis specifically claims the court erred by dividing the parties' employment benefits and the payouts from the National Tobacco Settlement as marital property and by failing to divide the value of their motor vehicles.

With regard to the division of employment benefits, Dennis argues that the circuit court abused its discretion because it ordered the parties to divide equally "any and all employment benefits." Because this Court has already held that benefits such as vacation and sick days are not divisible as marital property, Dennis contends the circuit court's order was erroneous. We disagree.

Dennis properly identifies our holding in Bratcher v. Bratcher²⁸ as expressly excluding items such as “accrued leave” from marital division. In Bratcher, we adopted the Maryland court’s holding in Thomasian v. Thomasian²⁹ that “accrued holiday and vacation entitlement[s]” are not the same as “pension or retirement benefits.”³⁰ Because these benefits “replace[] wages on days when the worker does not work,” they are “really only an alternative form of wages.”³¹ And since they are “much more difficult to value” and not “as tangible” as pensions or retirement benefits, we held that they were not divisible as marital property.³²

Because of our holding in Bratcher, we believe the more sensible interpretation of the phrase “any and all employment benefits” necessarily excludes entitlements to accrued vacation, holiday, and sick hours. Clearly, Dennis’s argument ignores the fact that “employment benefits” include more than vacation and holiday hours. It is well established that other employment benefits—such as retirement and pension benefits—are divisible as marital property. Although Dennis

²⁸ 26 S.W.3d 797 (Ky.App. 2000).

²⁹ *Id.* at 800; 79 Md.App. 188, 556 A.2d 675 (1989).

³⁰ Bratcher at 800, quoting Thomasian at 681.

³¹ *Id.*

³² *Id.*

argues that his retirement benefits cannot be divided because they are not vested, "Kentucky permits division as marital property of both vested and nonvested retirement benefits."³³

Therefore, we find no error in the court's decision to divide the parties' "employment benefits," while excluding the parties' accrued vacation, sick, or holiday hours, and including any retirement or pension benefits.

Dennis also argues that the court erred in holding that "[t]he issue of the tobacco settlement and/or tobacco buyout proceeds which derive from the years of the marriage is hereby reserved until such time that there may a [sic] resolution of such issue or the division is capable of being determined and distributed." According to the record, Dennis's parents gave him a 300-pound tobacco allotment. Dennis and Lee Ann bought an additional 700-pound allotment during the marriage.

The tobacco settlement, also referred to as the "Phase II" settlement, stems from a "landmark" 1998 agreement between the tobacco companies and the tobacco-growing states.³⁴ The purpose behind the Phase II settlement was to compensate "tobacco growers for losses they were expected to suffer under

³³ Holman v. Holman, 84 S.W.3d 903, 907 (Ky. 2002).

³⁴ "UPDATE: NC Judge: Tobacco Cos Freed From Farmer Payments," *The Wall Street Journal*, Dec. 23, 2004, available at: http://agpolicy.ky.gov/Documents/article_041223_WSJ_JudgeRules.pdf.

higher cigarette prices”³⁵ The payments, which began in 1999, were to be paid to tobacco quota owners and tobacco growers over a period of five years. But in the fall of 2004, the United States Congress approved a \$10.1 billion federal tobacco buyout; therefore, the tobacco companies argued they should not be required to make the \$189 million settlement payment scheduled to be paid out to farmers in December 2004.³⁶ The North Carolina Business Court agreed with the tobacco companies and held that the companies did not have to make the 2004 settlement payments. Moreover, the North Carolina court held that the companies should get a refund on payments made earlier in 2004.³⁷ Because of the potentially far-reaching financial impact of the North Carolina court’s decision, it is assumed that the order will be appealed.

Dennis argues that the circuit court erred because Lee Ann had already “protested the sums allegedly due to her under the National Tobacco Settlement Program.” Allegedly, the parties appeared before the “Phase II National Tobacco Settlement Board for Kentucky” and a “determination was rendered” allowing both of them to begin “receiving their

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id*; see also, State v. Philip Morris, et al., file no. 98 CVS 14377, (N.C. 2004), available at <http://www.ncbusinesscourt.net/120945/2004%20NCBC%209.htm>.

appropriate shares as established by that board." There is no evidence of this determination in the record.

In response, Lee Ann argues that because of the speculative nature of any future tobacco settlements, the circuit court properly delayed "assignment of tobacco settlement or buyout proceeds until they are capable of division." Thus, Lee Ann claims that if, when the amount of the settlements is secured, "certain settlement proceeds derive from the years of the marriage, the Court can give Lee Ann an equitable apportionment. To foreclose this possibility could very well provide Dennis with a windfall"

Dennis has failed to provide proof that a determination of the parties' "appropriate shares" of the Phase II settlement has already been made. Therefore, we must agree with Lee Ann that the nature of the tobacco settlements is too speculative to be determined at this time. Obviously, the recent decision from the North Carolina Business Court makes receipt of the payments even more speculative. Because of the provisional character of the settlement funds, we believe that the circuit court properly reserved this issue for future determination.

Dennis further argues that the circuit court did not have jurisdiction over this issue because the Phase II settlement is a "federal" issue that has not been enacted into

state law. Therefore, he claims the court's decision to reserve the issue for future determination was erroneous.

We reject this argument. Regardless of whether the tobacco settlement was created by state or federal legislation, the court undeniably had jurisdiction over Dennis and Lee Ann. The decision to reserve the issue of division of the settlement monies until a later time did not require the court to exercise power over the settlement itself but, rather, over when and how the settlement will be divided between the parties. Since Dennis availed himself of the Anderson Circuit Court when he filed his petition for dissolution, that court had power to enter an order regarding the division of parties' entire marital estate.

Finally, Dennis argues that the trial court erred by excluding their motor vehicles from marital division. Again, we note that the division of marital property is within the province of the circuit court. We will only set aside the circuit court's decision if it amounts to an abuse of discretion.³⁸ Moreover, the threshold requirement is that marital property be divided equitably, not equally.³⁹

The decision to exclude the parties' motor vehicle from division was not an abuse of discretion. There is no proof

³⁸ Russell v. Russell, 878 S.W.2d 24, 25 (Ky.App. 1994).

³⁹ *Id.*

that the overall distribution was inequitable; rather, the record indicates that both Dennis and Lee Ann received a fair share of the marital estate. Thus, although we do not fully understand the court's rationale for excluding only the parties' motor vehicles from marital division, we cannot say that the decision to do so was clearly erroneous.

DISPOSITION OF INDEBTEDNESS

Dennis next argues that the circuit court erroneously assigned him the liability for a \$2,000.00 debt owed to his mother, Marlene Peach. The debt apparently stemmed from the purchase of a Farmall tractor from Dennis's parents. Dennis claims that because both he and Lee Ann listed this debt on their financial disclosure statements, the court should have divided it between them. We disagree.

When a debt is incurred during a marriage, it is "traditionally assigned on the basis of such factors as receipt of benefits and extent of participation; whether the debt was incurred to purchase assets designated as marital property; and whether the debt was necessary to provide for the maintenance and support of the family."⁴⁰ As with marital property, courts

⁴⁰ Neidlinger v. Neidlinger, 52 S.W.3d 513, 523 (Ky. 2001) (citations omitted).

need not presume that "debts must be divided equally or in the same proportions as the marital property."⁴¹

The record indicates that the Farmall tractor was purchased for Dennis and Lee Ann's farming operation. Both parties assumedly participated in the purchase of the tractor, but there is no evidence that the tractor was purchased "to provide for the maintenance and support of the family." The tractor was deemed to be marital property since it was purchased after the parties' marriage.

As with the division of marital property, the division of marital debt is discretionary and within the province of the circuit court.⁴² Considering the relevant factors and the fact that Dennis's financial resources exceed Lee Ann's, we do not believe the decision to assign the \$2,000.00 debt to Dennis constituted an abuse of discretion. Therefore, we affirm.

AWARD OF MAINTENANCE

Dennis's sixth point of contention is that the circuit court erroneously ordered him to pay Lee Ann maintenance in the amount of \$500.00 per month for five years, or until Lee Ann's "death, cohabitation or remarriage" Dennis claims that because Lee Ann's income exceeded her monthly expenses and

⁴¹ *Id.*

⁴² *Id.*

because "Lee Ann's conduct broke up the marital household and caused this divorce while she took up with Jimmy Lee Hawkins," she does not deserve maintenance. We disagree.

First, whether or not Lee Ann's conduct "broke up the marital household" is not to be considered in determining whether to award maintenance.⁴³ Second, although Dennis claims that Lee Ann "took up with Jimmy Lee Hawkins," he cites to no evidence in the record which would support a finding of cohabitation. Without proof, we are unable to expound on the merits of this allegation.

KRS 403.200 governs awards of maintenance. The statute states that "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" Factors to be taken into account in determining the extent and amount of a maintenance award include:

- (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently . . . ;

⁴³ See 16 Louise E. Graham & James E. Keller, KENTUCKY PRACTICE § 16.10 (2d ed. 1997).

- (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.

Whether to award a party maintenance is within the sound discretion of the trial court.⁴⁴

The circuit court found that "given the standard of living of the marriage, the duration of the marriage, in excess of twenty years, the disparity of incomes of the parties, that it is reasonable to award [Lee Ann] spousal maintenance in the amount of \$500.00 per month for 5 years (60 months)." Dennis argues this finding was erroneous because Lee Ann's income exceeds her monthly expenses. This assumption is based upon Dennis's continued belief that Lee Ann secretly makes an additional \$1,550.00 per month working part time as a grocery store cashier.

⁴⁴ Weldon v. Weldon, 957 S.W.2d 283, 285 (Ky.App. 1997).

As previously stated, there is no evidence in the record to support Dennis's estimation of Lee Ann's income. Rather, the court found that Lee Ann's current gross income, *including maintenance*, was \$1,916.00. The court further found that her monthly expenses were \$1,894.00. We do not believe the fact that Lee Ann's income exceeds her monthly expenses by approximately \$20.00 proves that the court's maintenance order was erroneous. Further, the circuit court did not abuse its discretion when it determined that based on Lee Ann's current status, she was unable to provide for her reasonable needs and sustain the standard of living enjoyed during her marriage. Therefore, we affirm the trial court's decision to award Lee Ann maintenance in the amount of \$500.00 per month.

AWARD OF ATTORNEY'S FEES

Finally, Dennis argues the court erroneously ordered him to pay \$6,500.00 of Lee Ann's attorney's fees. We disagree.

KRS 403.220 states:

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.

As with most other decisions relating to property settlement, the assignment of attorney's fees is within the discretion of the trial court.⁴⁵ The only requirement is that the court must "consider the financial resources of the parties when ordering a party to pay a reasonable amount in attorney's fees."⁴⁶

Based on the totality of the evidence we have thus far discussed, it is clear that Dennis's financial resources exceeded Lee Ann's. Because this is the only requirement that the court must take into consideration, we believe the decision to assign a portion of Lee Ann's attorney's fees to Dennis was appropriate and supported by substantial evidence.

CONCLUSION

For these reasons, the May 18, 2004, order of the Anderson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Michael L. Judy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Susan Hanrahan McCain
Springfield, Kentucky

⁴⁵ Neidlinger, *supra* at 519.

⁴⁶ Poe, *supra* at 852.