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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002647-MR
AND
NO. 2007-CA-000124-MR

ROBERT BUSCHER PALMER-BALL, M.D. APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JERRY J. BOWLES, JUDGE
ACTION NO. 03-CI-502080

SHEILA CLEMONS PALMER-BALL APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, NICKELL, AND WINE, JUDGES.

NICKELL, JUDGE: The marriage of Robert ("Bob") and Sheila ("Sheila") Palmer-Ball was dissolved by order of the Jefferson Circuit Court on March 28, 2006. On December 4, 2006, the trial court entered an order correcting errors in the prior opinion and denying other issues raised in motions to alter, amend or

vacate[1] filed by both parties. Bob appeals and Sheila cross-appeals from both orders. Bob's appeal focuses on whether a Florida condominium purchased during the marriage, but after Bob received an inheritance from his father's estate, should have been awarded to him entirely as nonmarital property; whether the trial court properly calculated the value of Bob's medical practice; whether the trial court properly awarded maintenance and attorney fees to Sheila; and whether the trial court properly divided the marital debts between the parties. Sheila's cross-appeal focuses solely upon whether a diamond pendant, purchased as an investment by Bob during the marriage with marital funds, is marital property to be divided between the parties or a gift from Bob to Sheila for their silver wedding anniversary and therefore Sheila's nonmarital property. We affirm the trial court's orders in all respects.

FACTS

Sheila and Bob were married in Louisville on February 15, 1974. Two children, both adults now, were born to their union. A daughter, Elizabeth ("Beth"), was born in 1979. Bob and Sheila paid her tuition to Bellarmine University and borrowed heavily against their whole life insurance policies to purchase an unencumbered home for her. A teacher, Beth intends to repay the purchase price of her home to her parents, but is uncertain when her finances will permit her to do so. A son, Matthew ("Matt"), was born in 1983. He was attending Notre Dame University when the divorce proceedings began. Bob

[1] Kentucky Rules of Civil Procedure (CR) 59.

testified he and Sheila had promised to fund Matt's college tuition. Sheila testified Matt was never told he would not have to contribute to his education. Bob intended to retire early, but chose to work at least four additional years to pay for Matt's tuition. Once the divorce proceeding began and there was a downturn in Bob's medical practice, Bob borrowed money from his brother ($20,500.00) to pay for Matt's senior year of college. Matt graduated in May 2005.

When Bob and Sheila married in 1974, Bob was a high school biology teacher. He subsequently graduated from medical school in 1980 and has practiced internal medicine since that time. Bob is currently a solo practitioner and rents office space from Norton Healthcare. Salaries of some, but not all, of his office staff are included in his rent package. In recent years, Bob's business earnings have ranged from a high of $220,534.00 in 2000 to a low of $40,376.00 in 2004. Bob testified the drop in earnings resulted partially from many of his patients switching to Humana, a health insurance plan for which he was not an approved provider. Bob joined the Humana network of providers in 2003 and is rebuilding his patient base. Sheila believes Bob could earn more money by advertising. Bob opposes physician advertising. He testified he would not be the first Louisville internist to advertise for patients. Bob was fifty-six years old at the time of dissolution.

Sheila earned her teaching degree in 1973 and began teaching in 1974. In 1979, she earned a Master's degree in education. Between Matt's birth in 1983 and the time he turned seven in 1990, Sheila did not work outside the home.

During that time she cared for the couple's two children. In 1990 Sheila took a position at Assumption High School where she remains today as director of a program she developed for children with learning disabilities. Sheila has taught in the Jefferson County Public Schools, but most of her professional career has been spent in the service of parochial schools. Bob maintains Sheila could increase her salary and retirement benefits by returning to the county school system. Sheila was fifty-three years old and earning $53,706.00 annually at the time of dissolution.

According to Sheila, her marriage of nearly thirty years to Bob was rocky. The couple separated in 1996 but reconciled later that year. They celebrated their silver wedding anniversary in 1999. In November 2002, the couple separated for the final time and Sheila petitioned to dissolve the marriage in June 2003.

During the separation in 1996, Sheila remained in the marital home and Bob moved to an apartment. In August 1996, while living in the apartment, Bob used marital funds to buy a diamond pendant for $25,000.00 as an investment. He never mentioned the pendant to Sheila, which was appraised at $71,000.00 in 1996. That was not unusual since Bob handled the family's finances. Bob showed the diamond to their daughter Beth, her boyfriend, and several coworkers. When Beth asked her father why he bought such a large diamond he said it was an investment. When Beth asked if she could have it, he said she could wear it, but she could not have it. Three years later, on the occasion of their silver wedding

anniversary in February 1999, Bob asked Sheila whether she would like to wear the diamond pendant to a family dinner being held in their honor. The diamond was a surprise to Sheila and prompted her to ask where else she could wear it. Bob said she could wear it anywhere, even grocery shopping the following day. The parties differed as to whether Sheila was keen on attending the anniversary party but she did attend and she did wear the diamond. When the couple returned home that evening Bob did not ask Sheila to return the 5.85 carat diamond to him, nor did he ever ask that she return it to him or safeguard it in any special way. Sheila now claims the pendant was Bob's anniversary gift to her and therefore her nonmarital property. Bob disagrees saying he never told Sheila the diamond was a gift; Sheila says he never said it was not a gift. Ultimately, neither Sheila nor Bob chose to keep the diamond which at dissolution had an appraised value of $77,000.00. The court ordered Bob to sell the diamond and evenly split the proceeds with Sheila.

The couple maintained two checking accounts at separate banks during their marriage. There was a household account for ordinary living expenses and a separate business account for the medical practice. The only money deposited into the business account came from insurance reimbursements and patient fees. Bob testified he would never commingle the funds in the two accounts. When the balance in the household account dwindled, Bob withdrew money from the business account as a salary and deposited it into the household

account. Sheila's salary was also deposited into the household account and used to pay incidentals and living expenses.

Bob wanted to retire to a warm climate. When his father died, Bob inherited about $300,000.00. At Sheila's suggestion, she and Bob traveled to Florida to begin the search for a vacation condo. They quickly found one they liked in Naples and Bob paid the $16,000.00 down payment from his inheritance. Both parties agreed the $16,000.00 down payment on the condo was Bob's nonmarital property.

Of the $300,000.00 inheritance, about $130,000.00 was a separate stock account which both parties also agreed was Bob's nonmarital property. The remainder of Bob's inheritance, minus the $16,000.00 down payment on the condo, was deposited into the couple's household account and used to pay living expenses. While the family spent the inheritance for daily living, Bob did not draw a salary from the business account. Instead, his usual salary was allowed to grow in the business account where it earned a higher rate of interest. Once the business account had grown sufficiently, Bob wrote a check for the balance of the condo ($146,000.00) from the business account. At the time of dissolution, the condo had increased in value from the purchase price of around $162,000.00 to an appraised value of $300,000.00. Sheila accepted the appraised value; Bob did not. Bob asked that the appraisal be reduced by $25,000.00 due to water damage. The appraiser took a second look at the unit but saw no need to adjust his original opinion. Although unable to trace the condo purchase directly to his inheritance,

Bob maintained the condo was his nonmarital property because his inheritance enabled the family to buy the unit. The trial court found Bob did not satisfy Kentucky's tracing requirement and therefore ninety percent of the condo was found to be marital property. Ultimately, Bob retained the condo and bought out Sheila's marital interest.

After multiple hearings and a three-day trial, the Jefferson Circuit Court issued detailed findings of fact and conclusions of law on March 28, 2006. The court divided the couple's property and marital debts and awarded maintenance and attorney fees to Sheila. In particular, the court found ninety percent of the Florida condo was marital property because it was purchased with marital funds from Bob's medical practice bank account and not from his inheritance as Bob had maintained. The court found the diamond pendant was marital property because Sheila did not prove Bob transferred it to her as a gift.

Thereafter, both parties filed timely motions to alter, amend or vacate the March 28, 2006, findings and conclusions. As a result, the court corrected a few errors, rejected other arguments made by the parties, and issued a new order dated December 4, 2006. Bob has appealed both the March 28, 2006, and the December 4, 2006, orders. Sheila has filed a cross-appeal from both orders. We now affirm.

ANALYSIS

In a dissolution action, "[f]indings 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." CR 52.01. When supported by substantial evidence, findings of fact are not clearly erroneous. *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky.App. 2002). We give due deference to the trial court's opportunity to judge witness credibility and when the evidence is conflicting, the trial court, not this Court, decides who and what to believe. *Adkins v. Meade*, 246 S.W.2d 980 (Ky. 1952). While factual issues are reviewed for clear error, legal issues are reviewed *de novo*. *Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky.App. 2003); *Carroll v. Meredith,* 59 S.W.3d 484, 489 (Ky.App. 2001).

With few exceptions, all property acquired during a marriage is presumed to be marital property. KRS[2] 403.190(2) and (3). However, a party may overcome this presumption by proving an item was "acquired by gift, bequest, devise, or descent during the marriage and the income derived therefrom unless there are significant activities of either spouse which contributed to the increase in value of said property and the income earned therefrom. . . ." KRS 403.190(2)(a). A party claiming an asset is nonmarital property bears the burden of proving its nonmarital character by clear and convincing evidence. *Sexton v. Sexton,* 125 S.W.3d 258, 266 (Ky. 2004); *Brosick v. Brosick,* 974 S.W.2d 498, 502 (Ky. 1998). To determine whether property is marital or nonmarital, Kentucky uses a "source of funds" rule. *Travis v. Travis,* 59 S.W.3d 904, 909 (Ky. 2001). Simply stated, property purchased with nonmarital funds during a marriage is nonmarital property and property purchased during a marriage with marital funds is marital property.

[2] Kentucky Revised Statutes.

THE DIAMOND PENDANT

Sheila advances only one claim. She contends the trial court erred in finding the diamond pendant she wore to her twenty-fifth wedding anniversary dinner was marital property rather than a gift to her from Bob and therefore hers alone. Bob testified he purchased the pendant with $25,000.00 in marital money as an investment in 1996 while the parties were separated. He further testified he never intended to *give* the necklace to anyone. Sheila does not dispute the diamond was purchased as an investment but claims its character changed when Bob asked her if she'd like to wear it to their anniversary dinner in 1999, she wore it, and Bob never asked for its return. Bob argues the trial court properly found the necklace to be marital property and ordered it sold[3] with the proceeds being divided equally between the parties.

Whether the pendant was a gift is an issue of fact we review for clear error. *Hunter, supra,* 127 S.W.3d at 660 (citing *Ghali v. Ghali,* 596 S.W.2d 31 (Ky.App. 1980)); CR 52.01. So long as the trial court's findings are supported by substantial evidence we will not disturb them. *Sherfey, supra.* Since Sheila claims the diamond was a gift, she bears the burden of clearly and convincingly proving it to be nonmarital property. *Travis, supra.*

Four factors determine whether the pendant was marital property:

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[3] The court originally awarded the diamond pendant to Bob and credited Sheila with half of the appraised value ($37,500.00). Ultimately, the parties agreed Bob would sell the diamond and the parties would evenly split the proceeds.

> the source of the money with which the "gift" was purchased, the intent of the donor at that time as to intended use of the property, status of the marriage relationship at the time of the transfer, and whether there was any valid agreement that the transferred property was to be excluded from the marital property.

O'Neill v. O'Neill, 600 S.W.2d 493, 495 (Ky.App. 1980). Of the four factors, the donor's intent carries the most weight. *Sexton, supra,* 125 S.W.3d at 268-69. In applying these factors to the case *sub judice*, Bob testified he bought the pendant with marital funds as an investment. The sales ticket for the pendant identified it as an "investment diamond" and Beth, the couple's daughter, testified Bob told her he bought the diamond as an investment. Sheila was unaware of the purchase for three years. This was not particularly unusual since Bob handled the finances for the family. The parties disagreed about the status of the marriage at the time the diamond was purchased in August 1996. Bob testified the parties were separated; Sheila testified they had reconciled, but Bob did not fully return to the marital home until November 1996. Shortly before the couple's twenty-fifth wedding anniversary dinner on February 15, 1999, Bob showed the pendant to Sheila and asked whether she would like to wear it to dinner. Sheila was surprised and asked where else she could wear the necklace. Bob responded she could wear it anywhere she wanted, even grocery shopping. There was no testimony Bob and Sheila ever agreed to exclude the pendant from their marital property or that Bob intended the diamond to be a gift to Sheila and therefore her nonmarital property.

Sheila testified she believed the diamond was a gift. However, under *O'Neill,* it is not Sheila's belief, but rather Bob's intent, that is the controlling factor. Furthermore, it is doubtful Sheila really believed the necklace was a gift because she asked Bob where she could wear it besides the anniversary dinner. If she truly believed it was a gift to do with as she pleased she would not have asked where else she could wear it. As stated in *O'Neill,* Bob's purchase of the diamond in 1996 changed the form of the marital funds from cash to jewelry, but asking Sheila whether she wanted to wear the diamond to a party in 1999 and then allowing her to store it in her jewelry box within the marital home did not transform the pendant into nonmarital property. Sheila's complaint that the trial court took Bob's testimony at face value rather than questioning his veracity is unpersuasive. Both Beth and the pendant's invoice corroborated Bob's testimony that the diamond was purchased as an investment. There was no testimony from anyone that Bob ever told Sheila the diamond was a gift to her or that he considered the pendant anything other than an investment. Sheila *assumed* the pendant was a gift because she expected a memento of their silver anniversary. The trial court was free to pick and choose among the conflicting evidence and we cannot say it clearly erred in believing Bob and finding the diamond pendant was marital property. Thus, we reject Sheila's claim on cross-appeal and affirm the trial court's orders as they pertain to the diamond pendant.

THE FLORIDA CONDO

Bob alleges the trial court erroneously found ninety percent of the family condo was marital property. In what he labels a "but for" argument, Bob contends the condo purchase was made possible solely by an inheritance he received upon his father's death so the condo should have been awarded to him in its entirety as nonmarital property. In contrast, Sheila urges us to affirm the trial court's ruling because Bob did not trace the balance of the condo's purchase price to a nonmarital asset as required by *Chenault v. Chenault,* 799 S.W.2d 575 (Ky. 1990). Having considered the current state of the law in Kentucky and the facts presented to us, we reject Bob's "but for" argument and affirm the trial court's finding that ninety percent of the condo's value was marital property.

The facts are undisputed. Bob inherited $300,000.00. Approximately $130,000.00 of his inheritance was held in a separate stock account later deemed Bob's nonmarital property by the trial court. From the remaining $170,000.00 Bob paid the $16,000.00 down payment for the condo, the purchase price of which was about $160,000.00. Because this $16,000.00 down payment was traced directly to Bob's inheritance the trial court likewise found it to be Bob's nonmarital property. However, Bob deposited his remaining inheritance, about $154,000.00, into the couple's household account, thereby commingling it with their marital property. The couple continued to pay daily living expenses from their household account, while not drawing any salary for Bob from the business account, thereby allowing his earnings to draw a higher rate of interest. This business account was also marital property. Later, after sufficient funds were accumulated in the business

account, Bob paid off the balance owed for the condo purchase, about $146,000.00, with a check drawn on that account. Because Bob could not subsequently trace the $146,000.00 condo payoff directly to his inheritance, which had been deposited into the couple's household account, the trial court found ninety percent of the condo's purchase price came from marital funds. We hold the trial court was correct in characterizing all but the $16,000.00 down payment, and its proportionate increase in value[4], as marital property.

Citing *Allen v. Allen,* 584 S.W.2d 599 (Ky.App. 1979), Bob argues Kentucky no longer requires precise tracing of nonmarital funds into an asset acquired during marriage, and the couple's two bank accounts should be considered as one, thereby allowing him to trace the condo payoff drawn on the business account to his inheritance proceeds which he had deposited into the household account. While it may be true that precise tracing is no longer required, the concept of tracing remains alive and well in the Commonwealth as explained in *Chenault, supra,* 799 S.W.2d at 578-9.

> In *Allen v. Allen, supra,* the Court of Appeals retreated somewhat from its earlier decisions and held that the requirement of tracing should be fulfilled, at least as far as money is concerned, when it is shown that nonmarital funds were deposited and commingled with marital funds and that the balance of the account was never reduced below the amount of the nonmarital funds deposited." *Id.* at 600. The view expressed in *Allen* is consistent with the concurring opinion of Vance, J., in *Turley v. Turley,*

[4] The trial court awarded $30,000.00, ten percent of the condo's $300,000.00 appraised value at dissolution, to Bob as his nonmarital property. This figure was based on the court's finding that the $16,000.00 condo down payment, which all agreed was Bob's nonmarital property, was ten percent of the approximately $160,000.00 purchase price of the condo.

> *supra*. In that concurring opinion, it was persuasively argued that all nonmarital property should be restored upon dissolution of the marriage providing the parties have, throughout the marriage, maintained at least as much in assets as the combined value of their nonmarital property. By logical inference, if this view were adopted, any decrease during the marriage in the parties' total nonmarital asset value would be charged *pro rata* against their percentage share of total nonmarital property to be assigned.
>
> As appealing as the foregoing view may be, particularly when the simplicity of its application and its inherent equity is considered, we believe the concept of tracing is too firmly established in the law to be abandoned at this time.
>
> Accordingly, we shall adhere to the general requirement that nonmarital assets be traced into assets owned at the time of dissolution, but relax some of the draconian requirements heretofore laid down. We take this position, in part, in reliance upon the trial courts of Kentucky to detect deception and exaggeration or to require additional proof when such is suspected.

Thus, while tracing has not been eliminated, its requirements have been relaxed for the unsophisticated. However, that word hardly describes Bob who demonstrated great knowledge and skill in testifying about complex financial topics such as medical billing, health insurance, and the tax consequences of life insurance policies and investments.

Here, Bob traced the condo funds to two sources. The $16,000.00 down payment came from Bob's inheritance, a nonmarital asset, and the $146,000.00 payoff came from the couple's business account, a marital asset. Yet, Bob provides no legal authority which would allow us to accept his argument that

we should combine the couple's separate household and business accounts, located at two separate banks and under two separate names, and treat them as one account from which he ultimately paid off the condo. *Allen* may provide slight support for this premise, but it is easily distinguishable because there the commingling of marital and nonmarital funds occurred within a single bank account. Here we have two separate accounts and Bob, himself, testified he would never mix money from the two. If Bob would not combine or commingle the money held in these separate accounts it is unreasonable to ask or expect this court to do so.

Essentially, Bob argues the court can distinguish and separate his inheritance from the couple's marital property regardless of which of their accounts it was deposited into and which of their accounts was used to pay off the condo's purchase price. To illustrate his point Bob offered the analogy of mixing one's mashed potatoes with one's green peas, noting that though they be commingled they are no less identifiable and separable. However, once one's eggs have been scrambled it is impossible to separate them from the omelet. Thus, we reject Bob's interesting epicurean analogy and hold his legal theory as contrary to longstanding Kentucky law. Indeed, merely showing one "brought nonmarital property into the marriage without also showing he or she has spent his or her nonmarital assets in a traceable manner during the marriage" will not satisfy Kentucky's tracing requirement. *Polley v. Allen,* 132 S.W.3d 223, 299 (Ky.App. 2004). The undisputed proof established only the $16,000.00 down payment for the condo was traceable to Bob's inheritance. Because Bob did not trace the

remainder of the condo purchase price to a nonmarital asset he brought to or acquired during the marriage, there was no basis upon which the trial court could have found it to be nonmarital property. *Brunson v. Brunson,* 569 S.W.2d 163, 176 (Ky. 1978). On the strength of *Chenault,* we affirm the trial court's finding that ninety percent of the condo was marital property.

In a related argument, Bob claims the trial court prevented him from proffering evidence in support of his "but for" argument. Our review of the videotaped trial shows just the opposite. This claim is complicated by the fact that avowal testimony was not recorded when elicited in October 2004. At some point during the avowal, Sheila's attorney objected to the relevance of proving the portion of Bob's inheritance he deposited into the household account would have been sufficient to buy the condo had it been used for that purpose. The trial court, according to Sheila's brief, sustained that objection. Then, while preparing for trial to resume in June 2005, Bob's attorney discovered about ninety minutes of recorded testimony, including the avowal, was missing from the videotape. When trial resumed, the parties and the trial court attempted to reconstruct the avowal. After a long discussion, the court told Bob he could put on any avowal testimony he wanted and suggested three options for doing so: the parties could stipulate to the facts; they could submit affidavits summarizing the testimony; or they could continue taking evidence on the record. After about a five minute discussion on the record, Bob's attorney stated he had adequately preserved the record for consideration by this Court and there was no need to put anything else on the

record. Thus, the trial court did not prevent Bob from offering testimony by avowal.

However, the trial court did question the necessity of an avowal since the issue was strictly one of law and the anticipated testimony, much of which had already been stipulated, was not going to satisfy Kentucky's tracing requirement. Bob's attorney stated he was not trying to prove any facts, he was simply attempting to create a record for this Court to review if we found the "but for" argument convincing. Since we have rejected the "but for" argument there could be no error on the part of the trial court.

In another argument related to the condo, Bob claims that even if it is properly characterized as marital property, he is still entitled to more than half of it. He argues he is entitled to one hundred percent of the condo because his inheritance made its purchase possible. Despite a valiant search of the record, it does not appear this theory was ever presented to the trial court and Sheila argues it is unpreserved. We will not address an argument that has not first been brought before the trial court for consideration. *Kennedy v. Commonwealth,* 544 S.W.2d 219, 222 (Ky. 1976). Moreover, CR 76.12(4)(c)(v) requires "at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." No such statement appears in Bob's brief. Therefore he has also failed to comply with this rule.

We will make one final comment about the condo. Bob stated in the written "closing argument" he submitted to the trial court after the conclusion of all

the proof, "[i]n the least, the [trial] Court should credit Bob's $16,000.00 non-marital (sic) down payment plus the growth attributable to the market increase in the property's value as Bob's non-marital (sic) asset." That is precisely what the trial court did. The court figured the $16,000.00 down payment, which all agreed came from the inheritance, was about ten percent of the $162,000.00 purchase price of the condo. The trial court then awarded to Bob, as nonmarital property, $30,000.00 or ten percent of the $300,000.00 appraised value of the condo. The trial court correctly applied the law and there is no basis for reversal.

VALUATION OF MEDICAL PRACTICE

Bob alleges the trial court improperly calculated the value of his medical practice resulting in a figure that was inflated by $13,506.29. He claims the error occurred when the trial court updated the accountant's appraisal of the practice instead of ordering an accountant to update the numbers. Bob contends the trial court should have written-off as uncollectible forty percent of the accounts receivable for the first nine months of 2004 as was his accountant's habit. In contrast, Sheila argues the court applied the desired reduction. This issue is unpreserved for our review as it was not included in Bob's motion to alter, amend or vacate. As stated previously, we will not review a claim that has not first been presented to the trial court. *Kennedy, supra.* Furthermore, it appears the court did in fact deduct forty percent of the accounts receivable as being uncollectible. Therefore we affirm the trial court on this point.

ATTORNEY'S FEES

Bob argues the trial court erroneously awarded $19,500.00 in attorney's fees to Sheila. Without citing any authority for this theory, he claims the trial court failed to find Sheila could not pay her own attorney's fees. Sheila responds that a trial court is not required to make specific findings in awarding attorney's fees. We agree with Sheila.

Awarding attorney's fees is wholly within the discretion of the trial court and will be disturbed only if the trial court abused its discretion. *Giacolone v. Giacolone,* 876 S.W.2d 616, 620-21 (Ky.App. 1994) (citing *Gentry v. Gentry,*

798 S.W.2d 928 (Ky. 1990); and *Wilhoit v. Wilhoit,* 521 S.W.2d 512 (Ky. 1975)). Contrary to Bob's claim, a trial court need not make specific findings on this issue, it need only "'consider' the financial resources of the parties" and any award it makes must be reasonable. *Hollingsworth v. Hollingsworth,* 798 S.W.2d 145 (Ky.App. 1990). KRS 403.220 authorizes a court, "after considering the financial resources of both parties," to:

> 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. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

Our review of the record confirms the trial court considered the financial resources of both parties, past, current and future, in great detail. Following that review, the court awarded Sheila $19,500.00 toward her attorney's fees and costs of $36,431.70. In light of the evidence, the trial court did not abuse its discretion in awarding attorney's fees to Sheila and there is no basis for reversal.

DIVISION OF MARITAL DEBTS

Bob's next complaint is that the trial court incorrectly divided the marital debts between the parties. When dividing marital property, including debts, the trial court is to divide it into "just proportions." KRS 403.190(1). However, that does not mean there must be an equal division. *Lawson v. Lawson*, 228 S.W.3d 18, 21 (Ky.App. 2007); *Russell v. Russell,* 878 S.W.2d 24, 25 (Ky.App. 1994). In reaching its conclusion, the trial court shall consider:

> (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.

KRS 403.190(1).

Bob's first allegation about the division of marital debt is that the trial court failed to give him credit for having paid the interest on loans taken against his and Sheila's life insurance policies to purchase a home for their daughter. While required by CR 76.12(4)(c)(v), we find no citation in Bob's brief telling us where he asked the trial court to give him credit for these interest payments. Additionally, our review of the trial court record, including Bob's motion to alter, amend or vacate, does not reveal such a request. Since the claim was not presented

to the trial court first, it is not preserved for our review and we will not comment further. *Kennedy, supra.*

Bob's second complaint is that the trial court should have required Sheila to pay part of the $20,500.00 Bob borrowed from his brother to pay tuition for Matt's senior year of college. While Bob testified both children had been promised a college education, Sheila testified Matt was never told he would not have to contribute to his college degree. When there is conflicting testimony, the trial court is in the best position to assess witness credibility and we will not substitute our judgment for that of the trial court. CR 52.01. Matt was emancipated at the time Bob received the loan from his brother. There was no testimony Sheila agreed to the loan for the purpose of paying Matt's tuition. In light of the proof, we cannot say the trial court's findings of fact are "clearly contrary to the weight of the evidence." *Clark v. Clark,* 782 S.W.2d 56, 58 (Ky.App. 1990). Thus, there is no basis for reversal.

Bob's final complaint about the division of marital debt is that Sheila should have been responsible for half of the $77,000.00 he borrowed from his brother because that money benefited the marriage. In his motion to alter, amend or vacate, Bob says the loan was used to pay "automobile insurance payments, mortgage payments, payments on life insurance loans and other debt which did benefit the marital community." The trial court denied the requested relief because Bob:

> failed to specify the portion of the loan from his brother used to benefit the marital estate. Evidence of how the amount of the loans from Bob's brother (except that $20,500 was for college expenses for the party's son) used for marital purposes were not presented during the trial and this Court cannot make decisions on evidence not of record. No evidence was presented that Shelia (sic) participated in or had knowledge of the extent of these payments or there (sic) ultimate use.

Bob's appellate brief did not identify the evidence the trial court found to be lacking. Without such proof we cannot say the trial court abused its discretion in dividing the marital debt between Bob and Sheila. *Neidlinger v. Neidlinger,* 52 S.W.3d 513, 523 (Ky. 2001). Thus, there is no basis for reversal.

MAINTENANCE

Bob contends the trial court awarded $1,000.00 in monthly maintenance to Sheila for nine years in contravention of KRS 403.200. He argues the court based its decision solely on the standard of living of the parties while they were married. Sheila contends the trial court properly exercised its discretion.

Whether to grant maintenance lies solely within a trial court's sound discretion. Maintenance may be awarded if the requesting spouse cannot otherwise provide for his/her reasonable needs and cannot support himself/herself "through appropriate employment." KRS 403.200(1). In analyzing a request for maintenance, a trial court must consider:

> (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.

KRS 403.200(2). After reciting the statutory factors mentioned above, the trial court evaluated Sheila's current salary, her potential earning capacity (calculated to be about one-half of Bob's average income over the last five years), interest on liquid assets apportioned to her, her age, and the unlikelihood she could significantly increase her earning power before reaching retirement age. The court also considered the standard of living established during the twenty-nine year marriage as required by KRS 403.200(2)(c). Contrary to Bob's claim, the award of maintenance was not based solely upon the standard of living to which Sheila had grown accustomed during almost three decades of marriage. We perceive no abuse of discretion in the trial court commenting upon the difference in the unencumbered value of the marital residence Bob chose to keep ($450,000.00) and the fully financed home Sheila bought for herself ($101,500.00). These factors bear upon Sheila's ability to meet her needs and upon Bob's ability to provide for himself and pay his maintenance obligation. Bob has no house mortgage; Sheila does. The amount of maintenance awarded to Sheila is reasonable. We will not

substitute our judgment for that of the trial court where its decision is supported by substantial evidence. *Combs v. Combs,* 787 S.W.2d 260, 262 (Ky. 1990). Accordingly, there is no basis for reversal.

For the foregoing reasons, the orders of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

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