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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000375-MR
&
NO. 2008-CA-000410-MR

ANDREA HOGAN KAELIN,
FORMERLY MEINERS — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE ELEANORE GARBER, JUDGE
ACTION NO. 06-CI-500547

TERRY A. MEINERS — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, KELLER, AND LAMBERT, JUDGES.

KELLER, JUDGE: Andrea Hogan Kaelin, formerly Meiners (Andrea), appeals from the family court's (the court) judgment, arguing the court incorrectly: (1) determined the marital value of Terry's stock options; (2) granted Terry's motion for summary judgment regarding allocation of his employment contract; (3)

applied a 36% income tax rate in valuing Terry's non-qualified deferred compensation plan; (4) determined the amount of maintenance; and (5) awarded insufficient attorney fees. Both parties appeal the court's division of the value of the marital home. Terry cross-appeals arguing the court: (1) failed to consider evidence of Andrea's alleged prescription drug abuse in determining her contribution to the acquisition of marital assets; (2) incorrectly determined the non-marital value of Terry's stock options and investment account; (3) inappropriately valued his investment account with UBS as of the date of separation rather than the date of dissolution; and (4) incorrectly found that the parties had agreed to the distribution of additional household goods and furnishings. For the reasons set forth below, we affirm.

FACTS

The parties were married on March 21, 1994, separated on November 4, 2005, and the court dissolved their marriage by order dated November 2, 2007. No children were born of the marriage. Terry, whose prior marriage ended in dissolution, had two children, who spent a significant amount of time living with the couple during the marriage. During the course of the marriage, Terry worked as a radio show host and earned a significant amount of money, which will be detailed as necessary later in this opinion.

Andrea, who has no children, had also been previously married. That marriage ended when Andrea's first husband, David Kaelin (David), died in 1990. Following her first husband's death, Andrea inherited the couple's marital home

and inherited or was the beneficiary of various retirement/investment accounts and an insurance policy. Andrea operated her own business for a short time at the beginning of the marriage but did not otherwise work outside the home. Additional facts will be set forth as we address the issues raised by the parties.

STANDARD OF REVIEW

The issues raised by the parties require differing standards of review, which we will set forth as we address each issue.

ANALYSIS

There are three primary issues: (1) whether Terry's employment contract is a marital asset, subject to division; (2) whether the court properly determined the marital and non-marital value of Terry's initial stock option agreement; and (3) whether the court correctly determined what portion of the property was nonmarital. We will address these issues first and in that order and address the remaining issues thereafter.

1. Employment Contract

It is undisputed that Terry entered into a ten-year employment contract during the course of the marriage. Andrea contends that this contract is a marital asset and its value is subject to division. Furthermore, Andrea argues the court erred by granting summary judgment to Terry on this issue. "The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l*

Feeding Systems, Inc., 90 S.W.3d 46, 49 (Ky. 2002). Andrea's argument to the contrary notwithstanding, the issue is a question of law; therefore, we apply the *de novo* standard of review. *Smith v. Smith*, 235 S.W.3d 1, 6-7 (Ky. App. 2006).

In 2005, Terry entered into a ten-year employment contract with Clear Channel. In pertinent part, the contract provides that Terry would be paid $240,000 in year one with increases each year thereafter to a payment of $313,000 in year ten for a total payout under the contract of $2,750,400. The contract provided for additional compensation in the form of stock option awards, if approved by Clear Channel's board of directors, and "talent fees" for personal appearances and endorsements. Furthermore, the contract provided that Clear Channel could terminate Terry's employment for cause and that the contract was "personal in nature and may not be assigned by [Terry] to any other person or entity."

Andrea argues before us, as she did before the court, that Terry's employment contract contains goodwill, much as there is goodwill in an accounting or medical practice. *See Heller v. Heller*, 672 S.W.2d 945 (Ky. App. 1984); *Clark v. Clark*, 782 S.W.2d 56 (Ky. App. 1990); and *Drake v. Drake*, 809 S.W.2d 710 (Ky. App. 1991). However, the court agreed with Terry's argument that the contract, unlike an accounting or medical practice, is personal to him and not a divisible attribute of a business.

We agree with the court for two reasons. First, unlike the parties in *Heller, Clark,* and *Drake*, Terry does not operate a business. He is an employee

and, unlike an accounting or medical practice, Terry's contract cannot be sold. Second, as noted in *Clark*, goodwill "is the expectation that patrons or patients will return because of the reputation of the business or firm." *Clark*, 782 S.W.2d at 59. Terry does not have patrons or patients, he has listeners and, to the extent there is a reputation surrounding Terry, it is his, not Clear Channel's.

We note that the Arizona, California, and New Jersey cases cited by Andrea are not persuasive. In *Mitchell v. Mitchell*, 152 Ariz. 317, 732 P.2d 208 (Ariz. 1987), the Supreme Court of Arizona determined that the goodwill from a professional partnership was no less divisible than goodwill from a professional corporation. Furthermore, the Court determined that the partnership agreement was not binding on the wife with regard to valuation and division of any goodwill. In *Golden v. Golden*, 270 Cal.App.2d 401, 75 Cal. Rptr. 735 (Cal. Ct. App. 1969), the California Court of Appeal determined that the wife was entitled to a portion of the goodwill of her husband's medical practice. While the Court's opinion does contain the language cited by Andrea, that language refers to the goodwill in a business, not to goodwill personal to an individual. In *Dugan v. Dugan*, 92 N.J. 423, 457 A.2d 1 (N.J. 1983), the New Jersey Supreme Court was concerned with a husband's law practice, a business. It was not concerned with an employment contract. The preceding cases all involve goodwill associated with a business or enterprise, not goodwill associated solely with a person.

In *In re Marriage of McTiernan and Dubrow,* 133 Cal.App.4th 1090, 1099, 35 Cal.Rptr.3d 287, 294 (Cal. Ct. App., 2005), the California Court of

Appeal discussed the reasons for distinguishing between enterprise and personal goodwill. As the Court noted:

> [e]ndowing "a person doing business" with the capacity to create goodwill, as opposed to limiting goodwill to "a business," has wide ramifications. "A person doing business" includes much of the working population. Notably, there would be no principled distinction between husband in this case, who is a director, and actors, artists and musicians, all of whom could be said to be "persons doing business." Thus, all such persons who would have the "expectation of continued public patronage" would possess goodwill. This would create a substantial liability, as in this case, without a guaranty that the liability would be funded. . . . [Because] there is no guaranty, especially in the arts, that earnings will not decline or even dry up, even though expectations were to the contrary.

Finally, in *Gaskill v. Robbins,* 2009 WL 425619 (Ky. 2009), the Supreme Court of Kentucky distinguished between "enterprise goodwill," which attaches to a business, and "personal goodwill," which attaches to an individual business owner. The Court held that, "depending on the facts, goodwill can belong primarily or only to the person." *Id.* at *4. In such a case, the goodwill is personal and not subject to division upon dissolution of a marriage. *Id.* at *6. Although Terry does not own a business, as did Gaskill, any goodwill he has is purely personal to him. Therefore, the court properly determined that Terry's employment contract is not a marital asset.

2. The Stock Option

In 1992, prior to the marriage, Terry received a stock option grant from Clear Channel.[1] Five years later, during the marriage, Terry exercised his stock option. The parties did not dispute that a portion of the proceeds from the stock option was marital; however, they did dispute how to divide those proceeds. This issue presents a mixed question of fact and law. The "factual findings underpinning the determination of whether an item is marital or nonmarital are entitled to deference and, consequently, [are] reviewed under the clearly erroneous standard. Ultimately, classification is a question of law, which [is] reviewed *de novo." Smith v. Smith*, 235 S.W.3d 1, 6-7 (Ky. App. 2006).

Terry's expert testified that, for the purposes of categorizing the proceeds, the effective date of the option should be the date Terry began working for Clear Channel in 1986. She did so based on a letter from Clear Channel indicating that the stock option was being offered because of Terry's "superior performance and the interest of the Company in keeping [Terry] as a long term partner." Using this method resulted in approximately 87% of the proceeds being categorized as nonmarital and approximately 13% being categorized as marital.

Andrea's expert testified that the Incentive Stock Option Agreement should control the effective date of the option. That agreement specified that the stock option was being granted to "secure" Terry's continued service. Using this method resulted in approximately 64% being categorized as nonmarital and approximately 36% being categorized as marital.

[1] Terry also received a stock option during the marriage. There is no dispute regarding that stock option; therefore, we will address only the 1992 stock option.

The court, noting that there are no Kentucky cases addressing the issue, looked to the Supreme Court of Nebraska for guidance. In *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (Neb. 1998), the Supreme Court of Nebraska, noting that most courts recognize that stock options can represent compensation for past, present, and future performance, adopted the "time rule" for determining how to divide stock options. The time rule requires the court to determine "whether and to what extent the options were granted as compensation for past, present, or future services. Then the trial court should determine what percentage of each portion thereof was accumulated and acquired during the marriage." *Id.* at 254 Neb. 665, 578 N.W.2d 856. In making that determination, the court is not bound by the language of the stock option agreement nor the testimony of the employee. Rather, the court should look to the reasons the option was granted. Those reasons can include inducing an employee to accept employment, to reward an employee for past performance, to induce an employee to continue employment, how the option is handled for tax purposes, and the regularity with which options are granted. *Id.* Once the court makes the allocation between past, present, and future, the court must then determine what percentage was accumulated during the marriage.

> If an option . . . is granted prior to the marriage, that portion of the option . . . which represents compensation for past services was accumulated and acquired entirely outside the marriage. . . . To determine the percentage of compensation for future services, if any, when the option . . . is granted prior to the marriage but vests during the marriage, the trial court should create a

> fraction the numerator of which is the time from the date of marriage until the option vests and the denominator of which is the time from the date of the grant to the date the option vests.

Id. at 254 Neb. 666, 578 N.W.2d 857.

Taking into consideration the letter from Clear Channel, the language in the stock option agreement, the testimony of the expert witnesses, and Terry's age at the time the option was granted, the court determined the primary purpose of the option was to retain Terry as an employee. Therefore, it allocated 30% for past performance and, pursuant to the time rule, determined this percentage was Terry's nonmarital property. The remaining 70% the court divided according to the above formula, as follows: 70% x 64% (percentage of time from grant to vesting preceding the marriage) = 44.8% nonmarital property; 70% x 36% (percentage of time from grant to vesting during the marriage) = 25.2% marital property. The court then rounded the preceding percentages and combined nonmarital shares for a total of 75% nonmarital and 25% marital.

Having reviewed the record, the arguments of counsel, the court's opinion, and relevant case law, we discern no error in the court's reasoning or its disposition of this issue.

3. Purchase of the Marital Home

In 1992, prior to their marriage, Andrea and Terry purchased a lot on Bodley Drive in eastern Jefferson County (the Bodley lot) for $136,000. Neither party had sufficient records to accurately trace their contributions to the purchase

of this lot. However, both claimed the lion's share of any nonmarital contribution. As set forth above, the "factual findings underpinning the determination of whether an item is marital or nonmarital are entitled to deference and, consequently, [are] reviewed under the clearly erroneous standard. Ultimately, classification is a question of law, which [is] reviewed *de novo." Smith v. Smith*, 235 S.W.3d 1, 6-7 (Ky. App. 2006).

The parties offered into evidence the closing statement for the Bodley lot, which was in Terry's name only. The closing statement indicated that $1,000 in earnest money had been paid, that an additional $35,636.99 was paid at closing, and that the remaining $99,500 was being financed. Terry's expert attributed the earnest money and the amount paid at closing to Terry because his name was the only name on the closing statement. Andrea conceded that Terry paid the $1,000 in earnest money but contended that she contributed the $35,636.99 paid at closing.

The court reviewed the testimony of the parties and their experts and concluded the Andrea had paid the $35,636.99 at closing. In doing so, the court noted that several months before closing, Andrea had sold her previous marital home and deposited the proceeds from that sale into her checking account. That account had a balance of $71,565.28 nine days prior to closing and a balance of $34,874.87 twenty-two days after closing. The court also noted the documents from the dissolution of Terry's previous marriage in early 1992, which indicate that Terry had limited liquid assets at that time. Furthermore, the court noted testimony from Terry's brother that he had given Terry $17,000 which Terry stated

he believed he used toward the purchase of the Bodley lot. However, the court discounted this testimony as neither Terry nor his brother could produce any documentation pinpointing when that gift was made. Finally, the court also discounted Terry's testimony that Andrea used a portion of the money she received from the sale of her prior home to operate her business. The court noted that the tax returns did not reveal any expenditures of that magnitude and that the business was not incorporated until nearly a year following the closing on the Bodley lot.

In 1993, the parties entered into a contract to have a house built on the Bodley lot. The parties provided a $29,000 down payment, for which Andrea provided $15,000 and Terry provided $14,000. In early 1994, prior to the marriage, the parties closed on the completed house. At the closing, the parties provided $163,540 toward the total cost of $390,936.67. Andrea claimed that she contributed the bulk of the $163,540, which Terry disputed. As with the purchase of the Bodley lot, the parties did not have accurate records from which to trace the funds contributed to the construction/purchase of the Bodley house.

Terry's expert testified that she attributed $5,000 of the closing proceeds to Terry because he had a copy of a check made payable to the title agency. The remaining $158,540, Terry's expert divided equally between Andrea and Terry because both parties were on the closing statement and neither party could produce documentation to verify their individual contributions. Andrea disputed the equal division of the $158,540.

The court reviewed the testimony and documentation from Andrea showing that, in early 1993, she had sold a lot she purchased following David's death for $52,000; that she had received in excess of $93,000 as a distribution from David's 401k plan in March 1993; and that she liquidated an investment account she inherited from David in February 1994, netting $14,307 from that account. The court also reviewed testimony from Terry that he had sold a house he owned, netting $17,000; that he had received an additional gift from his brother to put toward the closing; and that Andrea had expended between $18,000 and $48,000 in her business prior to the closing. Finally, on reconsideration, the court recognized that Andrea's father had given the parties $20,000 each toward the purchase of the residence. Taking that evidence into consideration, the court determined that $8,540 could not be adequately traced and it divided that amount equally. The court then determined that Terry had contributed $44,270 of his nonmarital assets and that Andrea had contributed $184,907 of her nonmarital assets toward the purchase of the Bodley lot and house.

On his cross-appeal, Terry argues that the court "engaged in speculation" regarding the source of the nonmarital funds used to purchase the Bodley lot and house. Having reviewed the record and the court's well-reasoned findings of fact, conclusions of law, and decree of dissolution, as well as its order on the parties' motions to amend, alter, or vacate, we disagree. Neither party provided direct and exacting evidence to support their positions with regard to tracing; however, there was clearly enough evidence to support the inferences the

court made regarding the source of the funds used to purchase the Bodley lot and house. Therefore, we will not disturb the court's factual findings.

Terry also argues that the court misapplied the law to its factual findings. According to Terry, because he and Andrea held the Bodley lot and house as joint tenants prior to the marriage, there is a presumption of equality of interest. However, the case Terry cites, *McLeod v. Andrews*, 303 Ky. 46, 196 S.W.2d 473 (1946), is not dispositive because it deals with the disposition of estate assets and debts, not the disposition of non-marital property which later became, in part, marital property. Terry's citation to 48A C.J.S. Joint Tenancy § 24 (2007), is also not dispositive because it addresses only joint tenants, not joint tenants who later marry. Furthermore, that section of C.J.S. states that the presumption of equality may be overcome. Even a cursory review of the record reveals sufficient evidence to overcome any presumption in favor of equality.

Finally, we note this Court's reasoning in *Glidewell v. Glidewell,* 790 S.W.2d 925 (Ky. App. 1990), is persuasive. In *Glidewell*, an unmarried couple owned several parcels of real property as joint tenants. This Court determined that the couple should be treated as a partnership and that each "partner" should recover his or her "contributions on dissolution of the partnership after payment of the partnership debts." *Id.* at 927.

Based on the above, we discern no error in the court's application of the law to the facts and affirm the court's determination of the parties' marital and nonmarital interests in the purchase of the Bodley lot and house.

4. Improvements to the Bodley Lot and House

Beginning in 1997, the parties began a massive renovation of the Bodley lot and house, including the addition of a master suite, a lavish inground swimming pool with a cabana, and landscaping designed to add privacy to the property. The parties also paid down debt on the Bodley lot and house. The total cost associated with renovations and reduction of debt was $869,589, more than twice the original cost of the Bodley lot and house. The funds used to pay for the renovations and reduction of debt came primarily from the exercise by Terry of his stock option. Because the funds used were primarily traceable to Terry's stock option, the court allocated the marital/nonmarital portions of those funds according to the formula it used to allocate the stock option, designating $569,564.86 to non-marital and $300,024.14 to marital.[2] In setting forth its calculations, the court stated that it was not finding and could not find that the expenditures for renovations "resulted in a dollar for dollar increase in value (or greater than dollar-for-dollar increase)." Ultimately, the parties sold the Bodley lot and house for $1,400,000, netting $1,153,814.40.

Once the court made the preceding allocation, it then divided the proceeds from the sale of the Bodley lot and house. In doing so, the court stated, "This is a difficult case for a strict Brandenburg application." The court noted the nonmarital contributions by both parties to the original purchase, the nonmarital contribution to the renovations and debt reduction, and the marital contribution to

[2] We note that a portion of the funds used for the renovations and debt reduction were marital. The court did not divide those funds, designating them as marital.

the renovations and debt reduction. Taking those factors into consideration, the court restored to Terry his initial contribution to the purchase of the Bodley lot and house plus $569,564.86 of the cost of the renovations and debt reduction. The court restored to Andrea her initial contribution to the purchase of the Bodley lot and house, then divided the remaining amount equally between the parties.

Andrea argues that the court made two errors with regard to division of the proceeds from the sale of the Bodley lot and house: (1) the court's division of the cost of renovations and debt reduction to marital and nonmarital was flawed because the allocation with regard to the stock option was flawed; and (2) the court should not have attributed any amount of the renovation expenses to nonmarital funds. Terry argues that the court erred when it divided the marital estate equally because the court failed to consider Andrea's alleged failure to contribute to the acquisition of the marital estate. We will address each argument in the order set forth above.

As noted above, we discern no error in the court's allocation of the proceeds from Terry's exercise of his stock option. Therefore, we discern no error in the court's use of the same formula in dividing the contribution of those proceeds by Terry to the reduction of debt and the renovations on the Bodley lot and house.

In support of her second argument, Andrea relies primarily on *Travis v. Travis*, 59 S.W.3d 904 (Ky. 2001). Based on *Travis*, Andrea argues that Terry had the burden of proving the extent to which the renovations increased the equity

in the Bodley lot and house. Absent that proof, Andrea argues that any increase in equity should be deemed marital.

In *Travis*, the husband contributed $7,500 in nonmarital funds toward the $47,000 used to acquire and remodel the parties' marital residence. The house burned after the parties separated but before the dissolution of their marriage. The parties collected $63,000 from their casualty insurer. After paying off the mortgage, $23,364.14 remained for division between the parties. The parties stipulated that $7,500 of the proceeds represented the husband's nonmarital contribution, leaving $15,864.14 to be divided. The husband argued that the disputed proceeds should be divided pursuant to the *Brandenburg* formula, with the majority of the funds attributable to his initial nonmarital contribution and appreciation on that contribution. The wife argued that the husband should only be credited with the initial nonmarital contribution and that the remainder should be deemed marital. The trial court followed the formula proposed by the husband and awarded him the majority of the $15,864.14. On appeal, the Court of Appeals reversed and the Supreme Court affirmed.

In its opinion, the Supreme Court reviewed the three-step process a court must use to divide the parties' property in a dissolution: "(1) the trial court first characterizes each item of property as marital or nonmarital; (2) the trial court then assigns each party's nonmarital property to that party; and (3) finally, the trial court equitably divides the marital property between the parties." *Id.* at 909. (Footnotes omitted). The Court then stated that, when nonmarital property

increases in value simply because of general economic conditions, the increase in value is nonmarital. However, when nonmarital property increases in value due to the efforts of the parties, the increase is marital. As noted by Andrea, the Court stated that KRS 304.190(3) creates a presumption that any increase in value is marital and the spouse seeking a determination to the contrary bears the burden of proof. The Court then determined that the husband had "introduced no proof from which the court could determine why the property increased in value." *Id.* at 912. Because the husband had not met his burden of proof, the Court held that the trial court erred when it allocated any portion of the increase in value to the husband's nonmarital share.

As set forth above, the "factual findings underpinning the determination of whether an item is marital or nonmarital are entitled to deference and, consequently, [are] reviewed under the clearly erroneous standard. Ultimately, classification is a question of law, which [is] reviewed *de novo."* *Smith v. Smith*, 235 S.W.3d 1, 6-7 (Ky. App. 2006). Having reviewed the record, the relevant law, and the court's findings, we discern no error in the division of the proceeds from the sale of the Bodley lot and house. As noted by the court, *Travis*, "is more supportive of Terry's stance in this case than Andrea's." The court, as mandated by *Travis,* allocated to each party his or her share of nonmarital contributions to the Bodley lot and house. Some of those contributions occurred prior to the marriage and some, like the husband's contribution in *Travis*, occurred after the marriage. The court did not allocate any increase in value to Terry's

nonmarital contribution; it simply returned that nonmarital contribution to him. This is precisely what *Travis* mandates. Therefore, we discern no error in the court's division of the proceeds from the sale of the Bodley lot and house.

Finally, on this issue, the language from the court's findings of fact, conclusions of law, and decree of dissolution to which Andrea takes exception is not contrary to the court's ultimate holding. The court stated that the chart on page 16 of its opinion did not "represent a finding . . . that the expenditures made for improvements . . . resulted in a dollar for dollar *increase* in value (or greater than dollar for dollar *increase*). . . ." (Emphasis added.) That statement, although it may have been more artfully expressed, is correct. The court did not attribute any *increase* in value to Terry's nonmarital contribution to the expenditures for improvements and reduction of debt; it simply returned the nonmarital contribution to Terry.

Next we address Terry's argument that the court abused its discretion by not considering Andrea's alleged prescription drug abuse when dividing the marital estate. Andrea's alleged misuse of prescription medication became an issue early in the litigation when she filed a motion for an order prohibiting Terry from communicating with any third party about those allegations. After a hearing, during which the court stated that the allegations were not particularly relevant, the court issued a mutual restraining order. That order prohibited the parties from communicating anything to a third party, other than immediate family members, counselors, etc., that might "adversely impact either party's employment or

reputation." The order did not settle the matter and, despite a number of statements by the court that it did not see the particular relevance of the issue, Terry continued to raise it. Terry argued at trial that Andrea, over the course of the marriage and because of her abuse of prescription medication, became disengaged, and did not contribute to the marital estate.

At trial, Terry and one of his sons testified that Andrea did not participate in family or job related functions, that she slept until noon, and often spent the day in her pajamas. Terry also testified that Andrea spent an inordinate amount of time caring for her ill mother and father and visiting with her sister. By avowal, Terry offered into evidence medical records that he indicated showed Andrea's abuse of prescription medication.

On the other hand, Andrea testified that she participated in all events to which she was invited, helped care for and rear Terry's sons, and helped care for her mother and father. Furthermore, Andrea's brother and sister testified regarding Andrea's involvement in the lives of their parents and in the lives of Terry and his sons. With regard to her health, Andrea testified that she had a congenital defect that required a number of surgeries, that she continued to have pain from that condition, and that she took medication to alleviate the pain and to help her sleep.

With regard to the distribution of marital assets, the court stated as follows:

> KRS 403.190(1) provides that following restoration of each spouse's property to that spouse, the trial court "*shall* divide the marital property *without regard to*

> *marital misconduct* in just proportions considering all relevant factors, including (a) contribution of each spouse to acquisition of the marital property including contribution of a spouse as a homemaker;. . .” The court has briefly summarized and characterized the various witnesses [sic] testimony concerning Andrea’s contribution. This court has listened to everyone carefully, adjudged credibility to the best of its ability and finds that an equitable division of marital property in this case is an equal division.”

“Decisions of the court concerning the division of marital property are within the discretion of that court, and we will not disturb those decisions except for an abuse of that discretion.” *Kleet v. Kleet*, 264 S.W.3d 610, 613 (Ky. App. 2007). There is more than sufficient evidence in the record to support the court’s tacit finding that Andrea contributed to the marital estate; therefore, we discern no abuse of discretion in the court’s division of the marital property.

5. Maintenance

The trial court, after considering the factors set forth in KRS 403.200(2), determined that Andrea is entitled to receive maintenance at the rate of $3,750 per month for a period of four years. In doing so, the court noted that Andrea’s estimated monthly expenses were “speculative at best;” that Andrea retained the capacity to earn approximately $40,000 per year; that she received a share of the marital estate in excess of $700,000; and that she retained two nonmarital IRA accounts valued at approximately $70,000. Andrea contests the amount of maintenance awarded, questioning the court’s finding that her expenses were speculative.

The amount and duration of maintenance are within the sound discretion of the circuit court. *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990); *Barbarine v. Barbarine*, 925 S.W.2d 831 (Ky. App. 1996). An award of maintenance will not be disturbed on appeal absent an abuse of discretion. *Perrine v. Christine,* 833 S.W.2d 825 (Ky. 1992). An appellate court is not authorized to substitute its own judgment for that of the trial court where the trial court's decision is supported by substantial evidence. *Combs v. Combs*, 787 S.W.2d 260, 262 (Ky. 1990).

Having reviewed the record, and noting, as did the court, that Andrea estimated a monthly rent payment of $1,600 when she was living rent free in a condo owned by her father; that she had prospective monthly expenses of $664 for property taxes and a monthly condo association fee, which payments may have come from a trust of which Andrea was the beneficiary; that she anticipated a car payment of $450, although she was driving a 1998 Mercedes; that she would have educational expenses of $894 for completion of a program leading to a degree in Art when it is unclear if she had even begun the program; that she had monthly pet expenses of $400; and that she had monthly personal grooming expenses of $400, we discern no error in the court's categorization of these expenses as speculative. Taking these expenses into consideration, along with Andrea's nonmarital assets, her share of the marital assets, and her ability to earn a living, we discern no abuse of discretion in the court's award of maintenance.

6. Attorney Fees

In awarding attorney fees, the court stated as follows:

> This has been expensive litigation for both parties. While Andrea receives substantial assets in this case, their remains a strong imbalance in resources, in Terry's favor. While the court has substantial discretion in determining the amount of an attorney fee award, the Kentucky Appellate Courts have held that an allowance of fees is authorized by KRS 403.220 only when it is supported by an imbalance in financial resources of the respective parties. . . .Andrea meets the threshold requirement for an award. The court orders Terry Meiners to pay $35,000.00 toward Andrea Meiners' [sic] attorney fees within 90 days. Attorney B. Mark Mulloy may enforce this portion of the judgment within his own name.

Andrea argues that, in light of the disparity in income between the parties and Terry's conduct during the course of litigation, the court abused its discretion in awarding her only $35,000 in attorney fees. Terry argues that it was Andrea's conduct, not his, that was disruptive and prolonged the litigation. We have reviewed the record and there is evidence from which the court could have found fault with the conduct of both parties. Furthermore, as noted by the court, Andrea was awarded significant assets from the marital estate and has the capacity to earn a living wage. Therefore, we discern no abuse of discretion in the court's award of attorney fees.

7. Valuation Date of UBS Account

As previously noted, Terry ultimately placed the proceeds from the exercise of his stock option into what the parties have referred to as the UBS account. Following the parties' separation, Terry used funds from the account to

pay attorney fees and living expenses, make a donation to the University of Louisville, put a deposit on a condo unit, pay construction costs, and pay realtors' fees. The court found that the separation date is the appropriate date for valuation because Terry exercised total control of the account and expended a significant amount of money for his own purposes. We note that, although the court altered the amount available for division in its order on the parties' motions to alter, amend, or vacate, the court did not alter the valuation date.

On appeal, Terry argues that the court erred in evaluating the UBS account as of the date of separation because Andrea did not contribute to the account beyond that date. Terry argues that *Stallings v. Stallings*, 606 S.W.2d 163 (Ky. 1980), mandates that evaluation take place on the date of the decree, not the date of separation. However, in *Stallings* the question before the Court was **whether** property purchased after the parties had physically, but not legally, separated should be considered marital property. The question before the Court was not **when** that property should be valued.

Valuing and dividing property are within the sound discretion of the trial court. *Cochran v. Cochran*, 754 S.W.2d 546, 569-70 (Ky. App. 1988). Because Terry had control of the UBS account and expended a significant amount from that account for his sole benefit, we discern no error in the court's choice to value the account on the date the parties physically separated rather than on the date of judgment.

8. Income Tax Rate

Terry has an interest in his employer's deferred compensation plan. Terry indicated that the proceeds could not be distributed until sometime in the future and that any distribution would be subject to income taxes. In order "to avoid entangling the parties for years in dividing this asset" Terry asked the court to award the account to him with a credit to Andrea against Terry's share of the marital assets, less a 36% deduction for future income tax.

The court initially awarded the account to Terry and ordered that he pay Andrea half of the value of that account. However, the court did not deduct the amount of income tax liability from the amount awarded. In its order on the parties' motions to alter, amend or vacate, the court adjusted Andrea's award to reflect the 36% in income taxes Terry will have to pay on distribution. Andrea argues that the court abused its discretion because the tax rate far exceeded the tax rate the parties paid in 2005 and 2006. Terry argues that the rate of taxation in 2005 and 2006 is not an accurate predictor of future tax liability "because the parties' filing status and exemptions for dependents effectively lowered his tax obligation."

We note that the parties only claimed dependents on their 1997 and 1998 tax returns. They did not claim any dependents in any other year between 1992 and 2005. Although that portion of Terry's argument is somewhat disingenuous, we agree with the trial court that the award to Andrea of a fixed share, when there is a chance Terry might not collect anything and the potential

future tax rate is unknown, weighs in favor of giving Terry credit for tax at the rate of 36%.

9. Distribution of Additional Household Goods and Furnishings

Terry argues that the court abused its discretion when it determined the parties had reached an agreement to divide remaining household goods, furniture, appliances, and furnishings because no such agreement exists. Andrea argues that Terry made no reference to the record in making his argument and that the division of marital property is within the sound discretion of the court. However, Andrea does not cite us to where in the record we can find the alleged agreement nor does she indicate what specific property was subject to the alleged agreement.

"[I]t is not our responsibility to search the record to find where it may provide support for [Terry's or Andrea's] contentions." *Smith v. Smith,* 235 S.W.3d 1, 5 (Ky. App. 2006). As this Court did in *Smith*, "we choose to give little credence to the arguments by either party that are not supported by a conforming citation to the record." *Id.* Therefore, we affirm the court.

CONCLUSION

For the above stated reasons, we affirm the Jefferson Family Court as to all issues raised on appeal and on cross-appeal.

LAMBERT, JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the well-reasoned majority on all issues but for the application of a 36% tax rate to the future distribution from an employer's deferred compensation plan.

The brief of the Appellee/Cross-Appellant states:

> The trial court's method of calculating Terry's future tax liability was logical and equitable for several reasons. First, since the plan is unfunded, Terry may never receive these benefits. Second, it would be unfair to calculate Terry's future tax liability on the same basis as his tax rate during the marriage when the parties' filing status and exemptions for dependents effectively lowered his tax obligation. Finally, the court cannot anticipate with specificity what Terry's ultimate tax rate on this asset will be. The tax applied when distribution occurs, if it ever does, conceivably could be even greater that the 36% rate applied by the trial court."

Certainly the Appellee/Cross-Appellant will seek to cast their case in the best of light before the trial court. In reviewing the above argument: first, an unfunded plan that may never yield any benefits does not appear to establish any particular rate of tax; second, while a current tax rate may be assumed to be lower due to particular circumstances, the anticipation of a change in circumstances does not appear to establish any definite future tax rate; finally, when a court cannot discern with specificity a particular tax rate, this does not support an arbitrary tax rate.

The case before our Court is not unlike *McGinnis v. McGinnis*, 920 S.W.2d 68 (Ky. App. 1995). Therein our Court cited *Poe v. Poe*, 711 S.W.2d 849, 856 (Ky. App. 1986), in stating:

> [A] nonvested pension is not overly speculative where courts . . . are willing to delay the actual division of those benefits until they are capable of distribution and have in every sense of the word "vested." This type of creative distribution of the award silences any complaints concerning the speculative nature of future pension benefits . . . . While it might be argued that such a solution unnecessarily entangles the courts in administering dissolution actions, thereby delaying the resolution of the marital conflict, we note that it would do so no more than the current application of our maintenance and child support statutes presently [sic] the courts to do so.

While I certainly understand the trial courts desire to avoid entangling the parties for years by dividing the compensation plan, I believe that application of a speculative tax rate to an uncertain amount of a future distribution is by its terms speculative and uncertain.

I would reverse and remand for an order directing distribution in equitable amounts when and if distributed.

BRIEF FOR APPELLANT/ CROSS-APPELLEE:	BRIEF FOR APPELLEE/CROSS-APPELLANT:
B. Mark Mulloy Louisville, Kentucky	Diana L. Skaggs Sandra G. Ragland Louisville, Kentucky