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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001965-MR

PAULA ANN CARDI AND
THOMAS K. STONE — APPELLANTS

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 08-CI-00186

CESARE CARDI — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; MOORE AND WINE, JUDGES.

WINE, JUDGE: Paula Ann Cardi and her counsel, the Honorable Thomas Stone, appeal from an order distributing property in an action for dissolution of marriage. On appeal Paula lists numerous allegations of error regarding the division of property and debt, including sufficiency of the award of maintenance and

attorney's fees, as addressed herein below. Upon a review of the record, we affirm in part and reverse in part, and remand for further proceedings consistent with this opinion.

History

Paula and Cesare Cardi were married on August 9, 1986. The parties adopted Kathryn, born October 5, 1991, who became emancipated prior to this appeal. Paula filed a petition for dissolution of marriage in February of 2008. Paula suffers from a serious medical condition, mitochondrial myopathy, although the parties dispute whether her medical issues qualify her as disabled or prevent her from gainful employment. Paula testified that she first became disabled in either 1986 or 1988. Nonetheless, she worked part time outside of the home between 1986 and 1989 and between 2000 and 2003. Between 2000 and 2003, before Paula and Cesare moved to Kentucky, Paula was employed in a real estate office. Both parties agree that Paula did not engage in further employment once they moved to Kentucky.

Although Paula testified that she is disabled, she presented no disability determination into evidence and did not offer expert testimony regarding same. She further testified that she is not employed outside the home due to this disability. The trial court found, based upon the evidence presented, that Paula was "at least partially disabled." Likewise, there was also testimony and evidence presented that Cesare is disabled. Cesare has a disability determination from the

Veteran's Administration for which he receives a disability pension. Despite this disability, Cesare is still employed outside the home.

A bench trial was held on May 21, 2009, at which all issues were decided except for the division of personal property (including vehicles), which the parties had previously divided by agreement. Issues included division of property, division of debt, maintenance, division of retirement accounts and life insurance policies, healthcare coverage for Paula, reimbursement of medical expenses, child support, and attorney's fees. The trial court entered its final decree and order on July 23, 2009. Thereafter, Paula filed a Kentucky Rule of Civil Procedure ("CR") 59.05 motion to alter, amend, or vacate, which was denied by the court on September 21, 2009.[1] Paula now appeals the denial of this motion.

Analysis

Paula argues that the trial court erred (1) in the division of marital property, (2) in the division of debt, (3) in the amount maintenance awarded, (4) in the division of Cesare's military retirement, (5) in failing to divide Cesare's Veteran's Administration disability benefits, (6) in failing to include specific language requested by Paula for her continued health coverage, (7) in awarding her insufficient attorney's fees, (8) in awarding the parties' interest in the minor child's UTMA (Uniform Transfer to Minor's Act) account, and (9) in requiring Paula to provide Cesare with grades or report cards each semester for their child, as she is now emancipated. We will address each argument in turn.

[1] The trial court did grant Paula's motion to strike a paragraph of the opinion which referred to confidential negotiations during mediation.

Division of Marital Property

Paula contends that the trial court's division of marital assets was in error. Paula contends (1) that she should have received an equalization payment of $3,431.00 from Cesare to equalize the value of the marital vehicles, (2) that the trial court simply assigned bank accounts to the spouse whose name was on the account rather than dividing them equally, (3) that Cesare failed to adequately trace his non-marital interest in the Roth IRA and IRA Fidelity accounts, and (4) that the cash value of the life insurance policies was improperly valued because the court did not require Cesare to submit up-to-date statements, and that the division of same was unequal.

The division of marital property is governed by Kentucky Revised Statute ("KRS") 403.190, which requires that marital property be divided in "just proportions." However, "just proportions" is not tantamount to "equal." *Stipp v. St. Charles*, 291 S.W.3d 720, 726 (Ky. App. 2009). Indeed, a determination of what proportions are "just" when dividing marital property is a matter within the broad discretion of the trial court and there is no presumption of a "50-50" division. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001); *Herron v. Herron*, 573 S.W.2d 342 (Ky. 1978).

Paula's first argument regarding the division of marital property may be quickly dispensed with because the vehicles were divided prior to trial by agreed order and Paula stated at trial, in response to a question from the trial judge, that it was "not necessary" for the court to equalize the equity in the vehicles.

Thus, Paula is not entitled to argue for an equalization payment before this Court because the issue was waived below. *Baker v. Commonwealth*, 320 S.W.3d 699, 704-705 (Ky. App. 2010). As we have reiterated numerous times, an appellant may not "feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds*.

Paula also claims that the trial court erred in its division of the bank accounts by ordering that "whomever's name was on a particular account received same." Paula argues that it is impossible to know whether the accounts were divided fairly because the trial court did not require the exchange of bank statements dated on a particular date so that the parties would know what the balances were as of a specific date (or at the time of trial). However, this argument must fail as it is not the responsibility of the trial court to require the parties to provide the most current account statements. Rather, the parties must make known to the court the action they desire to be taken. CR 46. If Paula believed the account statements provided were inadequate or outdated, it was incumbent upon her to seek additional discovery or move the court to compel Cesare to produce more recent statements. Paula fails to cite to any portion of the record where she claims this issue is preserved for review. CR 76.12(4)(c)(iv)(v). We will not address an issue where the trial court was not given the opportunity to first address it. *Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky. App. 1998).

Next, Paula contends that Cesare failed to adequately trace his non-marital interest in the two Fidelity IRA accounts against which he made a non-marital claim. Paula contends that Cesare's testimony and his "Exhibit #10", a letter from the plan administrator, Fidelity, failed to provide adequate tracing for his non-marital claim.

Our Courts have interpreted KRS 403.190 to require that a party seeking to have property classified as non-marital "trace" the non-marital property to a specific asset owned by the parties at the time of dissolution. *Chenault v. Chenault*, 799 S.W.2d 575, 578 (Ky. 1990). Despite this requirement, our Courts have held that the requirement of tracing should not be draconian in its application, nor require proof with mathematical certainty. *Id*. Nonetheless, we acknowledge that mere speculation and conjecture are insufficient. *Smith v. Smith,* 235 S.W.3d 1, 9 (Ky. App. 2006).

In the present case, the trial court awarded Cesare the number of shares in each account as existed at the time of the marriage based upon the letter from Fidelity. We agree with Cesare that this form of tracing is adequate. *See, e.g., Chenault, supra*. As previously stated, tracing need not be done with mathematical precision. *Id*. Instead, it is sufficient that Cesare provided evidence to the court of the number of shares and corresponding monetary value of same existing at the time of marriage.

In addition, Paula complains that the trial court awarded Cesare all of another Roth IRA account although the account was found to be marital property. However, the trial court acknowledged this in its opinion and stated that it was awarding a greater number of shares in one of the Fidelity accounts to Paula in order to "equalize the shares awarded to the parties from both [that] account and the ROTH account." As such, the trial court acknowledged that it awarded Cesare all of the Roth account and compensated for this by awarding Paula a greater share of the marital portion of one of the Fidelity accounts. Nonetheless, as we previously stated, the trial court is under no obligation to divide property on a strictly "50-50" basis. *Stipp v. St. Charles*, 291 S.W.3d at 726.

Finally, Paula argues that the trial court erred in its division of the cash value of the parties' life insurance policies. Paula first argues that the valuation date on one of the life insurance policies was from an outdated statement. However, as already stated, it was incumbent upon Paula to seek additional discovery or move the court to compel Cesare to produce a more recent statement, or object to the introduction of the document at trial. Nonetheless, Paula fails to cite to any portion of the record where any of these actions were taken or where this error was otherwise preserved. CR 76.12(4)(c)(v). Hence, we will not consider the claim. *Shelton*, 992 S.W.2d at 852.

Paula also contends, however, that division of the life insurance policies was in error as the cash values for each differed and the division was

unequal. As previously stated, there is no presumption that property must be divided equally, only that it be divided in just proportions. KRS 403.190; *Stipp, supra*. Paula contends that the trial court was required to make specific findings as to the value of the life insurance policies if they were to be cashed out. We disagree.

Indeed, the only way the court could have divided the policies exactly equally would have been to require that all of the policies be cashed out and then divided the amount evenly between the parties. This would have left both of the parties uninsured, however, a less than desirable situation for both parties. Further, it is unclear that the division was unequal. Instead, the division may have, in fact, been equal as there was a dispute between the parties as to the value of same and the trial court was at liberty to believe the evidence it found most convincing. Moreover, Paula fails to acknowledge that Cesare was assigned a greater portion of the marital debt. Thus, it cannot be said that the trial court's decision to assign each of the parties their respective life insurance policies was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941 (Ky. 1999).

Division of Debt

Paula argues on appeal that the division of debt was unjust and did not follow the case law of *Neidlinger v. Neidlinger, supra*. Paula states that the parties had accumulated quite a substantial debt load by the time of dissolution. Indeed,

the parties had a combined debt of over one-hundred and ten thousand dollars, separate and apart from the primary mortgage on the marital residence.

The trial court ordered that Paula would assume the debt on her 2007 Honda and Cesare would assume the debt on his 2006 Harley and 2006 Subaru. Paula was ordered to pay approximately $48,747.00 in additional debt. Cesare was ordered to pay approximately $63,800.00 in additional debt. Paula contends that the trial court erred in its division of debt under the precedent in *Neidlinger, supra*, because the court did not make findings in its opinion concerning whether each debt was for the benefit of a particular party, for the benefit of their minor child, or for the benefit of the entire family. Paula notes that the trial court also failed to make any findings concerning her ability to assume any indebtedness. Paula contends that it is impossible for her to pay her portion of the debt with the assets and monies the court awarded her. Paula only agrees that one of the debts was assigned correctly, a debt on a Bank of America card that Cesare admitted was his alone.

However, Paula neglects to acknowledge that the trial court did make findings in regards to almost all of the debts which were assigned to her. For example, the trial court found that a Citibank debt of $4,878 was "incurred solely by [Paula] since the date of separation." The trial court also found that an NFCU debt of $19,243 was "incurred solely by [Paula] since the date of separation." Finally, the trial court found that a New York Life Insurance loan of $9,487 was "incurred solely by [Paula] since the date of separation." These three debts total

approximately $33,600. Accordingly, around $33,600 of the $48,747 assigned to her was for debt incurred *solely by her* after the date of separation. Hence, Paula's argument that the trial court failed to make any findings is without merit.

It is also worthy of mention that Paula herself, in her proposed findings of fact and conclusions of law submitted to the trial court, proposed that she specifically pay for each of the debts she was ultimately assigned, except for two, for which she proposed to pay for half. As such, Paula herself proposed to pay for all but approximately $6,000.00 of the debt which was ultimately assigned to her (not including any unpaid medical bills), and thus has waived any argument with respect to the assignment of those debts.

Accordingly, we affirm the trial court's division of debt.

Maintenance Award

Paula contends that the trial court's award of maintenance was insufficient. In support thereof, she contends that she became disabled in 1988, shortly after the parties' marriage. Paula has mitochondrial myopathy, a disease that is symptomatic when she engages in activity. When Paula's symptoms are aggravated by activity, it takes Paula two to three days of inactivity to recover. Paula states that the disease is progressive, and that over time she has had to reduce her activity level. Paula states that she never worked full-time outside the home, although she worked outside the home part-time between 1986 and 1989 and again between 2000 and 2003. Paula avers that when she worked at a real estate office between 2000 and 2003, she frequently missed days of work due to her condition.

The trial court awarded Paula maintenance in the amount of $2,100.00 per month, until such time as Kathryn reached the age of majority and child support payments ceased, and then $2,500.00[2] per month thereafter. The award was not limited in duration, but instead, extends over the duration of Paula's lifetime, unless or until she cohabitates or remarries or upon the death of either party. Paula contends that the trial court's maintenance award was not in conformity with the guidelines set forth in KRS 403.200. She states that "[t]here was no analysis or finding made by the trial court as required by statute." Paula further claims that this award is incongruous with Cesare's approximate yearly income at the time of trial of $187,436.00.

An award of maintenance lies within the sound discretion of the trial court. *Moss v. Moss*, 639 S.W.2d 370, 373 (Ky. App. 1982). Indeed, "[i]n matters of such discretion[,] barring a showing of absolute abuse, the confidence of the appellate courts is reposed in the trial judge. . . who has followed the case from its inception and who is charged with its most equitable resolution." *Id*. However, "[w]hile the award of maintenance comes within the sound discretion of the trial court, a reviewing court will not uphold the award if it finds the trial court abused its discretion or based its decision on findings of fact that are clearly erroneous." *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003).

Under KRS 403.200(1), a trial court awarding maintenance to a spouse must find that the spouse "lacks sufficient property . . . to provide for [her]

[2] Although this amount will be eventually reduced by the amount of any social security Paula receives.

reasonable needs;" and "[i]s unable to support [her]self through appropriate employment." Further, in determining the amount of maintenance, a court must consider the relevant factors in KRS 403.200(2) including the spouse's financial resources, the standard of living during the marriage, the duration of the marriage, and the age and physical condition of the spouse. *Id*.

In the present case, the trial court found that Paula was unemployed and at least partially disabled. The court further noted that Paula's condition had progressively worsened over time. Paula contends that the trial court failed to make findings as required by the statute. We disagree. Here, the trial court did make separate findings of fact and conclusions of law as required by CR 52.01 for any action tried upon the facts without a jury.

Indeed, the court obviously found that Paula lacked sufficient property and means to support herself as it found (1) that she was "unemployed," (2) that she was "at least partially disabled," (3) that her condition had "progressively worsened," (4) that "[Cesare] [wa]s the only source of income," and (5) that Paula "was solely dependent on [Cesare] for all funds." That this was taken into consideration is evidenced by the fact that the trial court chose to make an award to Paula of *lifetime* maintenance, only to cease upon her remarriage or cohabitation, or upon Cesare's death or her own. There is no magic language required, and the court need not recite the verbatim words "lacks sufficient property" or "is unable to support [her]self through appropriate employment" under KRS 403.200(1) when the findings made effectively state the same thing in other words.

Paula also complains that the amount of maintenance was insufficient, however, and that the court's failure to discuss the specific factors under KRS 403.200(2) was tantamount to the trial court "picking a number out of a hat or throwing a dart at a dartboard." Again, we disagree. The court need not specifically enumerate the factors set forth in KRS 403.200(2). *McGregor v. McGregor*, 334 S.W.3d 113, 118 (Ky. App. 2011); *Drake v. Drake*, 721 S.W.2d 728 (Ky. App. 1986). Rather, the court need only "consider" any "relevant" factors under KRS 403.200(2).

Although Paula claims that the amount of maintenance awarded essentially impoverishes her, reducing her to the life of a "scullery maid," she was awarded lifetime maintenance after the emancipation of her daughter of $2,500.00[3] per month ($2,100.00 while still receiving child support, before emancipation), and one-half of Cesare's military retirement as earned during the marriage, totaling $1,995.00 per month. Thus, Paula received $4,495.00 in maintenance and retirement benefits per month via the order. Certainly, the receipt of over $50,000.00 a year in maintenance and retirement benefits cannot be considered "impoverishment." In addition, Paula is entitled to 55% of Cesare's military survival benefit package that would entitle her to payments of approximately $4,600.00 per month in the event of Cesare's death. This monthly income is paired with the receipt by Paula of substantial marital assets, including one-half the value

[3] Again, such amount will be eventually reduced by the amount of any social security received.

of the $450,000.00 marital home, upon sale, and significant funds from marital IRA's.

Hence, finding no abuse, we affirm the trial court's award of maintenance.

Cesare's Military Retirement Benefits

Paula next contends that the trial court erred in its allocation of 54.8% of Cesare's military retirement as non-marital. Paula contends that a substantial portion of Cesare's military retirement was earned after the marriage. Paula asserts that Cesare did not prove how much had accrued in his military retirement at the time of marriage and, as such, failed to meet his burden for proving his non-marital claim.

Cesare claims that Paula mistakenly confuses military retirement with a private sector pension or 401K. Cesare maintains that military retirement, unlike private pensions, is a statutory entitlement that is computed on the day of retirement based upon rank and years of service. He asserts that the formula for the marital portion of a military retirement is the number of months between the date of marriage and dissolution over the total number of months of service at the time of dissolution, multiplied by one-half. We agree with Cesare that this is the formula to be used in dividing military retirement. *See, Snodgrass v. Snodgrass*, 297 S.W.3d 878, 888-891 (Ky. App. 2009). However, we note that division of the marital portion need not always be "in half," but by whatever percent the court

deems is a just proportion. *Id*. (Holding that the trial court was within its discretion to multiply the marital portion by 46/100, instead of "equally".)

The trial court found that Cesare served 376 months in the military prior to his retirement and that the parties were married for 206 of these months. Neither of these facts is disputed. The trial court took the total number of months of marriage (206) and divided by Cesare's years of service (376) and determined that this equaled 54.8%. Thus, the court determined that this portion of the military retirement was marital. The court then divided the marital portion of the retirement entitlement (54.8%) *equally*, leaving with Paula 27.4% of Cesare's total military retirement, or approximately $1,995.00 per month.

Contrary to Paula's assertion that the trial court did not make a finding as to what portion of the retirement "accrued . . . prior to the marriage," the court did, in fact, do so. The court found that Cesare had 170 months of service prior to the marriage as the court found that 206 months of service occurred after the time of marriage. The court then divided the marital portion equally.

Hence, we find no abuse of discretion and affirm the trial court's division of Cesare's retirement.

Cesare's Veteran's Administration Benefits

Paula next contends that she is entitled to "have the benefit of Cesare's Veteran's Administration disability benefits for the purposes of child support and maintenance." She finds fault with the trial court's statement that

Cesare's disability payment was not divisible under federal law, arguing that Cesare did not submit any proof that this was the case.

This argument may be quickly dispensed with, as it is a matter of well-settled law that Veteran's Administration disability benefits are not divisible as marital property. *See, West v. West*, 736 S.W.2d 31 (Ky. App. 1987); *Davis v. Davis*, 777 S.W.2d 230 (Ky. 1989).

Hence, no further discussion is required and we affirm on this ground as a matter of law.

Language in the Trial Court's Order Regarding Health Insurance and the SBP Benefit

Paula also alleges on appeal that the trial court erred in failing to include certain language in the decree of dissolution to ensure that she would be able to continue receiving Tricare health insurance through the military and be entitled to the Survivor Benefit Plan (SBP) through the military. This issue was preserved through Paula's CR 59.05 motion to alter, amend or vacate.

Prior to trial, Cesare filed a motion requesting the trial court to enter a limited decree of dissolution. The record indicates that the trial court withheld entering a limited decree of dissolution, upon motion by Paula, so as to give her an opportunity to inquire as to the continued availability of Tricare health care insurance for her through the military. The court passed the motion to a later date, and eventually passed ruling on the motion to the date of trial. After trial, on June 5, 2009, Cesare renewed his motion for a limited decree. At the hearing on the

motion, Paula submitted a proposed limited decree of dissolution with language provided to her by the JAG office at Fort Knox as necessary for the continuation of her health care insurance benefits.[4] The language she requested, as allegedly required for the continuation of her health insurance benefits, is as follows:

> [P]ursuant to state and federal law, [Paula] is entitled to a share of [Cesare's] military retirement benefits. [Cesare's] military retirement is all marital. [Paula] is entitled to an assignment of [Cesare's] military retirement benefits and is hereby awarded an equal portion thereof. It is intended that [Paula] shall receive her full share of [Cesare's] military pay, without reduction for disability compensation (VA disability pay or military disability retired pay) or any other reason. Military retired pay is deemed by the Court to include pay actually paid or to which [Cesare] would be entitled based on length of his creditable service. Further, [Paula] is entitled to former spouse coverage as the beneficiary of the [Cesare's] Survivor Benefit Plan. Upon entry of the Decree of Dissolution of Marriage, [Paula] shall be [Cesare's] former spouse beneficiary, with his monthly retired pay as the base amount and he shall do nothing to reduce or eliminate her benefits. [Cesare] shall immediately take the necessary steps to file the Election Statement for Former Spouse Coverage within 30 days if not done so already. [Cesare] shall continue to pay the required premiums to keep the SBP in full force and effect.

(From Paula's Proposed Findings of Fact and Conclusions of Law).

[4] A letter from the JAG office at Fort Knox was also sent to the trial court. Interestingly, upon review by this Court, we find no specific mention of health insurance in this letter. Only "former spouse coverage" is referenced with regard to the "survivor benefit plan." That said, it is possible that the Paula's entitlement to health insurance is dependent upon her receipt of a portion of Cesare's retirement benefits or being designated as the former spouse beneficiary of the survivor benefit plan. In either event, it is not clear from the record and we will leave such determination to the trial court on remand.

After the trial court accepted proposed findings from the parties, it entered a final decree, thus doing away with the need for a limited decree. Paula contends, however, that the trial court failed to include the language from her proposed decree in its final findings or decree, and that such language is required for her continued health coverage with the military. Hence, Paula argues that her continued health care coverage, which is of the utmost importance to her given her disability, is in jeopardy.

In the trial court's Findings of Fact, Conclusions of Law, and Decree of Dissolution of Marriage, the trial court held as follows:

> [Cesare's] military retirement includes a survivors benefit plan (SBP). The cost of maintaining the SBP is currently $475.00 per month and is being borne entirely by [Cesare] as a deduction from his military retirement . . . The SBP is not divisible. Under the SBP, [Paula] at the time of [Cesare's] death would by law receive an amount equal to 55% of [Cesare's] retirement benefit currently calculated at $4,006.00 per month. The Court finds that [Paula] be awarded the SBP.

Thus, the trial court also neglects to even mention health insurance. Further, the decree is ambiguous as to whether Cesare is required to continue paying for the SBP, as the decree only states that the premiums *were* "being borne entirely by [Cesare]" and that "[Paula is to] be awarded the SBP." It is unclear to this Court from a reading of the decree what is intended concerning health insurance for Paula. It is also unclear to this Court who is responsible for paying the SBP premiums. Although it is stated that the premiums were "being borne entirely by Cesare," the language could be taken to mean that Cesare bore the cost of the

premiums up until the time of the order and that Paula would assume that cost thereafter, or it could be taken to mean that Cesare was to continue to entirely bear the cost of the premiums after it was awarded to Paula. As such, we reverse and remand to the trial court for further findings consistent with this opinion. We do not mandate the court's inclusion of the precise language requested by Paula on remand, as at least one line of same –concerning VA disability pay—is in contravention of the law. Nonetheless, direct and clear language is required concerning health insurance and the payment of the SBP premiums.

Attorney Fees

Paula and her counsel, the Honorarble Thomas Stone, allege that the attorney's fees awarded by the trial court were insufficient. We disagree and affirm the trial court's award of attorney's fees. Paula was awarded a $4,000.00 advance on attorney's fees and an additional $6,000.00 in the court's decree. Thus, Paula received a total award of $10,000.00 in attorney fees.

The award of attorney's fees is within the broad discretion of the trial court. KRS 403.220. We will not reverse an award of fees, or failure to award attorney's fees, absent an abuse of that discretion. *Moss v. Moss*, 639 S.W.2d at 373.

Despite the fact that there is a significant disparity in earning potential between Paula and Cesare, both were left with substantial resources after dissolution. Paula was awarded a lifetime award of maintenance ($2,100.00 per

month before emancipation of Kathryn and $2,500.00[5] after emancipation), one-half of Cesare's military retirement as earned during the marriage ($1,995.00 a month), and 55% of Cesare's military survival benefit package, which was calculated at the time of trial to equal approximately $4,600.00 per month (which would replace both of the above in the event of Cesare's death). Aside from the $4,495.00 per month Paula receives in maintenance and military retirement, she was also awarded one-half the value of their $450,000.00 home, all of the shares in a Roth Fidelity IRA, over a third of the shares in a Traditional Fidelity IRA, one half of a USAA brokerage account, and 54 shares of Home Depot stock.

We acknowledge that KRS 403.220 authorizes a trial court to order a party to a divorce to pay the attorney's fees of the other where a disparity exists in the financial resources of the parties. However, even in cases where there is a disparity, the award of attorney's fees is not mandatory. *Moss v. Moss, supra.* Indeed, "whether to make such an assignment [of attorney's fees] and, if so, the amount to be assigned is within the discretion of the trial judge." *Neidlinger v. Neidlinger,* 52 S.W.3d at 519.

Therefore, despite the fact that Paula's attorney's fees may have been greater than the $10,000.00 awarded by the trial court, it is irrelevant for our purposes. Paula was left with substantial assets, maintenance and retirement payments. Accordingly we decline to disturb the trial court's award of attorney fees.

[5] Again, as will eventually be reduced by any amount of social security awarded.

Award of Interest on the Minor's UTMA Account

Paula next contends that the trial court's finding that "any funds [in the UTMA account] not expended on behalf of Kathryn's education shall be equally divided between the parties" was in error. Paula avers that this is contrary to KRS 385.112(2), which vests all interest in a UTMA account in the minor. Paula states that, pursuant to KRS 385.202, Cesare was required to turn over all funds in the UTMA to Kathryn at the time she reached the age of eighteen. We agree.

Cesare contends in his brief that this Court should apply Texas law, rather than Kentucky law, which would produce a contrary result. However, this argument is without merit as the parties were domiciled in Kentucky at the time the petition was filed. Indeed, in dissolution of marriage proceedings, absent an agreement to the contrary, the law of the marital domicile applies. *Fehr v. Fehr,* 284 S.W.3d 149, 153 (Ky. App. 2008); *Rowley v. Lampe*, 331 S.W.2d 887 (Ky. 1960).

Pursuant to KRS 385.202, the UTMA account should have passed to Kathryn when she reached the age of majority. *Id*. Thus, it was clearly error for the trial court to hold that "any funds not expended on behalf of Kathryn's education shall be equally divided between the parties." Accordingly, we reverse and remand on this ground. As it presently stands, Cesare only holds the funds in constructive trust for Kathryn. *Peter v. Gibson*, 336 S.W.3d 2 (Ky. 2010).

Directive to Supply Report Cards to Noncustodial Parent

Finally, Paula contends that the trial court lacked jurisdiction to require her to provide Cesare with records of Kathryn's class schedule and grades because Kathryn has now reached the age of majority. Paula contends that Kathryn is an adult and that she cannot compel Kathryn to provide her with grade reports and class schedules. Paula contends that these materials must instead come from Kathryn herself.

Cesare concedes on appeal that Paula cannot be compelled to provide grade reports and class schedules for Kathryn, who is no longer a minor. Thus, we reverse on this issue and direct the trial court to strike the requirement from its decree that Paula provide Cesare with grade reports or schedules for Kathryn.

Conclusion

In light of the foregoing, we affirm in part and reverse in part, and remand to the trial court for further proceedings consistent with this opinion.

MOORE, JUDGE, CONCURS.

TAYLOR, CHIEF JUDGE, CONCURS IN PART, DISSENTS IN PART AND FILES SEPARATE OPINION.

TAYLOR, CHIEF JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur completely with the majority's opinion except as concerns the issue raised regarding the amount of maintenance and the failure of the trial court to make specific findings as concerns the same. The majority states that the trial court was not required to make specific findings on this issue. I respectfully disagree.

The judgment on appeal in this action reflects that the court conducted a bench trial. Pursuant to CR 52.01, I believe the family court was required to make specific findings of fact on any and all issues properly raised and tried in this action. The amount of maintenance was one of those issues. While I concede that the underlying statute, KRS 403.200 does not require the trial court to make specific findings of fact, I do not believe it is controlling. Rather, I believe CR 52.01 is controlling and the family court erred as a matter of law in failing to make specific findings of fact as to how the exact amount of maintenance awarded was determined**.** *See Anderson v. Johnson*, ___ S.W.3d ____ (Ky. 2011).

Accordingly, I would remand the issue regarding the amount of maintenance awarded back to the family court for further proceedings.

BRIEF FOR APPELLANT:

Thomas K. Stone
Louisville, Kentucky

BRIEF FOR APPELLEE:

Frank P. Campisano
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