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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000373-MR
AND
NO. 2008-CA-000468-MR

AND
NO. 2009-CA-000144-MR
AND
NO. 2009-CA-000199-MR

ANDREA DUNCAN — APPELLANT/CROSS-APPELLEE

v.

KEVIN T. DUNCAN — APPELLEE/CROSS-APPELLANT

APPEALS AND CROSS-APPEALS FROM JEFFERSON CIRCUIT COURT
HONORABLE DONNA DELAHANTY, JUDGE
ACTION NO. 05-CI-500614

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND WINE, JUDGES; LAMBERT, SENIOR JUDGE.

WINE, JUDGE: Andrea Duncan appeals from the Jefferson Circuit Court's division of property and award of maintenance, child support and attorney's fees incident to the dissolution of her marriage to Kevin Duncan. On appeal, Andrea claims that the trial court adopted Kevin's proposed findings of fact "wholesale" and that the trial court's final judgment bore little resemblance to the evidence presented at trial. Kevin Duncan cross-appeals, claiming that the maintenance award was excessive and that the trial court erred by failing to award him attorney's fees. Upon a review of the record, we affirm in part, reverse in part, and remand.

History

Andrea and Kevin were married on July 1, 1989, in Jefferson County, Kentucky. Before their marriage, Andrea had graduated from the University of Louisville with an Associate Degree in computer science and a Bachelor Degree in finance. Kevin had earned a Bachelor Degree in applied mathematics and computer science. After the parties' marriage, Andrea and Kevin each obtained full-time employment in Louisville. Kevin then returned to school and earned a Masters Degree in engineering in 1992, and a law degree in 1994. While Kevin completed his education, Andrea gave birth to the first two of their four children. She worked full time and acted as the primary caretaker for the children while Kevin completed his education.

After Kevin was admitted to the Bar in 1994, Andrea quit her job and the family relocated to Ft. Wayne, Indiana, where Kevin obtained a position

practicing patent law. In 1995, Andrea obtained a position working as a computer consultant for a life insurance company. After the birth of their third child in 1996, Andrea remained employed, but changed her schedule from full-time to part-time employment.

In 1998, Kevin accepted a position with the law firm of Hunton & Williams in Virginia and the family relocated again. While in Virginia, Andrea began working part-time with "Kelly's Kids," a children's clothing company whose clothes she would sell at "parties" from the marital home.

Andrea and Kevin gave birth to their fourth child in 2000. The family lived together in Virginia until 2004 when Andrea and Kevin first separated. Andrea stayed in the marital home and Kevin moved into an apartment two streets down from the marital home. Andrea filed an action for dissolution in Virginia. She then took the children and moved back to Louisville, Kentucky, where she resided in a home purchased for her by her parents.

Thereafter, the parties entered into a temporary separation agreement on February 8, 2005, which provided for child support in the amount of $2,500 per month and temporary maintenance in the amount of $8,500 per month. Under the temporary agreement, this amount was deemed subject to modification in the event that Kevin moved to Louisville and experienced a cut in pay. At that time, Kevin earned approximately $500,000 a year. The action in Virginia was dismissed pursuant to the agreement.

Initially, after Andrea and the children moved to Kentucky, Kevin would travel to Louisville on weekends to visit with them. In December of 2004, Kevin purchased a condo in Louisville and began to look for employment in the Louisville area. Kevin filed the present divorce action in the Jefferson Family Court in February of 2005. During this time, Kevin continued to work for Hunton & Williams while living in Louisville.

A mere three months before trial, Kevin resigned his employment with Hunton & Williams and accepted a position in Louisville with the law firm of Greenbaum, Doll, and McDonald as a patent attorney. This position paid $180,000 a year, plus a $40,000 "sign-on" bonus in the first year. Andrea has not been employed outside the home since 1998, but did enroll in courses at the University of Louisville before trial in hopes of earning an accounting degree.

Andrea is currently living in a home valued at approximately $450,000 and owned by her parents. Andrea pays rent to her parents in the amount of $2,600 per month and has testified that she would like to purchase the home from them if she is financially able to do so after dissolution and distribution of the marital property. Kevin is currently living in a home valued at approximately $500,000 in Louisville.

Pursuant to the parties' temporary separation agreement, Kevin paid Andrea $11,000 per month from February 5, 2005, until July 5, 2006, ($8,500 "temporary maintenance" and $2,500 "child support"). From July 5, 2006, until the trial court entered its final judgment in August of 2007, Kevin continued to pay

$2,500 per month in child support, but paid a reduced amount of maintenance in the amount of $3,250 per month.

Prior to trial, on August 7, 2006, the parties entered into an agreed order resolving all issues involving custody and visitation with the children. Said order also stated that Kevin was required to furnish certain information to Andrea pertaining to a Chicago Investment Group ("CIG") stock account. Further, it was agreed that Kevin's Hunton & Williams defined benefit plan, capital account, and A&B Fidelity account would be divided equally between the parties upon Kevin's receipt of same. The order further specified that Kevin should immediately transfer a portion of his individual retirement account ("IRA") to one of Andrea's two IRA's in order to equalize the amount each party held in their respective IRA's. Certain escrowed monies from the sale of certain real estate were also agreed to be divided equally between the parties, minus a $4,800 payment to a doctor.

The trial was held on November 14 and 15, 2006. On November 15, 2006, the trial court entered a decree of dissolution but reserved all other issues. The sitting judge, the Honorable Kevin Garvey, then retired on December 31, 2006. Judge Garvey, after entering the senior judge program, did not enter a final judgment until August 31, 2007. The court's findings of fact and conclusions of law did not resolve custody or visitation, because the parties had already resolved these issues through the agreed order. However, the court ruled upon all other issues, including: the division of marital property, restoration of nonmarital

property, allocation of debt, dissipation of marital assets,[1] maintenance, child support, and attorney's fees.

Thereafter, both Andrea and Kevin filed motions to alter, amend, or vacate. The judgment did not become final until February 5, 2008. The new sitting judge granted certain modifications requested by each party while denying others. Andrea now appeals the denial of same and Kevin cross-appeals.

On appeal, Andrea contends that the trial court abused its discretion by improperly adopting Kevin's proposed findings of fact "wholesale" and that such findings were a mechanical or verbatim adoption rather than the product of the trial court's own independent deliberations. Further, Andrea contends that the trial court's classification of certain properties as nonmarital was in error. Andrea also contends that the trial court's division of marital property was erroneous, that the trial court's award of maintenance of a limited amount and duration was an abuse of discretion, that the trial court failed to make accurate findings concerning Kevin's income and the reasonable needs of the children, and that the trial court abused its discretion by failing to award her attorney's fees.

Kevin specifically disagrees with each of Andrea's alleged errors on appeal. He avers that the trial court's use of his proposed findings of fact and conclusions of law was not a mere perfunctory adoption, but that the trial court acted independently in making its findings. He states several other bases for denying Andrea's claims on appeal. However, Kevin maintains that the trial court

[1] Although no dissipation claim was ever made at trial, the court did make findings in regard to a dissipation claim.

abused its discretion by awarding too much maintenance to Andrea and by failing to award him costs and attorney's fees.[2]

Analysis

On appeal, Andrea argues that the trial court erred by adopting Kevin's proposed findings of fact and failing to make its own findings, that the trial court erred in its classification and restoration of certain properties as nonmarital, that the trial court erred in its division of marital property, that the trial court's award of maintenance of a limited amount and duration was in error, that the trial court failed to make reasonable findings concerning Kevin's income and Andrea's and the children's reasonable needs, and, finally, that the trial court abused its discretion by failing to award her attorney's fees. Instead of addressing the general arguments as set out in Andrea's brief, we shall divide such arguments by discussing each contested asset or award individually.

Kevin cross-appeals, claiming that the award of maintenance to Andrea was excessive and that the trial court erred by failing to award him costs and attorney's fees. We shall address Kevin's cross-appeals concerning maintenance and attorney's fees with Andrea's like claims.

Standard of Review

In dissolution actions where the distribution of property is contested, the trial court must engage in a three-step process. First, the court must categorize each piece of contested property as either marital or nonmarital in nature. Second,

[2] Kevin makes another argument concerning the trial court's method for restoration of certain marital property which is now moot. Thus, we need not address it.

the court must assign each party their respective nonmarital property. Finally, once the court has assigned to each party their nonmarital property, the court must undertake to equitably divide the remaining marital property. *Smith v. Smith*, 235 S.W.3d 1, 5 (Ky. App. 2006). Such division need not be equal, but must be accomplished in just proportions. *Davis v. Davis*, 777 S.W.2d 230, 233 (Ky. 1989).

This relatively straightforward, three-step process is complicated in cases where the property to be distributed has both marital and nonmarital components. *Smith*, 235 S.W.3d at 5. Such is the case in the present action. In cases such as this one, the trial court "must determine the parties' separate nonmarital and marital shares or interests in the property on the basis of the evidence before the court." *Travis v. Travis*, 59 S.W.3d 904, 909 (Ky. 2001).

This process is further complicated where such assets have appreciated in value since the marriage. Courts may apply the "source of funds" rule in such situations to determine the respective parties' nonmarital and marital interests in such property. *Id*. The "source of funds" rule states that any increase in value of nonmarital property acquired before the marriage remains nonmarital so long as the increase is due to general economic conditions rather than the result of efforts by the parties. Graham, Louise and Keller, James, *Kentucky Practice, Domestic Relations Law* § 15:64 (Ky. 2008).

Conversely, however, a property's increase in value may be considered marital where the parties' combined efforts led to the increase. *Id*.

Thus, when mixed-status property increases in value over the course of the marriage, courts must inquire as to "why the increase in value occurred." *Smith*, 235 S.W.3d at 5. Nonetheless, Kentucky Revised Statute(s) ("KRS") 304.190(3) creates a presumption that any increase in value of an asset during the marriage is marital. Thus, a party claiming that appreciation is nonmarital bears the burden to show that the increase in value was not due to the efforts of the parties. *Id*.

On review of the trial court's division, we must defer to the considerable discretion of the trial court. *Herron v. Herron*, 573 S.W.2d 342, 344 (Ky. 1978). We will not reverse the trial court's findings of fact unless same are clearly erroneous. *Cochran v. Cochran*, 746 S.W.2d 568, 569 (Ky. App. 1988); Kentucky Rule(s) of Civil Procedure ("CR") 52.01. However, we review the court's conclusions of law *de novo*. *Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky. App. 2003). A trial court's classification of property as marital or nonmarital involves the resolution of a matter of law, and is thus reviewed *de novo*. *Wilder v. Wilder*, 294 S.W.3d 449, 452 (Ky. App. 2009); *Heskett v. Heskett*, 245 S.W.3d 222, 226 (Ky. App. 2008); *Holman v. Holman*, 84 S.W.3d 903, 905 (Ky. 2002). Thus, a "two-tiered" scrutiny is involved upon our review of the question of whether an asset is marital or nonmarital -- with findings of fact being determined under the clearly erroneous standard and the ultimate legal conclusion being reviewed *de novo*. *Smith*, 235 S.W.3d at 6.

As we have previously noted, the standard of review in cases such as the present one has been notoriously inconsistent in our appellate courts, perhaps in

part due to the complicated interchange between the factual determinations and ultimate conclusions of law in such cases. *Id*. Nonetheless, we reiterate our previous position in *Smith, supra*, that a two-tiered review is appropriate in this type of case, whereby we give deference to the factual findings underlying the determination of whether an item is marital or nonmarital, but give no deference to the trial court's overall classification of same. *Id*.

Accordingly, we now turn to a review of the issues raised by Andrea and Kevin on appeal and cross-appeal.

The Trial Court's Use of Kevin's Proposed Findings and Conclusions

We first address Andrea's argument that the trial court erred by adopting Kevin's findings of fact "wholesale."

Generally, a trial court is free to ask counsel to draft and submit proposed findings of fact. *Bingham v. Bingham*, 628 S.W.2d 628, 629 (Ky. 1982). Indeed, "[i]t is not error for the trial court to adopt findings of fact which were merely drafted by someone else." *Prater v. Cabinet for Human Resources, Com. of Ky.*, 954 S.W.2d 954, 956 (Ky. 1997), citing *Bingham v. Bingham*, 628 S.W.2d 628 (Ky. 1982). Upon a review of the record in comparison to the trial court's findings of fact and conclusions of law in this case, it is clear that significant portions of Kevin's Proposed Findings of Fact and Conclusions of Law were used directly and verbatim by the trial court. However, this alone does not constitute error as the trial court may use the findings of fact drafted by another. *Id*.

Nonetheless, the concern when using facts and conclusions drafted by another is that the trial court "does not abdicate its fact-finding and decision-making responsibility under CR 52.01." *Bingham*, 628 S.W.2d at 629. The court may not make a "verbatim or mechanical adoption of proposed findings of fact and conclusions of law." *Id*. Here, it does appear that some of the findings of the trial court were not supported by the evidence actually presented, indicating a possible abdication of the trial court's fact-finding and decision-making responsibilities. In particular, the court found two of the marital assets to have no value where the parties had already stipulated to a precise value for each asset. This suggests a strong reliance upon Kevin's Proposed Findings of Fact and Conclusions of Law rather than upon the evidence presented at trial.

In addition, it appears that for at least one of the marital assets, an IRA, the trial court relied upon numbers used in Kevin's Proposed Findings of Fact and Conclusions of Law which were not supported by his actual testimony at trial. Specifically, the trial court awarded Kevin $67,221.94 as his premarital interest in the IRA where Kevin actually testified at trial that the amount "rolled over" from that account *after* the marriage was only approximately $31,000. Further, it appears that the trial court made findings regarding a dissipation claim which was never actually advanced by Andrea at trial.

Although each of these items could be indicative of a *possible* abdication of the trial court's duty to make independent findings of fact and conclusions of law, none is definitive. Regardless, we need not reach this issue

since several of the trial court's individual findings and conclusions were clearly in error and we reverse, herein, on same. Each point of individual error is set out more specifically below.

The CIG IRA Account

Two years before the marriage, Kevin had opened an IRA through his employer, Barber Coleman. Four years later, approximately two years after the parties married, the IRA was "rolled over" into another IRA (the Prudential/ Chicago Investment Group IRA, hereinafter the "CIG IRA"). At trial, Kevin testified that he accumulated $31,000 in the IRA over that four-year period. He could not, however, testify to any amount which was held in the CIG IRA at the time of the parties' marriage. Instead, he testified that he calculated his nonmarital contribution by "basically deciding" that approximately half of the money at the end of that four-year period would have been attributable to nonmarital contributions. No documents were introduced to show any of his individual contributions to the CIG IRA, nor when such contributions were made or in what amounts. Rather, Kevin's entire tracing argument relied upon his testimony regarding the value of the account *two years after* the parties' marriage.

On appeal, Andrea contends that Kevin's speculation and conjecture as to amounts that were nonmarital does not satisfy the tracing standard established by our courts. We agree. Judicial construction of KRS 403.190 has led to the creation of the concept of "tracing," which requires the party to trace any nonmarital property owned before the marriage to a specific asset or assets

currently owned by the parties. *Chenault v. Chenault*, 799 S.W.2d 575, 578 (Ky. 1990). Our Courts have held that marital tracing requirements should not be Draconian, and need not be shown with mathematical certainty. *Chenault, supra*. However, this Court has held that speculation and conjecture are not sufficient to meet a nonmarital claimant's tracing burden. *Smith,* 235 S.W.3d at 9 ("Speculation and conjecture will not suffice to meet even a relaxed burden"). Moreover, this case is distinguishable from the *Chenault* case cited by Kevin, because the Court in *Chenault* found that the funds in the account in question could not have come from any other source other than the claimed nonmarital source since neither party had a salary which could have otherwise explained the source of the funds.

We find the evidence presented in this case to be far too speculative to support a finding that Kevin is entitled to a portion of the CIG IRA as nonmarital property when Kevin provided absolutely no evidence of the account's value before the marriage or at the time of marriage. Thus, the entire award is based upon an undocumented amount that Kevin recalls rolling over into another IRA *two years after* the parties' marriage. Certainly the evidence presented could not have supported the trial court's award of $67,221.94 to Kevin as his nonmarital portion of the CIG IRA. We reiterate that while *Chenault* has certainly "relaxed" the tracing standards to such an extent that mathematical certainty is not a requirement, it has not so relaxed the requirement that a claimant can meet his burden by broad generalizations and speculation as to value before and after the

marriage, and as to what percentage of same is "marital." Thus, we reverse on this issue because Kevin has failed to meet his burden of proof and overcome the marital presumption. We remand with instruction for the trial court to divide the entire CIG IRA between the parties as marital property.

The CIG Stock Account

During the marriage, Kevin also maintained a stock investment account through the Chicago Investment Group ("CIG").[3] This investment account was comprised mainly of marital funds. However, Kevin asserts a nonmarital interest in the account based upon the deposit of certain funds he deems as nonmarital. Kevin testified at trial that inheritance monies from his mother's estate were used to buy certain shares of stock ("the FLSH stock") in the CIG account. The trial court agreed, awarding same to Kevin as nonmarital property. Andrea claims on appeal that the money used for the purchase was marital (rather than inheritance money) and that regardless of the classification, such monies were not ultimately used to purchase the FLSH stock in question.

During trial, Kevin testified that he learned in the summer of 2000 that he would be inheriting approximately $20,000 from his mother's estate. He further testified that, in anticipation of the receipt of these inheritance funds, he sent a check to Prudential Securities in the amount of $15,000 for the purchase of stock in September of 2000. This $15,000 check was written from a marital

[3] Testimony indicated that this account was managed by other groups, such as Prudential, during the marriage, but was managed by CIG at the time of dissolution.

checking account comprised of marital funds (the "Crestar/Sun Trust account"). Said stock was purchased at that time by Kevin's broker.

Several months later, in February of 2001, Kevin received an inheritance check from his mother's estate in the amount of $20,000. This inheritance check was deposited into the Crestar/Sun Trust marital checking account. Kevin alleged at trial that the deposit of this check into the parties' checking account was intended to "pay himself back" for the $15,000 in stock he had purchased the previous September. He admitted at trial that the "exact dollars" received from his mother's estate were never actually used to purchase stock, however.

Andrea argues on appeal that a party making a nonmarital claim may not retroactively seek to label marital funds as nonmarital based upon the notion of "paying oneself back" or the "expectation of a future receipt of funds," when it is clear that the monies used for a particular transaction were marital funds. We agree.

Indeed, to do so would necessarily turn our entire judicially created concept of tracing upon its head and require that courts routinely make inquiry into the "intent" of the spouse at the time of *any* transfer or use of marital funds. This we will not do. As previously stated, all property acquired after the marriage is presumed to be marital and the party making a claim to any particular property as nonmarital bears the burden of proof to show otherwise. KRS 403.190(3); *Sexton v. Sexton,* 125 S.W.3d 258, 267 (Ky. 2004). Moreover, the entire concept of

tracing does not even directly apply in the present case since tracing can only begin from the time nonmarital funds come into a party's possession. By all mandates of logic and reason, funds cannot be "traced" back any further than the moment they were first received by a party. Thus, Kevin has failed to trace any interest in the CIG stock account to any funds which were nonmarital. We will not modify existing caselaw to make an exception based upon the subjective intent of the party at the time of use or transfer. Thus, we reverse the trial court's judgment awarding Kevin shares of stock in the CIG stock account as his nonmarital property.

Nonetheless, we do recognize that Kevin did have an influx of $20,000 of nonmarital funds through his mother's inheritance during the marriage. The funds were deposited into a marital checking account (the Crestar/Sun Trust checking account) and comingled with marital funds. However, as Kevin did not make any nonmarital claim to funds held in the Crestar/Sun Trust account, we need not address this issue. As previously stated, the burden is upon the claimant seeking to have property classified as nonmarital to make a claim for and prove same.

The "Hoya Galvin" and "Devil Bunny II" Racing Interests

During the parties' marriage, Kevin contributed funds to two horse-racing ventures: Hoya Galvin Racing and Devil Bunny Racing II.[4] Kevin testified at trial that, although the parties held an interest in these two entities, the ventures

[4] Kevin testified at trial that another racing venture to which he contributed, "Devil Bunny Racing I," was no longer inexistence.

often operated at a loss and were generally "for fun." Andrea did not contest this characterization. However, on appeal, Andrea contends that it was error for the trial court to assign a "zero" value to these two entities and award them to Kevin. Specifically, Andrea avers that the parties stipulated to the value of these two entities on the record at trial (and cites to the record accordingly). We agree that it was error for the trial court to assign no value to these assets when the parties stipulated to specific values for the assets at trial.[5]

Counsel for both parties discussed these assets on the record during trial and came to an agreement that Hoya Galvin Racing had a value of $4,000 and Devil Bunny Racing II had a value of $5,000. Such stipulation was made explicitly on the record. Kevin agreed to these values during his testimony and stated that he agreed Andrea should be awarded one-half of each. The trial court clearly erred by failing to recognize that the parties had *already stipulated* the values of these assets. No finding of fact by the court was necessary (or proper) because the value of the assets had already been determined by stipulation. *See, e.g.,* Thomas L. Osborne, *Trial Handbook for Kentucky Lawyers,* § 21:4 (2008); Brett R. Turner, 2 *Equit. Distrib. Of Property* 3d § 7:11 (2005); *Federal Deposit Ins. Corp. v. St. Paul Fire and Marine Ins. Co*., 942 F.2d 1032, 1038 (6th Cir. 1991)("Stipulations voluntarily entered by the parties are binding, both on the district court and on us"). Since no reason was given by the trial court concerning

[5] Predominantly because the trial court gave no reason in its judgment and order why the stipulation should be disregarded, and neither party had moved the court for relief from the stipulation.

why the stipulation of fact should be disregarded, we can only assume that it was disregarded by mistake or error.

Accordingly, we reverse on the ground that Hoya Galvin Racing and Devil Bunny Racing II were stipulated by the parties to have values of $4,000 and $5,000, respectively. On remand, the trial court shall accord such values to these assets and shall award Andrea one-half the value of each.

Andrea's Nonmarital Claim to Proceeds from the Sale of the Marital Residence

Andrea also appeals the trial court's failure to award her any amount on her nonmarital claim from the proceeds of the sale of the marital residence in Virginia. She claims that proceeds from the sale of the Virginia home were traced back to the purchase and sale of a home on Wallace Avenue in Louisville, Kentucky, which she owned prior to the marriage. The trial court found that Andrea had "not adequately traced her non-marital claim as required by *Brandenburg,"*[6] and did not award her *any* amount as her nonmarital contribution from the proceeds of the sale of the marital home.

Andrea purchased the Wallace Avenue property for $49,000 in 1987, two years prior to the marriage. She obtained a note and mortgage on the property in the principal amount of $44,100. It appears that Andrea lived in the home and made monthly mortgage payments on the home from October 1, 1987, until the parties married on July 1, 1989. After the parties married in 1989, they continued to live in the home together and make monthly mortgage payments until it was

[6] *Brandenburg v. Brandenburg*, 617 S.W.2d 871 (Ky. App. 1981).

sold in 1994. The Wallace Avenue property sold for $113,500 and two mortgages totaling $64,016 were paid off. The resulting equity was $49,484.

When the parties purchased their next home in Ft. Wayne, Indiana, $29,023 from the sale of the Wallace Avenue property was used as a down payment. The Ft. Wayne home was later sold after Kevin obtained a job with Hunton & Williams in Virginia. The parties only netted $18,000 from the sale of the Ft. Wayne home (thus only $18,000 in proceeds rather than $29,023 was available for the parties to use as a down payment on the next marital home). Once in Virginia, the parties purchased their next marital home using the $18,000 from the sale of the Ft. Wayne home as a down payment.

Clearly, then, Andrea showed that at least $18,000 was gained from the Wallace Avenue property and passed through each home until the parties' separation. Andrea presented documentation of all of the above. She sought to recoup the full amount of the proceeds from the Virginia home ($74,492), representing the amount of her initial nonmarital contribution and the appreciation of that nonmarital contribution as it passed through the homes. In essence, she sought application of a modified *Brandenburg* formula whereby the appreciation gained from the Wallace Avenue home was then allowed to grow and further appreciate through the next two marital homes.

Kevin, however, alleged that the increase in value of the Wallace Avenue property was not due to general economic conditions but was due to improvements made to the home after the parties' marriage. Thus, he contended

that the monies earned from the sale of the Wallace Avenue property and transferred through the other properties were marital rather than nonmarital. Nonetheless, he admitted at trial that Andrea was at least entitled to her initial nonmarital contribution in the form of her down payment on the Wallace Avenue property, stating as follows: "I certainly see that her initial down-payment of forty-nine hundred on the Wallace Avenue house would be appropriate for her to receive." Despite this recognition, the trial court failed to award Andrea any amount on her nonmarital claim.

We agree with the trial court that the *Brandenburg* formula was not appropriate in this case because the parties both argued that the increase in value of the Wallace Avenue property was due to improvements made upon the property rather than general economic conditions. *See Travis v. Travis*, 59 S.W.3d 904 (Ky. 2001). However, we find that the trial court erred by failing to award Andrea any amount on her nonmarital claim. It is quite clear that Andrea's initial investment into the Wallace Avenue home of $4,900 was adequately traced. Although the trial court may have properly found, based upon the evidence submitted, that Andrea was not entitled to any amounts constituting paid principal or appreciation above that initial down payment, she was entitled, *at the very least*, to this initial contribution.

It is apparent that Andrea made a down payment of $4,900 on the Wallace Avenue property and, thereafter, made monthly mortgage payments until the parties' marriage. However, it also appears from the record that second

mortgage(s) were taken out on the property at some point and that improvements were made to the property which would have increased its value. Because Andrea submitted no documentation concerning when any second mortgages on the property were taken out (such as whether the mortgages occurred prior to or subsequent to the marriage) and because she submitted no documentation of particular improvements made upon the property which would have increased its value *prior* to the marriage, it would not have been error for the trial court to conclude that her nonmarital contribution was not clearly proved in excess of her initial down payment on the Wallace Avenue property.

KRS 403.190(2)(e) states that the "increase in value of property acquired before the marriage [is nonmarital] to the extent that such increase did not result from the efforts of the parties during the marriage." In the present case, both parties argued that the Wallace Avenue property's increase in value was *not* due to general economic conditions, but rather, was due to improvements made upon the property. KRS 403.190(2)(e). *See also Travis v. Travis, supra*; *Goderwis v. Goderwis*, 780 S.W.2d 39 (Ky. 1989). Although Andrea's affidavit stated that she made "substantial improvements to the property prior to the parties' marriage," she provided no other evidence of such improvements or their value. Kevin also testified that substantial improvements (refinishing of the home's basement) were made after the parties' marriage, but also failed to provide any documentary evidence of such improvements or their value.

Thus, the trial court, as the finder of fact, could have found Andrea's testimony unpersuasive or insufficient to show that the improvements made upon the property prior to the parties' marriage were the reason for the property's appreciation. Indeed, the trial court is entitled to weigh the evidence presented. It would have been well within the court's discretion to find that Andrea failed to show that the increase in value of the Wallace Avenue property was due to improvements which took place prior to the marriage.

However, the trial court abused its discretion by finding that Andrea was not entitled to a return of her initial down payment on the Wallace Avenue property of $4,900, which was traced through the subsequent down payments and sales of the family's next two marital homes. As previously noted, even Kevin admitted at trial that Andrea was entitled to the return of her initial down payment of $4,900. Although the trial court could have properly found that the property's appreciation was marital upon weighing the evidence before it, the trial court could not have properly found that even Andrea's initial down payment was marital. There is no question that at least that amount ($4,900) was passed through the family's next two marital homes.

Accordingly, we reverse and remand with instructions to the trial court to restore to Andrea $4,900 -- the amount of her down payment on the Wallace Avenue home -- as such amount was adequately traced through the purchase and sale of the parties' two subsequent homes. *Travis v. Travis*, *supra*.

Kevin's Partnership Interest in Hunton & Williams

Andrea also maintains on appeal that the division of assets was unequal, in part, due to the fact that she was not awarded any portion of his partnership interest in Hunton & Williams. We disagree.

As Andrea herself admits in the briefs before this Court, no dissipation claim was ever made at trial. Therefore, Kevin's reasons for returning to Kentucky are neither relevant nor before us. Neither is any speculative interest he might have enjoyed had he stayed in Virginia. The only interest remaining after his return to Kentucky was the value of his Hunton & Williams capital account ($88,733). Because the Hunton & Williams capital account was divided equally between the parties as marital property, Andrea cannot be heard to complain on appeal. Moreover, this fictitious asset cannot be ascribed to Kevin in his overall "share" of the marital assets awarded by the trial court.

Inequitable Division of Marital Assets: The Trial Court's Award of Monies for the Payment of Taxes and Classification of Withdrawals from Marital Funds, Post-Separation, as Withdrawals Made for the Payment of Taxes

Andrea also alleges that the division of marital property resulted in such a gross disparity between the parties as to constitute an abuse of discretion. Her primary complaint in this category (other than her argument concerning the Hunton & Williams partnership interest, discussed above, and a medical health savings account, discussed below) is that the trial court erred in its treatment of the parties' tax liability incurred during the marriage (including its treatment of various

withdrawals from marital accounts by Kevin and overpayments Kevin made to the IRS). Her general complaint on appeal is that the overall effect of the trial court's treatment of the parties' tax liability allowed Kevin to retain funds allegedly used for "tax purposes" which were not actually used for tax purposes, resulting in a windfall to Kevin.[7]

The history of this argument is quite complex. We will begin with an account of the withdrawals Kevin made for the stated purpose of paying the parties' federal income tax obligations. The trial court found that each of these withdrawals "were applied to income tax obligations" and, thus, were "for a marital purpose."

a.) The CIG Stock Account Withdrawals

The first disputed withdrawal occurred on January 1, 2005, when Kevin withdrew $30,000 from the CIG stock account. This money was used to pay the IRS for the parties' 2004 joint tax liability. However, the payment to the IRS resulted in an overpayment of $24,533. In 2005, Kevin applied 100% of this overpayment to his separate tax return. Andrea did not benefit from the application of any of this overpayment to her own separate tax return in 2005.

[7] Although Kevin argues that Andrea's arguments in this respect are unpreserved, we disagree. Andrea's motion to alter, amend, or vacate clearly discusses the CIG withdrawals and tax consequences of Kevin's withdrawals, overpayments, and the overall inequity regarding the trial court's division of same. Because her arguments concerning the 2006 taxes necessarily build upon the overpayments in prior years (2004 and 2005), and because her argument concerning the overall inequity of the division must take into account all monies spent to repay taxes between separation and dissolution, we find same to be sufficiently preserved for review.

The second withdrawal in question was a withdrawal of $15,467 from the CIG stock account that Kevin made on January 1, 2006. None of these funds were sent to the IRS. However, Kevin alleged that these funds were used to "pay himself back" for monies he expended to pay 2005 taxes.[8]

The third withdrawal in question occurred in May of 2006, when Kevin withdrew $29,607 from the CIG Stock Account. The stated reason for this withdrawal was also for Kevin to "repay" himself for taxes paid to the IRS.

The final disputed withdrawal, also occurring in May of 2006, was in the amount of $51,251 and was used by Kevin to make a down payment on a condo in Louisville (the Griffin Gate residence). Although the parties stipulated the value of the Griffin Gate residence was $50,000 and this amount was divided equally between them, Andrea now makes claim for one-half of the other $1,251 used for closing costs. Because the parties stipulated to the amount to be split on the Griffin Gate residence, and because Andrea failed to raise this argument in her motion to alter, amend, or vacate, Andrea has waived any argument concerning the $1,251 difference between what was stipulated to and what was withdrawn. We will discuss the implications of the other withdrawals hereinbelow as they regard the "overpayment" of taxes and the trial court's ultimate division of the tax liability.

b.) Effect of "Overpayment" of Taxes to the IRS and the Trial Court's Judgment

[8] It is of note that $24,533 had already been applied to the 2005 taxes from the previous year's "overpayment." In 2005, Kevin again overpaid his tax obligation, this time by $42,845.

As previously noted, Kevin overpaid the tax liability to the IRS in both 2004 and 2005. The 2004 overpayment of $24,257 was applied to Kevin's 2005 return and the 2005 overpayment of $42,845 was applied toward Kevin's 2006 return. Kevin asserted that his 2006 tax return still included his 2005 income because Hunton & Williams operated on a non-calendar fiscal year running from April 1 through March 31, which allowed its attorneys/employees to essentially "shift" their tax burden forward to the next calendar year. As the fiscal year for Hunton & Williams ended on the last day of March in 2005, Kevin's income from April 2005 through December of 2005 would have been reported on his 2006 return. Accordingly, Kevin argued at trial that the tax obligation on his personal 2006 return was still the joint responsibility of both parties.

Andrea complains that the first $30,000 withdrawal from the CIG stock account on January 1, 2005, was used to overpay the parties' 2004 joint federal tax liability by $24,533. This $24,533 overpayment was then applied to Kevin's "single" return filed in 2005. We do not find fault with the application of $24,533 to Kevin's 2005 return, however, because Kevin's income was *still marital* at that time. *Stallings v. Stallings*, 606 S.W.2d 163 (Ky. 1980); Graham, Louise and Keller, James, *Kentucky Practice, Domestic Relations Law* § 15:8 (Ky. 2008); KRS 403.190(2). Indeed, all monies earned after separation, but prior to divorce, are still marital and thus belong to both parties. *Id*. Accordingly, Kevin's "single" 2005 return was still the responsibility of both of the parties.

Andrea also complains that the January 1, 2006 withdrawal of $15,467 from the CIG stock account was essentially "pocketed" by Kevin and that the trial court's judgment neglected to account for this. This money was not sent to the IRS (like the $30,000 withdrawn the previous year). Instead, Kevin claimed to be "paying himself back" for income tax payments he made to the IRS. However, for the same reason that Andrea's argument failed as to the earlier $30,000 withdrawal, Kevin's argument concerning this transaction must also fail. Kevin could not be "paying himself back" since the funds he initially used to pay for the taxes were *not* his own, but were marital. Kevin repeatedly referred to monies earned at this time as "his" money because same were earned "post-separation" and he was paying Andrea temporary maintenance. We must reiterate that monies earned after separation, but before dissolution, are ***not*** the property of the individual party, but of the marriage. *Id*. Thus, Kevin had no reason to pay himself back since the money he used to pay the tax obligation in the first place also belonged to Andrea.

For this same reason, the $29,607 withdrawal in May of 2006, which Kevin also alleged was to "reimburse" himself for tax payments made on the 2005 return, is subject to the same criticism.[9] He could not "repay" himself for monies

[9] Moreover, this withdrawal could not have been paid to the IRS for 2005 income tax liability as page 4/5 of Kevin's Exhibit No. 24 makes clear. Kevin's Exhibit No. 24 (his 2005 income tax return), clearly shows that the last payment of quarterly taxes in 2005 was made on April 15, 2006. Thus the $29,607 withdrawal in May of 2006 was withdrawn after all 2005 payments to the IRS had already been made. Therefore, the trial court's finding that this withdrawal was applied to the income tax obligation is clearly erroneous.

spent on taxes because the monies initially expended were still marital (*i.e.*—belonged to Andrea as well as Kevin). *Id.*

In addition, the application of the $42,845 overpayment to his personal 2006 return is also problematic because not all of the 2006 return would have been part of the marital tax obligation (although *much* of it would have been). Nonetheless, to truly analyze whether Kevin was given a "windfall" through the withdrawals totaling $45,074 from the CIG stock account (which he ultimately retained and were not distributed) and the $42,845 overpayment of the 2006 tax obligation, we must analyze the trial court's treatment of the parties' tax liability in its findings of fact and conclusions of law.

The trial court found that Kevin's capital gains tax debt for 2006 was $297,355. The court noted that it had previously set aside $141,399 to Kevin from the CIG stock account to be applied to this liability. Thus, the court found that $155,956 remained to be paid on this debt. The court took this number and assigned two-thirds of the liability to Kevin and one-third of the liability to Andrea. The court did not credit Andrea with any of the withdrawals Kevin made from the CIG stock account, nor did it credit the amount that the return had already been overpaid from the previous year's taxes.

While it appears to this Court that the trial court perhaps intended to describe the parties' overall tax liability for 2006, the judgment can only be coherently read to describe $297,355 as the parties' capital gains tax liability. For this reason, we must reverse this finding as clearly erroneous. It is clear that the

evidence in the record could only have supported the conclusion that the total tax liability was $297,355, not that the capital gains tax liability was $297,355. Thus, we must remand on this issue for the trial court to make a finding as to the parties' total income tax liability and capital gains tax liability.

Further, we must also reverse on the grounds that it was clearly erroneous for the court to fail to take into account Kevin's withdrawals from the CIG account and the 2005 overpayment that was credited to the 2006 tax obligation. It appears that this oversight was based upon the faulty assumption of law that "post-separation" income is not marital. As aforestated, post-separation monies were continually described by Kevin at trial as "his own," while the money Andrea received in temporary maintenance was referred to as "hers." This is the only explanation in the record for why the trial court would not have credited Andrea with the amounts Kevin withdrew from the CIG account to "repay" himself for taxes. Indeed, the entire premise underlying the CIG withdrawals in question is that Kevin expended "his own" money on a joint tax obligation and that he was repaying himself out of the CIG fund for spending "his own" money. This is simply flawed legal reasoning. As is the long-standing rule, and as we have previously stated, monies earned post-separation, yet prior to the entry of a decree of dissolution, are marital. *Stallings, supra* at 164; *Kentucky Practice, Domestic Relations Law* § 15:8. *See also* KRS 403.190(2). Thus, it was not proper for Kevin to claim marital funds for himself to be set aside from distribution on the grounds that he was reimbursing himself.

In addition, while it was certainly proper and within the trial court's discretion to order Andrea to pay one third of the capital gains tax debt, it was improper for it to fail to subtract the $42,845 overpayment to the IRS from the total tax debt. Regardless of what amount the trial court finds is the proper tax liability on remand, it must then subtract $42,845 from that amount to account for the overpayment that would have been credited to the 2006 return.

Accordingly, we reverse and remand on this issue. We reverse the trial court's finding that the capital gains tax liability was $297,355. We remand for the trial court to make a finding as to the capital gains tax liability which is supported by the record. We further reverse and remand the trial court's finding that the CIG withdrawals made post-separation, which Kevin kept to himself under a "reimbursement" theory, were nonmarital. On remand, such amounts must be placed back into the marital pool for division between the parties. Because the trial court divided the marital property equally,[10] Kevin shall owe Andrea $7,733 for the January 2006 withdrawal from the CIG account of $15,467. Further, and for the same reasons, he shall owe Andrea $14,803 for the May 2006 withdrawal from the CIG account in the amount of $29,607. Conversely, for the reasons stated hereinabove, Kevin shall not "owe" Andrea any sums for the $30,000 withdrawal

[10] Although Andrea contests that the trial court divided the marital property equally, we find that the court did, in fact, divide the marital property equally. The trial court divided all marital property, except for the medical savings account, equally. While Andrea did not receive one-half of all of the contested property, this was due to the trial court's *classification* of certain properties as nonmarital, rather than the court's actual division of property classified as marital. Nonetheless, we again point out that the trial court was not required to divide marital property equally, although it did so. *See, e.g., Davis v. Davis, supra.*

from the CIG account made in January of 2005 or the $1,251 difference from the CIG withdrawal associated with the purchase of the Griffin Gate residence.

Division of Personal Bank Accounts

Andrea also argues on appeal that Kevin was ordered, by a pretrial order of the trial court on July 14, 2006, to equally divide all of his financial accounts with her. While Kevin and Andrea both substantially complied with the order in dividing the rest of their financial accounts, Kevin failed or refused to divide his Crestar/SunTrust checking account with Andrea. Andrea also contends that Kevin failed to divide an account she refers to as "PNC #0623" with her; however, she failed to raise any argument concerning the PNC account in her motion to alter, amend, or vacate, and thus we will consider her argument with respect to this account waived on appeal.

Upon a review of the record, it is clear that the trial court ordered the parties to evenly divide all of their financial accounts between one another. The trial court made equally clear that the parties' personal checking accounts were to be included in the division because the trial court struck through Kevin's proposed language in the order that "[t]he parties' personal checking accounts shall not be included in this division."

Nonetheless, despite this previous order, when the trial court entered its Findings of Fact and Conclusions of Law in the case, it simply stated that each of the parties' bank accounts remained "rather fluid" because the parties used such accounts for operating expenses, and found that "each party shall retain bank

accounts in their respective name[s]." This finding specifically neglects to recognize, however, that Andrea had already divided her accounts with Kevin and that Kevin failed to comply with the court's order to divide his SunTrust account with her. Because the trial court never granted a motion to exempt Kevin's SunTrust account from division, it was incumbent upon the trial court to at least address this fact in its opinion and state if or why Kevin was no longer ordered to comply with its prior order.

Moreover, the arguments Kevin advanced at trial for why the account should have been exempted – namely that he paid Andrea temporary maintenance out of these accounts – was based upon an erroneous assumption of law (as previously pointed out, post-separation income is still marital, thus the money funding that account was still marital). *Stallings, supra*; *Kentucky Practice, Domestic Relations Law* § 15:8.

Accordingly, we find that the trial court clearly erred in failing to require Kevin to divide the SunTrust account, since it had previously ordered that he do so. The trial court did not vacate (or even address) its prior order and, thus, we can only assume it failed to recognize that it had already ordered division of the account. Thus, we reverse and remand to the trial court with instructions for the court to order Kevin to immediately transfer to Andrea the sum of $13,388, or one-half of the SunTrust checking account balance as evidenced at trial.

The Medical Savings Account

Andrea also contends that it was error for Kevin to receive the Medical Savings Account ("MSA"). However, we disagree.

A trial court is required to divide marital property in "just proportions" and is under no obligation to divide all property "equally." KRS 403.190. *See also Stipp v. St. Charles*, 291 S.W.3d 720 (Ky. App. 2009). Whether a division is within "just proportions" is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001).

In this case, there was evidence at trial that the MSA may not have been divisible without destroying its tax-deferred protections because of the specific nature of the account (the account was for medical expenditures only). Further, Kevin was ordered to provide insurance for the children (by continuing to pay the health insurance premiums for their insurance policies) and to pay for two-thirds of all of the children's remaining uninsured medical expenses. Thus, there were clearly legitimate reasons why the court may have chosen not to divide this account. The court was well within its discretion to determine that it was dividing the marital property in "just proportions" by awarding the entire account to Kevin since Kevin was required to pay for a greater share of the children's medical expenses. *Stipp, supra.*

Accordingly, it was not error for the trial court to fail to award Andrea a portion of the MSA. Thus, we affirm on this ground.

The Trial Court's Maintenance and Child Support Awards

Andrea further maintains on appeal that the trial court abused its discretion by awarding maintenance of too limited an amount and duration and by failing to consider Kevin's actual income. She also claims that the trial court erred by failing to make accurate findings regarding Kevin's income for the purposes of calculating child support. Finally, she claims that the trial court erred by failing to make specific findings regarding her reasonable needs and the reasonable needs of the children.

Kevin cross-appeals, claiming that the award of maintenance to Andrea was excessive. Both Andrea and Kevin request a reversal and a reconsideration of the award of maintenance on remand. Andrea also requests a reversal and reconsideration of the child support award.

a.) Findings of Fact Concerning the Parties' Incomes

The trial court found that Kevin's annual income was $180,000 per year and that Andrea was voluntarily unemployed. Taking into account Andrea's "past work experience, her age and good health and job opportunities in the area," the court found that Andrea had the capability to earn between $53,000 and $67,000 per year. Therefore, the court imputed to her an income of $53,000 per year (a gross income of $4,416 per month). The court noted that because it jointly considered Andrea's expenses with the children's, it would also take into consideration monies she would receive in child support -- $450 per month, per child ($1800 monthly).

The problem with the trial court's analysis is that it failed to consider all of the parties' income. Indeed, while the trial court did make specific findings as to Kevin's income, it was erroneous in its calculation of his total income. Although the trial court was not required to consider Kevin's income from the previous year while he was employed by Hunton & Williams (although it had discretion to do so), it was not within the discretion of the court to disregard his other sources of *current and present* income. This is especially true because the court used the same income finding for both its maintenance and child support awards.

Andrea is correct that it was error for the court to limit its findings concerning Kevin's income to his salary alone, while neglecting to consider his significant capital gains and investment income. Indeed, in some cases, a party's income could come entirely from sources such as dividends, investments and annuities rather than a regular wage or salary. Here, where it was apparent and undisputed that Kevin had significant investment income, it was clearly erroneous for the court to find that his income consisted solely of his $180,000 salary.

Likewise, however, it was *also* error for the court to neglect to consider Andrea's investment income because KRS 403.200 requires the court to consider the "financial resources of the party seeking maintenance." KRS 403.200(2)(a). Nonetheless, we recognize that Andrea need not be imputed investment income from *all* of her available assets, because "we do not impose a

duty to invest all proceeds from a cash settlement in order to reduce the amount of a spousal maintenance." *Powell v. Powell*, 107 S.W.3d 222 (Ky. 2003).

As for child support, the analysis regarding the parties' income is more clearly defined because KRS 403.212(2)(b) provides a statutory mandate that a party's gross income shall include income from any source derived, including "salaries, wages, retirement and pension funds, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains. . . and alimony or maintenance received." Clearly, Kevin's income could not be limited to his $180,000 per year salary for the purposes of child support. Rather, the trial court must consider Kevin's income from all other sources named in the statute, including his significant investment income, capital gains, and bonuses. KRS 403.212(2)(b). However, for the purposes of calculating child support, the court must also consider Andrea's other sources of income. Such consideration would include her investment income and the receipt of any alimony the court awards. KRS 403.212(2)(b).

Accordingly, we reverse and remand to the trial court for specific findings on the parties' total incomes. On remand, the court shall consider the parties' gross income from all sources, including income from investments, annuities, dividends and capital gains. However, the court shall not impose upon Andrea a duty to invest all proceeds from the dissolution action when making its maintenance determination. *Powell, supra*. After making specific findings

concerning the parties' incomes, the court shall then make new determinations in regard to the award of maintenance and child support.[11]

b.) Failure to Make Specific Findings Regarding Andrea's and the Children's Reasonable Needs

We now turn to Andrea's argument that the trial court failed to make specific findings regarding Andrea's and the children's reasonable needs and expenses.

In the present case, the trial court found that the expenses claimed by Andrea of $11,087 were unreasonable. The trial court then determined that $9,407 per month was a reasonable monthly expense amount. This amount *included* the expenses of the children. The trial court also found that Kevin's claimed monthly expenses of $10,939 were unreasonable, and instead found that $8,429 was a reasonable monthly expense amount. Although the trial court found only a $1,000 difference between the reasonable needs of Andrea and the four children *together* and Kevin's reasonable needs as an *individual*, it failed to elaborate upon how such figures were calculated. Indeed, we may only speculate on review as to what portion of the $9,407 in reasonable monthly expenses would be attributable to Andrea's needs as opposed to the children's.

[11] As an aside, although Kevin complains on appeal that he is unable to meet his own needs while meeting those of Andrea, he failed to raise this issue in his motion to alter, amend, or vacate. While Kevin did complain about the amount of available income left available to him in the section of his motion to alter, amend, or vacate entitled "Attorney's Fees and Costs," he did not at any point state that he was unable to meet his own needs or that the maintenance obligation would render him unable to meet his own needs. Because the trial court was not presented with the opportunity to address this issue below, we will not address it now. *Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky. App. 1998).

We agree with Andrea that the trial court failed to find separately for her needs and the children's needs and that the consideration of maintenance under KRS 403.200 and child support under KRS 403.212 each require consideration of different factors depending on Andrea's and the children's various resources, needs, and expenses. At a minimum, it is clear that the court could not have reasonably applied KRS 403.200 without first determining Andrea's basic needs. Likewise, it could not have reasonably arrived at a child support calculation *which deviated from the guidelines* set forth in KRS 403.212 without first determining the children's reasonable needs. Indeed, deviation from the child support guidelines requires specific findings. *Downing v. Downing*, 45 S.W.3d 449 (Ky. App. 2001). Nonetheless, "once the trial court finds a valid basis under KRS 403.211(3) [such as combined parental monthly income above $15,000] for deviating from the guidelines chart it has considerable discretion in setting child support above the guidelines." *Id*. at 456.

Here, although the parties' gross income clearly exceeded the $15,000 per month maximum under KRS 403.212(7), the trial court set child support in an amount below that prescribed under the highest amount set in the guidelines chart. Although the trial court has discretion in the amount to award in child support under KRS 403.211(3) and KRS 403.212(5) in cases where the parties' gross income exceeds the uppermost levels of the guidelines table, we hold that a trial court may not award an amount *less* than that recommended for highest income on the table without making specific findings in its opinion. As this Court has

previously noted: "At a minimum, any decision to set child support above the guidelines must be based primarily on the child's needs as set out in specific findings." *Id*. Likewise, we find that any decision to set child support *below* the guidelines for high-income individuals must be based primarily on the children's needs and set forth in specific findings.

For these reasons, we reverse and remand for the trial court to make specific findings for the children's needs as well as specific findings for Andrea's needs. We note, additionally, that the court should not only consider Andrea's reasonable needs for the purposes of maintenance, but also must consider the other factors enumerated in KRS 403.200(2)(a)-(f), including the duration of the marriage and the standard of living established during the marriage.

On remand, after specific and separate findings are made for the needs of Andrea and the children, and after the trial court makes new and proper findings concerning the parties' respective gross incomes, the trial court shall then reconsider its awards of maintenance and child support based upon these findings.

Failure to Award Attorney's Fees

We now reach the parties' final argument on appeal/cross-appeal. Andrea's final claim on appeal is that it was error for the trial court to fail to award her attorney's fees after considering the financial resources of both parties upon distribution. Kevin alleges in his cross-appeal that it was error for the trial court to fail to award him costs and attorney's fees in light of a statement made by the court that a party who causes excessive fees due to their litigiousness should bear those additional costs incurred.

We agree with neither party on this issue. Rather, we uphold the trial court's decision not to award attorney's fees to either party. As we have often stated, the trial court has broad discretion in determining whether to award attorney's fees. KRS 403.220. Indeed, "[t]he determination of attorney fees and court costs is a matter delegated entirely to the discretion of the Circuit Court." *Moss v. Moss*, 639 S.W.2d 370, 373 (Ky. App. 1982). Because the trial court is under no obligation to award attorney fees to either party, and since such a determination is within the complete discretion of the trial court, we will not disturb the court's broad discretion absent an abuse of same. *Neidlinger*, 52 S.W.3d at 519.

In the present case, both parties were left with substantial resources after the marriage, although a disparity does exist between Andrea's and Kevin's resources and future earning potentials. KRS 403.220 authorizes the trial courts to order one party to pay the attorney's fees of another party where a disparity exists

in the relative financial resources of the parties. However, even where a disparity exists, "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* at 519, citing *Wilhoit v. Wilhoit*, 521 S.W.2d 512, 514 (Ky. 1975). Indeed, "[t]here is nothing mandatory about it." *Moss, supra*.

Andrea argues that the financial disparity between the parties was so great as to constitute an abuse of discretion for the court not to grant attorney's fees to her. We disagree. Rather, such a determination is particularly within the province of the trial court, even where a disparity does exist between the parties.

We also disagree with Kevin's argument on cross-appeal that the trial court abused its discretion in failing to award him attorney's fees because of Andrea's "litigiousness" and "unreasonable conduct" throughout the litigation. Kevin bases his argument on statements made by the court that a party who engages in unnecessary conduct to prolong litigation should bear the costs of the fees incurred as a result of that unnecessary behavior. However, this argument is misplaced. While a trial judge may consider the conduct of the parties in awarding attorney fees, it is under no obligation or mandate to award attorney fees. *See, e.g., Gentry v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990); *Rearden v. Rearden*, 296 S.W.3d 438 (Ky. App. 2009).

Accordingly, we affirm the trial court's determination that each side should bear its own costs and attorney's fees.

Conclusion

In conclusion, we affirm in part and reverse in part. On each of the above-stated grounds of reversal, we remand for further proceedings consistent with this opinion. On remand, the trial court shall restore monies to Andrea that were awarded to Kevin as nonmarital property from the CIG, IRA, and CIG stock accounts. Further, the trial court shall award to Andrea one-half of the value of Hoya Galvin and Devil Bunny II racing interests as stipulated by the parties at trial. Andrea shall also be awarded the value traced to the original down payment on her nonmarital home in Louisville, Kentucky. In addition, Andrea's share of the two relevant withdrawals from the CIG account that Kevin used to repay himself for monies expended on taxes shall be restored to her as specified above. Further, the trial court shall order division of the Crestar/Sun Trust account in conformity with its prior order. Finally, after making specific findings concerning the parties' incomes and Andrea's and the children's reasonable needs, it shall reconsider its awards of maintenance and child support in light of those findings.

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