

Commonwealth of Kentucky
Court of Appeals

NO. 2009 CA-001193-MR

RAYMOND J. MONACO, JR.

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE DAVID A. TAPP, SPECIAL JUDGE
ACTION NO. 04-CI-00741

MELINDA J. STEWART
and her attorney,
MICHAEL DAVIDSON

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND MOORE, JUDGES; ISAAC,¹ SENIOR JUDGE.

DIXON, JUDGE: Appellant, Raymond Monaco, appeals from a judgment of the Whitley Circuit Court concerning property division, maintenance and allocation of debt in this domestic relations matter. Finding no error, we affirm.

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

Facts

The parties herein were married on May 2, 1987. Raymond is an anesthesiologist and a partner in Definitive Medical Solutions (“DMS”), which provides anesthesia services to hospitals and clinics located in central and eastern Kentucky. Although Melinda had been employed as an oil and gas attorney with Shell Oil Company in Louisiana prior to the marriage, she did not work after the couple moved to Corbin, Kentucky. Two children were born during the marriage, a son born in 1987 and a son born in 1991. The record is undisputed that during the marriage, the parties’ standard of living was extravagant, and they accumulated substantial assets including personal belongings, several stock portfolios, a large marital residence, and a condominium in Lexington, Kentucky.

The parties separated in June 2004, and Raymond filed for dissolution of marriage in October 2004. The trial court bifurcated the matter, entering the decree of dissolution of marriage on September 14, 2005, and reserving all other issues for trial. Following a bench trial, the court entered findings of fact, conclusions of law, and a final judgment on November 18, 2008, dividing the parties' non-marital and marital property and allocating the parties' debts. Raymond thereafter appealed to this Court raising numerous claims of error. For the reasons set forth herein, we affirm.

Standard of Review

In dissolution proceedings, appellate review is constrained by procedural rules, statutes, and case law. Reversal is only appropriate if the trial court has abused its considerable discretion. We must defer to the trial court's findings of fact unless they are clearly erroneous; i.e., not supported by credible evidence. CR 52.01; *Bennett v. Horton*, 592 S.W.2d 460 (Ky. 1979). The test for abuse of discretion is whether the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008). A factual finding is not clearly erroneous if it is supported by substantial evidence. "Substantial evidence" is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998).

As to the division of property within a dissolution proceeding, the trial court likewise must apply the facts to the law of the case. "The property may very well have been divided or valued differently; however, how it actually was divided and valued [is] within the sound discretion of the trial court." *Cochran v. Cochran*, 746 S.W.2d 568, 570 (Ky. App. 1988) (citation omitted). As such, this Court, as an appellate court, exists to correct errors of law made by lower courts, not to provide the parties with a trial *de novo*.

Division of Marital Property

Raymond first argues that the trial court was biased in favor of Melinda and did not divide the marital property in just proportions in accordance

with KRS 403.190. Raymond contends that the trial court did not properly take into consideration the non-marital assets awarded to Melinda or the long periods of separation during the marriage. It is Raymond's position that the trial court did not consider or appreciate what his future economic circumstances would be.

A trial court is to divide marital property in just proportions considering the relevant factors set forth in KRS 403.190, which provides:

(1) In a proceeding for dissolution of the marriage or for legal separation, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's property to him. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:

(a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;

(b) Value of the property set apart to each spouse;

(c) Duration of the marriage; and

(d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

(2) For the purpose of this chapter, "marital property" means all property acquired by either spouse subsequent to the marriage except:

(a) Property acquired by gift, bequest, devise, or descent during the marriage and the income derived therefrom unless there are significant activities of either spouse

which contributed to the increase in value of said property and the income earned therefrom;

(b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;

(c) Property acquired by a spouse after a decree of legal separation;

(d) Property excluded by valid agreement of the parties; and

(e) The increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during marriage.

(3) All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section.

It is well-established that marital property must be divided without regard to marital misconduct. *McGowan v. McGowan*, 663 S.W.2d 219 (Ky. App. 1983).

However, while the equitable division of assets means that such must be divided “in just proportion,” the division need not necessarily be equal. *Wood v. Wood*, 720 S.W.2d 934 (Ky. App. 1986).

While Raymond claims the trial court was biased against him, he fails to provide any evidence to support such conclusion and we certainly find none.

Furthermore, the trial court was painstakingly thorough in its evaluation and division of all assets and debts based on the relative positions of the parties at the

time of dissolution. Admittedly, Raymond was assigned a significantly larger debt amount than Melinda. However, the majority of such debt related to a second home and other items that Raymond purchased after the parties separated but prior to the decree of dissolution, for the purpose of cohabitating with his then-girlfriend and now wife.

Maintenance

Raymond argues that the trial court erred in awarding Melinda any maintenance under KRS 403.200 because she was awarded sufficient property and was capable of finding appropriate employment. Initially, the trial court ordered temporary maintenance of \$5,500 per month. At trial, Melinda sought an award of permanent maintenance in the amount of \$8,000 per month. Ultimately, however, the trial court awarded Melinda maintenance in the amount of \$3,000 per month until she reached the age of fifty-nine and a half (59 ½) years.

KRS 403.200(1) provides that a trial court may award maintenance only if it finds that the spouse seeking maintenance lacks sufficient property, including marital property apportioned to her, to provide for her reasonable needs, and the spouse is unable to support herself through appropriate employment. It is appropriate to award maintenance when a party is not able to support themselves in accordance with the same standard of living that they enjoyed during the marriage. *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003); *Robbins v. Robbins*, 849 S.W.2d 571, 572 (Ky. App. 1993). The burden of proof is on the party seeking maintenance. *See Newman v. Newman*, 597 S.W.2d 137 (Ky. 1980).

Under KRS 403.200, the trial court has dual responsibilities: one, to make relevant findings of fact; and two, to exercise its discretion in making a determination on maintenance in light of those facts. In order to reverse the trial court's decision, a reviewing court must find either that the findings of fact are clearly erroneous or that the trial court has abused its discretion. *Weldon v. Weldon*, 957 S.W.2d 283, 285 (Ky. App. 1997).

The trial court herein engaged in a detailed analysis of each factor to be considered under KRS 403.200(1) when determining the amount and duration of maintenance:

The first factor a court considers . . . is the financial resources of the party seeking the award of maintenance. This Court has awarded substantial marital and non-marital assets to Melinda. Notably, the Court awarded Melinda approximately \$975,743.09 in retirement accounts. Given Melinda's age, she will be able to access these retirement accounts in approximately eight (8) years. Additionally, this Court awarded Melinda approximately \$377,883.95 in other marital and non-marital assets. . . .

Nevertheless, this Court is mindful of the fact that Melinda will not be able to access the bulk of these assets . . . until she reaches retirement age. As such an award of maintenance for a period of eight (8) years, or until Melinda reaches the age of sixty-five (65) is appropriate. . . .²

The second factor is the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment. . . . Although Melinda testified that it will take her five years

² Upon learning that Melinda could, in fact, access her accounts without penalty at age 59½, the trial court modified the award to reflect that maintenance would end when Melinda reached such age.

to obtain her PhD in counseling psychology, Melinda currently holds a *juris doctor*. Additionally, Melinda obtained her realtor's license during the pendency of this action. Accordingly, Melinda's need for maintenance is somewhat mitigated because she has sufficient education or training to enable her to find appropriate employment.

The third factor is the standard of living established during the marriage. Testimony at trial revealed that the parties became accustomed to a very high standard of living during the marriage. The parties lived in lavish homes, drove luxury cars, and took opulent vacations. Accordingly, an award of maintenance is appropriate in order to allow Melinda to enjoy a similar standard of living subsequent to the dissolution of marriage.

The fourth and fifth factors are the duration of the marriage, as well as the physical and emotional condition of the spouse seeking maintenance. . . . The parties were married for approximately eighteen (18) years. Melinda is currently fifty-seven (57) years of age. Ray is currently forty-nine (49) years of age. Melinda was diagnosed with breast cancer during the pendency of this action; however, her cancer is currently in remission. Accordingly, consideration of the length of the marriage, the disparity in ages between the parties, and Melinda's health justifies an award of maintenance.

The final factor . . . is the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance. . . .

Ray is an anesthesiologist and a partner in DMS. Ray earns a substantial income. Indeed in 2006 Ray's adjusted gross income was approximately \$407,000. In 2005 and 2004, Ray's adjusted gross income was \$408,000 and \$475,000 respectively. In 2003, Ray's adjusted gross income was \$577,000. Ray argues that despite his rather large income, he has significant debts and is unable to pay maintenance. This Court disagrees. Given Ray's substantial income, an award of maintenance will not create an "undue burden" on Ray.

Although Melinda is entitled to an award of maintenance, this Court finds that her award . . . must be reduced because Melinda is voluntarily under-employed. Although Melinda obtained her Kentucky realtor's license during the pendency of this action, she has earned less than \$1,000 in several years from this employment. Prior to the marriage Melinda worked as a successful oil and gas attorney for Shell; however, Melinda has not practiced law in approximately twenty years and she is not licensed to practice law in Kentucky. Considering Melinda's age and the length of time she has been absent from the practice of law, it is unrealistic to expect Melinda to begin practicing law again. Nevertheless, Melinda holds a *juris doctor* as well as her Kentucky realtor's license. Additionally, Melinda is an intelligent and highly-motivated individual. Clearly, Melinda is capable of earning much more than \$1,000 in several years.

The amount and duration of maintenance is within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *Gentry v. Gentry*, 798 S.W.2d 928, 937 (Ky. 1990); *Newman*, 597 S.W.2d at 140. The trial court herein was in the best position to observe the credibility of the parties and evidence. Based upon consideration of all of the relevant factors, we cannot conclude that the amount and duration of maintenance was erroneous.

Deferred Compensation Accounts

Raymond next challenges the trial court's allocation of Melinda's deferred compensation accounts. Specifically, Melinda had two retirement accounts with her former employer Shell Oil, Inc. - a Shell Provident Fund ("SPF") and a Shell Pay Deferral Investment Fund ("SPDIF"). On the date of the parties' marriage, the SPF had an approximate value of \$52,824.43 and the SPDIF had an

approximate value of \$11,448.89. The trial court determined that although Melinda primarily contributed to these funds prior to the marriage, the parties did contribute small amounts to both accounts shortly after they were married.

Accordingly, the trial court ruled:

Melinda's retirement accounts have increased in value primarily due to economic conditions and *not* from the combined efforts of the parties. . . . Accordingly, the increase in value of Melinda's Shell retirement accounts is predominately non-marital property. Nevertheless, the Court is mindful that a portion of Melinda's Shell retirement accounts is marital property and must be equitably divided between the parties.

As of the date of the bifurcated decree, Melinda's SPF account had a total account balance of \$308,358.00. Of this amount, \$295,006.10 is non-marital property and is awarded to Melinda. The remaining balance of \$13,351.90 is marital property. Of this amount, \$6,675.95 is awarded to Ray and the remainder is awarded to Melinda. As of the date of the Bifurcated Decree, Melinda's SPDIF account had a total balance of \$50,694.55. Of this amount, \$45,019.60 is non-marital property and is awarded to Melinda. The remaining balance of \$5,674.95 is marital property. Of this amount, \$2,837.47 is awarded to Ray and the remainder is awarded to Melinda.

Raymond now argues that the trial court erred by only characterizing as non-marital property those contributions made shortly after the marriage. Citing to *Mercer v. Mercer*, 836 S.W.2d 897 (Ky. 1992), Raymond contends that although the retirement accounts themselves were non-marital property, the entire growth of the funds that occurred during the marriage should have been deemed marital property. We disagree.

All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property. KRS 403.190(3). However, KRS 403.190(2)(e) specifically exempts from the category of marital property “[t]he increase in the value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during the marriage.” Thus, an increase in the value of non-marital property may be marital or non-marital depending on why the increase in value occurred. *Stallings v. Stallings*, 606 S.W.2d 163 (Ky. 1980).

In *Goderweis v. Goderweis*, 780 S.W.2d 39, 40 (Ky. 1989), our Supreme Court acknowledged that if non-marital property increases in value during the marriage, the trial court must first determine the reason for the increase in value. If the increase in value of non-marital property is attributable to general economic conditions, the increased value of that property is also considered non-marital. *See also Smith v. Smith*, 497 S.W.2d 418 (Ky. 1973). However, “[a]n increase in value of non-marital property during a marriage which is the result of a joint effort of the parties establishes the increase in the value of the non-marital property as marital property.” *Godeweis*, 780 S.W.2d at 40.

Raymond’s reliance on *Mercer v. Mercer* is misplaced. In *Mercer*, the issue was whether the accumulation of interest from non-marital funds deposited in a financial institution was income to be treated as marital property or was merely an increase in value of a non-marital asset which would be treated as non-marital property. The Court explained:

Here the interest income has been realized and could have been used by the parties at any time. There is a distinct and clear difference between the increase in value of a non-marital asset and income earned from that non-marital asset. There is a difference between an appreciation in the value of principal and the earning of interest on principal and the accumulation of that interest. Income may be used by the parties at any time. As an example, the amount of interest must be included in gross income for tax purposes, but when an asset increases in value, the amount of the increase in value is not necessarily used by the parties and is not included in gross income for purposes of taxation. Interest income is clearly income earned on a non-marital asset and must be treated as marital property.

Mercer, 836 S.W.2d at 899.

Here, other than the small contribution made at the beginning of the marriage, the parties took no action to induce or further the growth of Melinda's accounts. Further, as the trial court noted, Melinda did not have access to those accounts until she reached retirement age. Thus, unlike the parties in *Mercer*, Melinda was not entitled to the interest from the accounts at any time. As such, we agree that the growth of the retirement accounts was not income but was rather simply an increase in the value of a non-marital asset.

401(k) Account

In its final judgment, the trial court ruled that Melinda was entitled to one-half of the value of Raymond's 401(k) as of the date of the bifurcated decree, or approximately \$588,000. Raymond thereafter filed a motion to alter, amend or vacate arguing, in part, that the final judgment was ambiguous in that it specified both a percentage and a set amount of money. Raymond claimed that economic

conditions subsequent to the date of the bifurcated decree had resulted in a decrease of the fund, and that the court should modify the initial order to reflect that Melinda was only entitled to 50% of the decreased amount. However, by order entered June 8, 2009, the trial court ruled:

It is a well-established rule of construction that a specific provision will prevail over a general one where there is conflict between the two. . . . In this case, the provision that [Melinda] is awarded \$588,000 of [Raymond's] 401(k) is a more specific award than "one-half." Also less specific than that award is the Court's award to [Raymond] of the "remaining portion," using no more specific language. . . . The Court hereby alters its division of [Raymond's] 401(k) to more clearly provide that [Melinda] is awarded \$588,000 of [Raymond's] 401(k) and [Raymond] is awarded the remaining portion.

"Kentucky courts have consistently held that pensions in divorce proceedings are to be valued as of the date of decree of dissolution." *Perry v. Perry*, 143 S.W.3d 632, 633 (Ky. App. 2004) (citing *Foster v. Foster*, 589 S.W.2d 223 (Ky. App. 1979)). The value of Raymond's 401(k) on the date of the bifurcated decree was \$1,176,000.00. Had the account experienced a growth following the entry of the decree, Raymond would have been the sole beneficiary of the growth and Melinda would have still only been entitled to \$588,000.00. However, because the law is clear that valuation occurs at the time of the decree, any loss of the account that subsequently occurs was to Raymond's detriment. Accordingly, the trial court did not err in refusing to modify the original award.

Value of Definitive Medical Solutions

At trial, each party presented experts on the valuation of Raymond's interest in DMS. Raymond's expert, Calvin D. Cranfill, employed the excess earning methodology to value the business. Using income figures from 2002 to 2005, Cranfill calculated the weighted average income at \$212,959.00. Cranfill then divided this figure by the capitalization rate which he estimated to be approximately 20%. Next, Cranfill added in the net tangible assets to calculate the value of common equity. The common equity figure was then discounted for a lack of control since Raymond only had a 25% interest in the business. The figure was further discounted for personal goodwill and other marketability considerations for a final fair market value of the 25% interest in common equity in DMS of \$176,249.00.

Melinda's expert, James M. Roller, used an income approach and weighted average earnings for the years 2002-2005. Roller "normalized" the assets by adding back items such as depreciation and unnecessary expenses. Roller employed the same 20% minority discount but only a 5% marketability discount. Ultimately, Roller concluded that the value of Ray's 25% interest in DMS was approximately \$365,000.00.

The trial court, recognizing the disparity between the two experts' valuations, undertook its own detailed analysis beginning with the most obvious difference in the calculations – marketability discount. Marketability is essentially the ease with which a business interest could be sold or converted into cash. The trial court noted that while the two experts essentially agreed to the definition of

“marketability,” they nevertheless arrived at drastically different discount rates. Cranfill discounted the value by 45%, while Roller believed only 5% was appropriate.

The trial court explained that the difference in the experts’ marketability discount rates was attributable to each expert’s treatment of goodwill. Cranfill testified that although enterprise goodwill is a marital asset, Raymond’s personal professional goodwill is not and must be removed from the value of DMS. Roller, on the other hand, argued that all of the goodwill would be classified as enterprise goodwill and thus, there should be no deduction for Raymond’s personal goodwill.

In disagreeing with both experts’ treatment of goodwill, the trial court noted that although the issue is of limited impression in Kentucky, a panel of this Court in *Heller v. Heller*, 672 S.W.2d 945, 948 (Ky. App. 1984), drew no distinction between “personal professional” goodwill and “enterprise” goodwill in holding that “the value of goodwill incident to a professional practice is a divisible marital asset.” Accordingly, the trial court herein observed:

With this being said, the Court cannot allow Cranfill to reduce the value of a marital asset, Ray’s interest in DMS, by removing another marital asset, Ray’s “personal professional” goodwill. Therefore, the amount of Cranfill’s applied marketability discount attributable to “personal professional” goodwill must be removed from the calculation. Unfortunately, Cranfill did not itemize his marketability discount. Therefore, the Court will determine the marketability discount to be applied.

...

In the case of professional service entities, a prospective buyer must ask what exactly he or she is buying. Take the case of a doctor for example. . . . Each patient has an

inalienable right to see whichever doctor he or she chooses. Add to the fact that the law greatly disfavors non-compete clauses among professionals and you are left with little reason to buy at a premium. What would prevent the selling doctor from opening a new practice down the street? Furthermore and perhaps more importantly, why would a prospective buyer pay such a premium for something he or she is capable of starting from scratch for vastly less money?

For these reasons, the Court believes that the marketability discount must be greater than Roller's five (5%) percent. As previously stated, Cranfill's estimate of forty-five (45%) percent includes an inappropriate discount attributed to goodwill. Roller submits that the foremost text on the subject, "Valuing a Medical Practice," states the marketability discount is usually less than fifteen percent. The Court, however, believes even 15 percent is too low. Given all market considerations, the Court believes a marketability discount of twenty (20%) percent should be applied.

Recalculating both expert's numbers with the modified marketability discount, the trial court arrived at estimated values of \$256,362.00 using Cranfill's methodology and \$306,439.00 using Roller's methodology. The trial court concluded that Roller's overall calculations were more credible and therefore assigned a \$306,439.00 fair market value to Raymond's 25% interest in DMS. The court ordered that such amount was to be equally divided between the parties.

On appeal, Raymond argues that the trial court erred in refusing to find a distinction between personal professional goodwill and enterprise goodwill. Raymond submits that the recent decision in *Gaskill v. Robbins*, 282 S.W.3d 306 (Ky. 2009) is controlling. We disagree.

In *Gaskill v. Robbins*, our Supreme Court observed that while it was generally accepted that goodwill is a factor to be considered in arriving at the value of a business, “whether goodwill can be divided between the business *and* the individual is a question of first impression.” *Id.* at 312 (emphasis in original). After analyzing case law from various jurisdictions, the court concluded that in some circumstances personal goodwill and enterprise goodwill must be valued separately. In *Gaskill*, Julie Ann Gaskill was the sole proprietor and only practitioner in her oral and maxillofacial surgery practice. As the Court noted,

“[e]very patient of the practice is treated by her. Only she exercises the professional judgment and skill required to perform surgery on her patients. . . . Gaskill alone has performed the treatment in this practice for over thirteen years. Clearly, the practice is, in general, marital property, and therefore subject to division, but how are we to divide a person's reputation, skill and relationships? To what extent can a buyer of a business assume that his performance will equal that of the present owner? To what extent can he take on the seller's reputation in the community?

. . .

The distinction between enterprise and personal goodwill has a rational basis that accepts the reality of specific business situations. In a case such as this one, there can be little argument that the skill, personality, work ethic, reputation, and relationships developed by Gaskill are hers alone and cannot be sold to a subsequent practitioner. In this manner, these attributes constitute non-marital property that will continue with her regardless of the presence of any spouse. To consider this highly personal value as marital would effectively attach her future earnings, to which Robbins has no claim.

Id. at 312-315.

Certainly, we cannot fault the trial court for failing to consider a decision that was not in existence at the time of the final judgment. Notwithstanding, we do not find *Gaskill* applicable to the facts herein. Raymond had a 25% interest in an anesthesia practice that operated throughout central and eastern Kentucky. Unlike *Gaskill*, where the skills and reputation of a single individual were at issue, the value and reputation of DMS would be based upon the whole of the practice. Further, contrary to Raymond's argument, the trial court clearly and thoroughly considered the goodwill aspects of DMS. Quite simply, we are of the opinion that any analysis of Raymond's personal goodwill, separate from the enterprise goodwill of DMS, was negligible and its removal from consideration by the trial court did not affect the overall calculation of business value.

Dissipation of Marital Funds

Raymond also challenges the trial court's award of \$70,000.00 to Melinda for his dissipation of marital funds. Essentially, Raymond does not dispute that after the parties' separation but prior to the decree of dissolution he expended substantial marital funds for jewelry and vacations with his then-girlfriend, as well as furnishings, landscaping and improvements to his new home that he purchased to cohabitate with her. Rather, it is Raymond's position that he "had provided for all of Melinda's needs and Melinda was not deprived because of Ray's spending during a time in which Melinda was in no way contributing to Ray's ability to earn money." Raymond submits that this case is analogous to *Shively v. Shively*, 233 S.W.3d 738 (Ky. 2007). We disagree.

Dissipation of marital assets occurs when “marital property is expended (1) during a period when there is a separation or dissolution impending; and (2) where there is a clear showing of intent to deprive one’s spouse of her proportionate share of the marital property.” *Brosick v. Brosick*, 974 S.W.2d 498, 500 (Ky. App. 1998) (citing *Robinette v. Robinette*, 736 S.W.2d 351 (Ky. App. 1987)). Once a party establishes a dissipation of marital assets by a preponderance of the evidence, the burden shifts to the party charged with dissipation to account for those assets. *Bratcher v. Bratcher*, 26 S.W.3d 797, 800 (Ky. App. 2000). In ruling on this issue, the trial court correctly determined:

The first element requires a finding that marital property was expended prior to an impending separation or dissolution. *Brosnick*, 974 S.W.2d at 500. As evidenced by the testimony at trial, Ray spent large sums of money subsequent to the parties’ separation. Furthermore, Ray knew that the dissolution was forthcoming. Accordingly, the first element is satisfied.

In order to satisfy the second element, the trial court must find a clear showing of intent to deprive the other spouse of her proportionate share of the marital property. *Id.* During the period of separation Ray spent substantial amounts of marital funds on a second residence, vacations, and jewelry for his paramour, Courtney. Indeed, Ray married his paramour within a few months after this Court entered the Bifurcated Decree. This Court finds that Ray intended to deprive Melinda of access to her proportionate share of marital assets, given the vast sums of money Ray spent during the relatively short period of time between the parties’ separation and the entry of the Bifurcated Decree. . . . Accordingly, Ray shall pay Melinda the sum of \$70,000 to account for his dissipation of marital assets.

We also agree with the trial court that Raymond's reliance on *Shively v. Shively* is misplaced. Significantly, *Shively* did not concern a claim of dissipation but rather the division of income earned after the parties' separation but prior to the decree of dissolution. In holding that the husband's post-separation income was not subject to equitable distribution, a panel of this Court noted that the substantial distribution of assets as well as both parties' sizable incomes supported the trial court's ruling allowing each party to keep the income earned after the date of separation and the purchases and debts associated with those earnings. *Id.* at 740. Here, unlike in *Shivley*, Raymond was the only party with a substantial income and his post-separation spending was intended to deprive Melinda of marital assets. The trial court did not abuse its discretion.

Gordon Hill Residence

Raymond challenges the trial court's allocation of proceeds from the Gordon Hill residence. In the September 2005 Bifurcated Decree, the trial court ordered that the Gordon Hill property be sold. In November 2006, Raymond re-purchased the home at a public auction for \$285,000.00. The proceeds from the sale, after the payment of all fees and costs were \$131,429.12. At trial, Melinda claimed that \$63,509.02 of the initial purchase of the Gordon Hill property in 1987 came from the sale of her non-marital home in Louisiana. Additionally, she claimed that her mother had gifted her \$65,962.46 for the construction of a pool house at Gordon Hill, and that such payment was actually an advance on her inheritance. Raymond

disputed both claims and asserted that all of the proceeds from the sale of Gordon Hill were marital property. In its final judgment, the trial court determined:

Melinda testified that the proceeds generated from the sale of her New Orleans home were utilized to purchase Gordon Hill. Melinda also produced documentary evidence to support her claim. Melinda produced bank statements, an income tax return, and other documentation.

. . .

Given the evidence provided by Melinda, . . . this Court finds that Melinda has adequately traced her non-marital contribution to Gordon Hill. Accordingly, the Court finds that Melinda made a non-marital contribution to Gordon Hill in the amount of \$63,509.02.

However, with respect to Melinda's purported non-marital contribution to the pool house, the trial court found that Melinda presented "no evidence to support her assertion that her mother's contribution to Gordon Hill was an 'advance' on Melinda's inheritance." Finally, the court awarded Raymond a credit in the amount of \$21,047.00 for the amount he reduced the principal balance on the mortgage pursuant to previous orders of the court.

KRS 403.190(3) creates a presumption that all property acquired during the marriage is marital property. However, KRS 403.190(2)(b), exempts from the definition of marital property "[p]roperty acquired in exchange for property acquired before the marriage" As a result, "an item of property will often consist of both non-marital and marital components, and when this occurs, a trial court must determine the parties' separate non-marital 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). Numerous decisions of Kentucky Courts interpreting KRS 403.190 have led to the creation of the concept of “tracing,” which requires a party to trace any non-marital 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). With respect to the tracing requirements, the Kentucky Supreme Court has explained:

While such precise requirements for non-marital asset-tracing may be appropriate for skilled business persons who maintain comprehensive records of their financial affairs, such may not be appropriate for persons of lesser business skills or persons who are imprecise in their record-keeping abilities.

Id.

While Raymond now complains that Melinda did not sufficiently trace the proceeds from the Louisiana house, it was for the trial court to resolve any conflicting evidence in the record. Property may be divided or valued differently; however, how it actually is divided and valued is within the sound discretion of the trial court. *Cochran*, 746 S.W.2d at 570. We do not find that the trial court abused that discretion. Nor do we find any merit in Raymond’s claim that the court’s award was yet further evidence of its bias in favor of Melinda. As evidenced from the judgment, the trial court evaluated the marital contributions alleged by both parties, and determined that some were adequately proven and others failed to meet the burden of proof.

Zoeller Court Condominium

In its November 2008 final judgment, the trial court ordered that the Zoeller Court condominium where Melinda was residing in Lexington be sold. After its remaining indebtedness was satisfied, Raymond was to be given credit for court-ordered³ payments in the amount of \$8,288.00, with the remaining proceeds divided equally between the parties. However, in response to Raymond's motion to alter, amend or vacate, the trial court clarified its ruling in its June 8, 2009 order:

The parties have apparently experienced some confusion as to who is responsible for payments on the mortgage, condominium association fees, homeowner's insurance, and property taxes on the Zoeller Court condominium pending its sale. Upon review of the Final Judgment, the Court finds it to be unclear in that respect, and hereby amends the final Judgment to provide that Petitioner and Respondent shall split evenly all the Zoeller Court expenses until the property sells.

Raymond now argues that the trial court erred in essentially imposing a joint venture upon the parties and refusing to give him an additional credit for the principal payments.

Clearly, it was within the trial court's discretion to order that the property be sold and require the parties to allocate costs between them until such occurs. Admittedly, we are perplexed by Raymond's objection as he was previously ordered to pay all the liabilities associated with the condominium. Further, as the record indicates that Melinda was required to make numerous repairs to the property without contribution from Raymond, the trial court may have found that

³ Pursuant to the September 2005 Bifurcated Decree, Ray was required to pay the mortgage, condominium association fees, homeowners' insurance, and property taxes on the Zoeller Court property.

the initial credit awarded to Raymond was sufficient and he was not entitled to any further monies until the property is sold. In any event, as we cannot conclude the trial court's findings of fact were clearly erroneous, they will not be set aside.

Downing v. Downing, 45 S.W.3d 449, 454 (Ky. App. 2001); CR 52.01.

Melinda's Health Insurance

In its final judgment, the trial court ordered Raymond to "continue to maintain health insurance on Melinda until Melinda is able to find suitable employment and obtain coverage for herself." The trial court subsequently denied Raymond's motion to require her to pay her own coverage. Raymond now argues that such was error. We disagree.

Prior to trial, the trial court granted Raymond's request for an independent medical examination of Melinda regarding her treatment and recovery prognosis after her breast cancer surgery, which occurred during the pendency of these proceedings. Dr. Mitchell Carl, who conducted the examination, testified by deposition. Given Melinda's health, the disparity in income between the parties and the award of maintenance, we simply cannot find that the trial court abused its discretion in directing Raymond to continue to pay Melinda's health care coverage. Contrary to Raymond's claim, the trial court did not require him to pay the coverage indefinitely, but only until she obtained employment that would permit her to assume the expense.

Attorney's Fees and Costs

At trial, Melinda requested an award of attorney's fees and costs in the amount of \$116,527.17, which represented seventy-five percent of the fees and costs she incurred in the proceedings below. In its final judgment, the trial court order Raymond to pay \$58,263.59 or 50% of her requested fees.

Under KRS 403.220, the trial court may award a party a reasonable amount of attorney fees and costs associated with a dissolution action. To justify such an award, there must exist a disparity in the parties' financial resources. *Neidlinger v. Neiglinger*, 52 S.W.3d 513 (Ky. 2001). Additionally, “obstructive tactics and conduct, which multiple[s] the records and proceedings’ are proper considerations ‘justifying both the fact and the amount of the award.’” *Sexton v. Sexton*, 125 S.W.3d 258, 273 (Ky. 2004) (quoting *Gentry v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990)). However, the award of attorney fees and costs is not mandatory, and appellate review is limited to abuse of discretion. *Id.* An abuse of discretion occurs when the circuit court's decision was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

In awarding Melinda attorney fees and costs, the trial court noted:

Ray earns a substantial income. Although Melinda's earning power is significantly less than Ray's, this Court is mindful of the fact that Melinda has access to ample financial resources. Moreover, the record is replete with examples where Ray used obstructive tactics, such as failing to timely respond to discovery, in order to hinder and prolong the instant litigation. Finally, the instant action was extraordinarily complex when compared to other dissolution actions and required tremendous labor,

time and skill. Accordingly, Melinda is awarded fees in the amount of \$58,263.59 or 50% of her requested fees.

Considering the facts of this case, we are simply unable to conclude that the trial court's award of attorney fees and costs was arbitrary, unreasonable, unfair, or unsupported by legal principles. Accordingly, it did not abuse its discretion.

Raymond has challenged virtually every ruling of the trial court. However, we are of the opinion that the trial court was extremely detailed in its 69-page judgment and went to great pains to thoroughly consider every issue presented. Trial courts have very broad discretion to fashion a fair and appropriate remedy, in accord with the statutory scheme, which is specific to the particular action as no two dissolution actions are alike. We conclude that all of the trial court's findings of fact were supported by substantial evidence and it acted well within its discretion in its rulings herein.

The findings of fact, conclusions of law, and final judgment of the Whitley Circuit Court are affirmed.

ALL CONCUR.

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