RENDERED: AUGUST 4, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001086-MR

ALEXANDER GEORGE DIGENIS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DONNA L. DELAHANTY, JUDGE
ACTION NO. 12-CI-500193

JENNIFER YVONNE YOUNG
(f/k/a DIGENIS);
MARY JANICE LINTNER;
and LYNCH, COX, GILMAN &
GOODMAN, PSC — APPELLEES

AND NO. 2014-CA-001122-MR

JENNIFER YVONNE YOUNG
(f/k/a DIGENIS) — CROSS-APPELLANT

v.

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DONNA L. DELAHANTY, JUDGE
ACTION NO. 12-CI-500193

ALEXANDER GEORGE DIGENIS CROSS-APPELLEE

AND NO. 2014-CA-001749-MR

JENNIFER YVONNE YOUNG
(f/k/a DIGENIS) APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DONNA L. DELAHANTY, JUDGE
ACTION NO. 12-CI-500193

ALEXANDER GEORGE DIGENIS APPELLEE

AND NO. 2015-CA-000036-MR

JENNIFER YVONNE YOUNG
(f/k/a DIGENIS) APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DONNA L. DELAHANTY, JUDGE
ACTION NO. 12-CI-500193

ALEXANDER GEORGE DIGENIS APPELLEE

OPINION
AFFIRMING AS TO APPEAL NO. 2014-CA-001086-MR;
DISMISSING AS TO APPEALS NOS. 2014-CA-001122-MR; 2014-CA-001749-MR; AND 2015-CA-000036-MR

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND JOHNSON, JUDGES.

KRAMER, CHIEF JUDGE: Jenny Young and Alexander Digenis, M.D., appeal several of the Jefferson Family Court's adjudications relative to the dissolution of their marriage regarding the division of property, an award of child support, and an award of attorney's fees. We will address each of these overall aspects of the family court's final judgment in that order. For the reasons discussed below, we affirm with regard to the appeal filed by Alex (No. 2014-CA-001086-MR); and we dismiss with regard to the cross-appeal and two other appeals filed by Jenny (Nos. 2014-CA-001122-MR; 2014-CA-001749-MR; and 2015-CA-000036-MR).

I. Division of property

A. Factual and procedural history

Three days before Alex Digenis and Jenny Young married on October 13, 2007, they executed a 65-page prenuptial agreement. Alex's net worth was several million dollars; Jenny's was a fraction of that; and the overarching purpose of their agreement was asset protection—a means of keeping *their* property *separate*. To that end, their agreement contained a broad and extensive list of assets Alex and Jenny agreed would remain separate from the marital estate, including but not limited to: (1) $184,000 of equity Alex had in his house; (2)

Alex's and Jenny's respective incomes; (3) any assets Alex or Jenny purchased with their respective incomes during marriage; and (4) any appreciation of, or income generated by, their separate assets. Their agreement provided any separate property, or property purchased with separate funds, could never be considered a gift to the other spouse (irrespective of record ownership) unless "a written memorandum of the party making the lifetime gift specifically stat[ed] the intent of the party to gift separate property to the other party[.]"[1] Their agreement further provided that they could only acquire jointly owned, marital property by executing an express agreement to that effect with regard to a particular asset, or through the

[1] The language quoted above derives from Article VI (A) of the agreement, which provides the exception to the general rule:

> Nothing herein contained shall be construed to preclude either party from conferring property upon the other by Last Will and Testament or by lifetime gift. Any lifetime gift shall be evidenced by a written memorandum of the party making the lifetime gift specifically stating the intent of the party to gift separate property to the other party, for purposes of this Agreement. Any gift or additional legacy, bequest, or devise which Husband may make to Wife, and any gift or additional legacy, bequest or devise which Wife may make to Husband shall not be construed as a waiver of this Agreement.

Absent the written memorandum described in Article VI(A), however, the general rule set forth in Article I(B) applied:

> For purposes of this Agreement, the property described above shall be deemed to be and shall always remain the separate property of the respective party, shall remain non-marital in nature, and may be referred to in this Agreement as "separate, non-marital property." Additionally, both parties specifically reject the concepts of (i) unintentional creation of marital property or (ii) unintentional transmutation of non-marital or separate property into marital property. Accordingly, all property separately owned by either party prior to the marriage or separately acquired, and any exchange or substitution for such property shall be and always remain separate, non-marital property regardless of the record ownership thereof unless an interest in that separate, non-marital property is expressly gifted to the other as stated herein under Testamentary and/or Lifetime Disposition of Property. Neither party intends by this agreement to limit or restrict in any way the right and power to receive any such gift from the other.

expenditure of funds from a designated joint bank account into which Alex and Jenny were each obligated to contribute a minimum annual sum of $30,000.

A few years later, Alex then experienced what he would come to describe as "financial Armageddon."[2] Much of what happened and is continuing to happen is chronicled in a pair of cases, *KMC Real Estate Investors, LLC v. RL BB Financial, LLC*, 2012 WL 1980387, 868 N.E. 873 (Table) (Ind. Ct. App. 2012), and *Buridi v. Leasing Group Pool II, LLC*, 447 S.W.3d 157 (Ky. App. 2014). In sum, Alex was one of the approximately thirty physicians comprising the membership of "Kentuckiana Investors, LLC" (KI), an entity whose purpose it was to invest in the construction of a new medical center in Clark County, Indiana. Between May and June of 2009, Alex and his fellow KI members individually executed personal guarantees—guarantees they collectively failed to read or consult with legal counsel to understand[3]—and effectively agreed to become jointly and severally liable for payment (not merely collection) of the medical center's millions of dollars of mortgage and lease obligations. In late 2009, the medical center began to fail. It defaulted on the balance of its obligations in 2010, and it later filed for Chapter 11 bankruptcy protection. Its numerous creditors then looked to the individual KI members for payment.

[2] This is the term Alex used during a July 26, 2012 hearing before the family court.

[3] *See* KMC, 2012 WL 1980387 at *1. Likewise, Alex testified below that the joint and several nature of the guaranty he executed was "unbeknownst" to him.

This turn of events and the ensuing litigation prompted several of the KI members to declare bankruptcy.[4] Alex, however, testified he did not want to declare bankruptcy; he was willing to "pay his share;" but, despite being jointly liable, he did not "want to have to pay everybody else's." Accordingly, Alex engaged in what he testified were "asset protection maneuvers" designed to "leverage" favorable personal settlements with KI's creditors.

To begin, Alex and Jenny had been making regular weekly payments from their joint marital account (described in their agreement) on the mortgage that existed on Alex's house for about a year after their marriage.[5] Alex used his separate funds to pay off the balance of the mortgage in 2008. But, Alex took a new mortgage in December 2009, and deposited the mortgage funds into his separate JP Morgan Chase bank account. He then invested this sum—along with approximately $1.75 million of his separate funds—into an LLC he subsequently created; and he assigned his ownership interest in the LLC to a family trust he created thereafter. During a December 5, 2012 hearing before the family court, Alex explained:

> ALEX'S COUNSEL: Alex, why did you refinance the house in December of 2009 to take $251,000 in cash out of the house?

[4] The former 49% co-owner of Alex's plastic surgery practice was among the KI members who filed for personal bankruptcy protection. His share of the business is now under the control of a bankruptcy trustee.

[5] The mortgage that existed at the time Alex and Jenny married amounted to $176,000. Alex arrived at his figure of "$184,000 in equity," as stated in the agreement, by subtracting $176,000 from what was then the $360,000 fair market value of his home.

ALEX: Again, it was to, um, to, again have leverage to negotiate with the creditors because at that point I was worried that the creditors would come and, because it was paid off, to put a lien on the house and, and lock it down. Um, and that was the point where the creditors, that, that was basically an asset protection maneuver.

ALEX'S COUNSEL: So your motivation in '08 when you paid it off had to do with the economy in this country. Your motivation in '10 when you refinanced had to do with the fact that you were then facing judgments?

ALEX: That's right.

ALEX'S COUNSEL: Alex, ultimately, was it from this JP Morgan account, or was it from other accounts, that you ultimately funded the $1.75 million in cash a couple of months later into the Digenis Properties, LLC, vehicle, which then moved $1.62 million of that over into the Digenis Family Delaware Trust?

ALEX: It would be from this account, and potentially other accounts that I had.

ALEX'S COUNSEL: So when I look at that other deposit there of $400,000 there in January of 2010, again, you're putting money into this account that you ultimately moved into that?

ALEX: Yes. Essentially, I moved all the money into this account and then moved it all into the Delaware Trust.

Alex emphasized that the LLC and family trust were "protection vehicles" for the funds discussed above, and that he created them in the early months of 2010 when he was "in the throes of this process of being sued and being exposed to debt collection" from several of KI's creditors.

Alex also enlisted Jenny and his father, George Digenis, to participate in his asset protection maneuvers. Jenny and George each invested $10,000 in Alex's LLC. As to why, Jenny testified:

> Alex was very clear when he set up that trust, he said this needs to be an unbreakable trust. It needs to be very clear that other investors like you and my dad have put your own money into this trust so, to help make it irrevocable or unbreakable, that it's not just his investment. He said so that money needs to be traceable to your income and your accounts only so that it's not, basically, him writing me a check for $10,000 and me turning around and investing it in his LLC.

What Alex ultimately came to regard as his most maneuverable asset protection vehicle, however, was his prenuptial agreement with Jenny. As discussed above, their prenuptial agreement provided in substance that Alex could place any or all of his separate property under Jenny's name; but, absent a separate written memorandum stating it was Alex's intention to make a gift of the property to Jenny, Jenny could never claim a beneficial interest in the property. Beginning in 2010, KI creditors had begun garnishing Alex's salary and attaching his separate bank accounts. Thus, Alex began using the prenuptial agreement for a different kind of asset protection—a means of using Jenny's name to keep *his* separate property *hidden* from third parties. He testified:

> ALEX: Okay, let me put it in my words. During the period of, this period as mentioned before in testimony, judge, the Kentuckiana Medical Center liabilities and creditors had become part of the issue in terms of, um, monies being captured or being placed liens on, et cetera, so we put it in Jenny's name for safeguarding. That was the whole point of it, that basically I said we're gonna put

> as much as we can in your name. The prenup says it doesn't matter who it's titled under, it's where it came from.
>
> ALEX'S COUNSEL: Alex, just answer the question. Why was it put in Jenny's name?
>
> ALEX: To avoid the creditors.

For example, in March 2010, Alex executed a new deed to the home in which he and Jenny resided, changing his sole ownership of the home to a joint ownership with Jenny as tenants by the entirety. As Alex understood it, the March 2010 deed was merely an "asset protection maneuver;"[6] the record change of ownership did not affect his interest in the home at all; and it remained his sole property.

Alex directed Jenny to open an account at PNC Bank in the late months of 2011, in her name only. At that point in time, their joint marital account (described in their agreement) had been subjected to attachments from creditors and Alex wanted an alternative, safer location to deposit his share of separate funds for joint marital expenses. Thereafter, Alex and Jenny reduced their joint account

[6] Under Kentucky law, "[a] tenancy by the entirety is an estate in land shared by husband and wife, whereby at the death of either the survivor is entitled to full fee simple ownership." *Sanderson v. Saxon*, 834 S.W.2d 676, 678 (Ky. 1992). "A distinguishing feature of a tenancy by the entirety is that the survivor takes the entire estate at the death of the deceased co-tenant not by virtue of that death, but because, in law, each was viewed to own the entire estate from the time of its creation." *Id*. A tenancy by the entirety "creates one indivisible estate in them both and in the survivor, which neither can destroy by any separate act." *Hoffmann v. Newell*, 249 Ky. 270, 60 S.W.2d 607, 609 (1933). "Alienation by either the husband or the wife will not defeat the right of the survivor to the entire estate on the death of the other. There can be no severance of such estate by the act of either alone without the assent of the other, and no partition during their joint lives, and the survivor becomes seised as sole owner of the whole estate regardless of anything the other may have done." *Id*.

to a zero balance; and, between October and November of 2011, Alex regularly endorsed his paychecks for Jenny to deposit into Jenny's PNC Bank account.

Alex directed Jenny to deposit the proceeds from their 2009 joint state and federal income tax refunds into an Ameritrade investment account, and the proceeds of their 2010 joint refund into a Scottrade investment account, each listed in only Jenny's name, again for "asset protection."[7] Until the early months of 2012, Alex accessed and exclusively managed the investments of both accounts.

And, on June 15, 2010, Alex paid $49,000 of his separate funds for the majority[8] of a 2011 BMW, a vehicle he drove exclusively, claimed as his own, but titled in Jenny's name. Upon the questioning of his counsel during the proceedings below, he explained:

> ALEX'S COUNSEL: Alex, in June of 2010, why, when this vehicle was purchased, was it titled in Jenny Digenis's name?
>
> ALEX: Again, as an asset protection vehicle. The prenup says regardless of who it's titled in, it, it goes back to where the money came from.
>
> ALEX'S COUNSEL: Okay. So you were in the throes of all this debt collection stuff in June of 2010?
>
> ALEX: Yes, sir.

[7] As of January 2012, the value of the Scottrade account was $117,680. This amount consisted of approximately $46,000, representing part of the proceeds of Alex's and Jenny's 2010 joint federal tax refund; $15,000, representing half of George's reimbursement to Alex for his share of an apartment they had purchased in Athens, Greece, earlier that year; and about $56,000 of Jenny's separate funds. The Ameritrade account, valued at $43,104, was exclusively invested with proceeds of their joint tax refund.

[8] The remainder of what was owed on the BMW was paid in eleven installments of $459.77 from Alex's and Jenny's joint checking account.

Things progressed in this manner until the beginning of 2012. At that time, Alex had spent approximately $600,000 to settle with two of KI's creditors and was continuing to leverage negotiations with several other KI creditors who, on the strength of his personal guarantee, could legally call upon him to satisfy all of approximately $5.75 million in the medical center's outstanding debts.

Also at that time, Jenny separated from Alex. She filed for divorce in Jefferson Family Court on January 19, 2012. And, Jenny claimed Alex had gifted her the 2011 BMW; she cut off Alex's access to and proceeded to liquidate the Ameritrade and Scottrade accounts; and, after ultimately depositing part of the proceeds into the PNC Bank account listed in her name only (approximately $72,000), she used the other part ($59,790.31) to make a down payment on a house for herself in Oldham County. Thereafter, Alex stopped making substantial deposits in Jenny's PNC account, and he instead began to personally deposit his paychecks into an account he established at a bank in Ohio—a place, Jenny testified, where Alex hoped his creditors would not look for his money.

The Jefferson Family Court eventually entered a limited decree of dissolution. It later adjudicated the remaining issues, including the parties' division of property, through a January 27, 2014 order. There, the family court made the following relevant determinations: (1) the 2011 BMW qualified as Jenny's separate property; (2) the monies Jenny liquidated from the Scottrade and Ameritrade *accounts* qualified as marital property, and the monies in the *account*

were, therefore, to be divided equally; (3) Jenny was entitled to half of $28,360, the proceeds of her and Alex's joint 2011 federal income tax refund, along with half of $4,860, the proceeds of their joint 2011 state income tax refund; (4) Jenny was entitled to $42,258.02, an amount representing half of the marital contributions that had been made toward repaying the second mortgage on the home where she and Alex had resided together; and (5) Alex owed Jenny $10,000 to refund her investment in his LLC.

B. Analysis

Alex appeals each of the family court's adjudications regarding the five property issues discussed above. In his view, the prenuptial agreement controlled the disposition of the first four issues and mandated a different result. As to the fifth issue (*i.e.*, whether he still owed Jenny a $10,000 refund), he argues the evidence compelled a finding that he had already paid Jenny back. Jenny, on the other hand, has cross-appealed regarding only the third issue.

Generally speaking, the division of property in dissolution proceedings is governed by Kentucky Revised Statute (KRS) 403.190. Relevant to this appeal, KRS 403.190 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.

With this in mind, we will now discuss the propriety of the family court's adjudications regarding these five property division issues. Additional facts and law will be discussed as it becomes relevant.

1. *The 2011 BMW*

Jenny argued below that she was entitled to keep the 2011 BMW as her separate property because it was titled in her name and was therefore a gift to her from Alex.[9] *See* KRS 403.190(2)(a). The family court agreed. On appeal, Alex asserts that the 2011 BMW was not a gift to Jenny and that it is *his* separate property. Alex has set forth the clearest explanation of his reasoning in the following passage of the reply brief he filed with this Court:

> "[u]pon transfer of property in which purchase price is paid by another and transferee is wife, child, or other natural object of bounty of person by whom purchase price is paid, *a resulting trust does not arise unless latter manifests intention that transferee should not have beneficial interest in the property*."[10]

[9] The elements of a valid spousal gift are discussed at length in *Sexton v. Sexton*, 125 S.W.3d 258, 268-70 (Ky. 2004).

> The parties' stipulated Prenuptial Agreement in the instant case, including the above-cited provisions, accomplished just that: The terms of the parties' Prenuptial Agreement manifest an express intention by both parties that under these circumstances, Jenny should not have a beneficial interest in the BMW. Mere title is not evidence of the gifting of a beneficial interest, nor is any mere writing; the stipulated Prenuptial Agreement set forth with particularity the parties' intention that a gift could only be established by a writing specifically stating the intent to gift separate property. The Prenuptial Agreement provisions themselves are clear and convincing evidence that Jenny did not at any time acquire a beneficial interest in the BMW.
>
> . . .
>
> The bottom line is that the disposition of parties' property in the dissolution-of-marriage action was governed by the parties' Prenuptial Agreement as stipulated, and Kentucky law is clear that in the context of a dissolution neither record title nor the form in which it was held is controlling or determinative.

Alex's argument is consistent with the testimony he gave before the family court and his interpretation of his prenuptial agreement with Jenny. He had the 2011 BMW legally titled in Jenny's name because, absent a contemporaneously executed written memorandum indicating he *intended* to make the vehicle a gift to her, he believed no gift could have occurred. Rather, their prenuptial agreement, as Alex understood it, automatically created a trust: He

[10] Alex misquotes but captures the substance of the Restatement (Second) of Trusts, § 442 (1959), which provides:

> Where a transfer of property is made to one person and the purchase price is paid by another and the transferee is a wife, child or other natural object of bounty of the person by whom the purchase price is paid, a resulting trust does not arise unless the latter manifests an intention that the transferee should not have the beneficial interest in the property.

retained the beneficial interest in the vehicle; Jenny functioned as its legal owner and trustee for "asset protection" purposes; and the prenuptial agreement had the operative effect of contractually obligating Jenny, as trustee, to convey legal title to the vehicle to him upon request. Alex is asking the Court to direct Jenny to specifically perform this obligation.

With that said, we agree with the family court's conclusion that Alex is not entitled to the vehicle. This was the necessary result even if, as Alex argues, his decision to title the vehicle in Jenny's name did not represent a gift to Jenny, but was instead "asset protection" for himself.

As to why, the explanation begins with Alex's working definition of "asset protection." Alex admitted under oath that shortly before and after his millions of dollars of joint and several liabilities materialized and he was sued or threatened with suit, he removed or concealed many of his assets; transferred other assets to an insider for no consideration; but, that he often retained possession or control of the property that he transferred. He testified this was all done to avoid his creditors and leverage his ability to negotiate his amount of indebtedness. This was the case with the 2011 BMW—he testified that he drove the car exclusively, but transferred legal title to an insider, Jenny. According to Alex, this was "asset protection." According to Kentucky law, this was a quintessential example of a debtor employing a secret trust to "hinder, delay, or defraud" his creditors;[11]

[11] Kentucky Revised Statute (KRS) 378.010 (entitled "Fraudulent conveyances and encumbrances – Void as to whom – Exception) was in effect during the various conveyances and transactions at issue in this matter. It provided:

it is commonly referred to as a "fraudulent conveyance." *See* BLACK'S LAW DICTIONARY 672 (7th ed. 1999).

To be sure, prenuptial agreements *can* be a valid and enforceable means of property division in dissolution proceedings within the meaning of KRS

> Every gift, conveyance, assignment or transfer of, or charge upon, any estate, real or personal, or right or thing in action, or any rent or profit thereof, made with the intent to *delay, hinder or defraud* creditors, purchasers or other persons, and every bond or other evidence of debt given, action commenced or judgment suffered, with like intent, shall be void against such creditors, purchasers and other persons. This section shall not affect the title of a purchaser for a valuable consideration, unless it appears that he had notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor.

(Emphasis added.) KRS 378.010 *et seq*. was subsequently repealed and replaced with KRS 378A.005 *et seq*. during the pendency of these proceedings. For our purposes, it remains applicable. *See* KRS 466.080(3) (providing "No statute shall be construed to be retroactive, unless expressly so declared.") However, KRS 378A.040, which provides more elaboration on this subject and is not inconsistent with the broad purview of its predecessor statute provides in relevant part:

> (1) A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred to obligation:
>
> (a) With actual intent to *hinder, delay, or defraud* any creditor of the debtor;
>
> . . .
>
> (2) In determining actual intent under subsection (1)(a) of this section, consideration may be given, among other factors, to whether:
>
> (a) The transfer or obligation was to an insider;
>
> (b) The debtor retained possession or control of the property transferred after the transfer;
>
> (c) The transfer or obligation was disclosed or concealed;
>
> (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
>
> (e) The transfer was of substantially all the debtor's assets;
>
> (f) The debtor absconded;
>
> (g) The debtor removed or concealed assets;
>
> (h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
>
> (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
>
> (j) The transfer occurred shortly before or shortly after a substantial debt was incurred; and

403.190(2)(d). Equity, however, can render all or part of a prenuptial agreement unenforceable and can further intervene in the otherwise statutory context of property distribution. This is the case when enforcing such an agreement would be unreasonable, or would yield a manifestly unfair result between the spouses in light of various changed facts and circumstances. *See Blue v. Blue*, 60 S.W.3d 585, 589-90 (Ky. App. 2001).

This is also the case when, as here, a court's enforcement of such an agreement, or even the property distribution statutes themselves, would condone or facilitate a purpose that violates public policy. The rationale behind this rule was most succinctly explained in *Justice v. Justice*, a divorce action which, as here, involved a husband who sought judicial assistance in compelling his former wife to return assets he had previously conveyed to her for the purpose of keeping the assets out of the reach of his creditors:

> It has long been a rule of equity in divorce actions that notwithstanding the statutory provisions requiring that the property rights of the parties upon the granting of a divorce should be restored, such restoration could not and would not be enforced if the party had, during the marriage relation, conveyed the property to his or her husband or wife for fraudulent or immoral purposes. *Bean v. Bean*, 164 Ky. 810, 176 S.W. 181; *Honaker v. Honaker*, 182 Ky. 38, 206 S.W. 12; *Jagoe v. Jagoe*, 194 Ky. 101, 238 S.W. 185, 187. As was said in the case of *Jagoe v. Jagoe*, supra:

> (k) The debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor.
>
> . . .

(Emphasis added.)

> 'Under the evidence in this case it is reasonably clear—and the chancellor below has so held—that the defendant in order to avoid his liability on a warranty of the jack had, during the marriage relation, conveyed his property to his wife; and it is the policy of the law that where one for unlawful or immoral purposes has placed the title to his property in another, the courts will not at his instance or suggestion relieve him from the situation in which he has placed himself by reason of his immoral or unlawful purpose. The evidence in this case justifies the conclusion that defendant placed the title to this property in his wife for the purpose of avoiding a liability on his warranty, and he now comes into court, and asks a chancellor to restore to him the title to the property which he thus voluntarily parted with for an immoral and unconscionable purpose.
>
> 'To permit the courts to thus be made tools for the perpetration of such frauds would bring into disrepute the whole administration of justice. They are not constructed for the purpose of aiding unconscionable persons to consummate the frauds which they may concoct; on the contrary it is the rule that courts will not permit themselves to be made the instruments by which such fraudulent schemes are carried out.'

219 S.W.2d 964, 965-66 (Ky. 1949).

Alex titled his vehicle in Jenny's name to keep it from the reach of his creditors. A person who conveys property or titles it in another's name to avoid the reach of creditors is generally at his grantee's mercy as to whether he will ever get his property back; the "clean hands" maxim bars either party to the conveyance from obtaining affirmative judicial relief to enforce the arrangement. Put another way, after a fraudulent conveyance the grantee may hold the property in a secret trust for the benefit of the grantor, but the courts are unwilling as a matter of public

policy to enforce that trust, except for the benefit of creditors.[12],[13] Accordingly, the family court committed no error by refusing to award Alex the vehicle.

2. *The funds Jenny liquidated from the Scottrade and Ameritrade accounts*

[12] *See Taylor v. Taylor*, 400 S.W.2d 677, 679 (Ky. 1966) (applying and collecting additional cases applying this rule of equity in the context of divorce); *see also Asher v. Asher*, 278 Ky. 802, 129 S.W.2d 552 (1939) (explaining the rule, and cited with approval in *Mullins v. Picklesimer*, 317 S.W.3d 569, 577 (Ky. 2010)); *Fyffe's Adm'r v. Lyon*, 274 Ky. 399, 118 S.W.2d 745 (1938); *First Nat. Bank v. Short*, 234 Ky. 130, 27 S.W.2d 668, 670 (1930) (explaining grantee of property to be held in secret trust only holds the property for the benefit of grantor's creditors); *Nixon v. Nixon*, No. 2006-CA-001161-MR, 2007 WL 2333045 at *2 (Ky. App. Aug. 3, 2007) (affirming family court's determination that the doctrine of unclean hands prevented husband, in divorce action, from claiming marital or separate ownership of vehicles he titled in the name of his wife to avoid taxes and to prevent wife from a prior marriage from receiving any of the proceeds from the sale of the vehicles) (cited here as persuasive authority pursuant to Kentucky Rule of Civil Procedure (CR) 76.28(4)).

[13] The record does not indicate which of Alex's creditors were affected by his "asset protection maneuvers," or to what extent. For our purposes, however, it makes no difference. Likewise, it makes no difference that Alex's creditors are not even parties to these proceedings. According to his own sworn testimony, Alex conveyed property for a purpose Kentucky law recognizes as fraudulent and immoral. He now seeks equity. And, in the words of *Carson v. Beliles*, 121 Ky. 294, 89 S.W. 208, 210 (1905):

> It is contrary to the policy of the law that one should be "discouraged" in the assertion of a legal right by his adversary conveying his property without consideration. The transaction involves moral turpitude in the intention with which it is done. What actually happens may be immaterial. Suppose, for an example, one conveys his property on secret trust for the purpose of defrauding his creditors, and then should afterwards pay all his debts; would the fact that no creditor was actually injured enable him to recover from his vendee? Or suppose one having no creditors should convey his property for the purpose of becoming indebted, and of then defrauding his dupes by being insolvent, but should repent before the fraud was committed; could it be maintained that, because he had paid his creditors in the first case, and never had any in the second, he could recover the property conveyed? We think both these questions should be answered in the negative. The enforcement of a trust is a purely equitable remedy. The chancellor [. . .] would not so aid one whose hardship arose from his own evil intent or moral turpitude. That which was conceived in sin, as to the interest of the wrongdoer, was permitted to be brought forth in iniquity; or, as one of the older opinions has it, "He who doeth fraud may not borrow the hand of the chancellor to draw equity from a fountain his own hath polluted." Believing it to be contrary to public policy that one should undertake to defeat a claim about to be asserted against him through the machinery of the law by conveying his

By Alex's calculation, the total funds that resulted from Jenny's liquidation of the Scottrade and Ameritrade accounts amounted to $138,572.39.[14] Alex argues that because the family court classified the balance of these funds as "marital," he is entitled to half of this amount, $69,286.19.

Jenny, on the other hand, argues Alex is only entitled to the portion of the liquidated funds that she deposited in her PNC account representing George's $15,000 reimbursement payment to Alex for his share of the apartment in Athens, Greece, plus half of the remaining balance of the account. Jenny has also filed a protective cross-appeal relating to this issue (Appeal No. 2014-CA-001122-MR) because, as it stands, both parties have different interpretations of the family

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> property upon a secret trust, with a false statement that it was made for a valuable consideration, we think the chancellor should have dismissed the bill which sought to recover the property so conveyed by appellee.

[14] In his brief, Alex offers the following summary of his figure of $138,572.39:

> Scottrade Account Liquidation Amounts
>
> January of 2012 was the month in which Jenny commenced this divorce action. The Scottrade account was valued at $96,910.24 as of March 31, 2012. Jenny systematically liquidated all of the assets in this account in a nineteen-day period of time in April of 2012. On April 2, 2012, Jenny liquidated a portion of the account and distributed to herself $9,450. On April 9, 2012, Jenny liquidated an additional portion of the account and distributed to herself $56,000, funds that she deposited into her new individual Republic Bank savings account on April 12. On April 17, 2012, Jenny again liquidated assets in the account and distributed to herself $979. On April 20, 2012, Jenny liquidated the balance of the assets in the account and distributed to herself $30,801.40 that she deposited into her Republic Bank checking account.
>
> Ameritrade Account Liquidation
>
> As of March 31, 2012, the value in the Ameritrade account was $42,024.07. Jenny liquidated this Ameritrade account on April 23, 2012, and transferred $41,341.39 directly from this account to her individual Republic Bank checking account.

Alex also noted in the proposed findings of fact that he offered below that Jenny initially funded the PNC account with two deposits that originated from her separate Republic Bank account, traceable to liquidated monies from the Scottrade and Ameritrade accounts. The two deposits were in the respective sums of $41,341.39 and $30,801.40.

court's decision in this respect—a decision comprised of two seemingly inconsistent rulings: One regarding the disposition of the PNC account wherein a *portion* of the liquidated Scottrade and Ameritrade proceeds were deposited; and another regarding the disposition of the *entirety* of the Scottrade and Ameritrade proceeds.

Jenny's argument in her cross-appeal is to the effect that, if the family court's decision does stand for the proposition that Alex is entitled to half of $138,572.39, it was erroneous. Because the family court's decision does not stand for that proposition, it is unnecessary to address her argument, and her cross-appeal is dismissed as moot.[15] Upon review, we interpret the family court's decision as providing Alex with an award of the liquidated funds limited to a portion of the liquidated funds Jenny deposited into her PNC account representing George's $15,000 reimbursement payment to Alex for his share of the apartment in Athens, Greece, plus half of the remaining balance of the account (what Jenny agrees Alex is owed). Moreover, the family court committed no error in limiting Alex's award to that amount.

We begin our analysis of this matter by interpreting the family court's order, starting with the family court's first ruling which relates to the PNC Bank account:

PNC BANK ACCOUNT

[15] Jenny included several issues in her prehearing statement for her cross-appeal, but this is the only one of those issues she argued in her brief.

> The parties have a PNC bank account which remains to be dispersed. The funds contained therein include a $15,000.00 deposit made by Alex's father representing his share of an apartment which was purchased in Athens Greece. As it was agreed by the parties that the apartment in Greece is Alex's non-marital property the $15,000.00 shall be awarded to Alex.
>
> *The remainder of the balance* is found to be marital property with each party being entitled to one-half of same. The account shall be divided equally with each party receiving their respective one-half within thirty (30) days of the entry of these findings of fact and conclusions of law.

Alex and Jenny have no dispute over the amount of funds held in the PNC account, nor do they dispute how the family court divided them. Alex and Jenny also testified that the monies in the PNC account consisted of, and were traceable to, liquidated funds from the Ameritrade and Scottrade accounts. This was a point that the family court tacitly recognized: the family court determined that $15,000 in the PNC account—an amount from Alex's father relating to the purchase of an apartment in Greece, which the parties agreed originated from the Scottrade account—belonged to Alex. Thus, it appears the family court classified the remainder of the liquidated funds in the PNC account as "marital property" and divided those funds equally.

The confusion arises on the following page of the family court's order. There, from all appearances, the family court made a *second* ruling on the *same issue*. In relevant part, the family court's order provides:

> SCOTTRADE and AMERITRADE INVESTMENT ACCOUNTS

As noted elsewhere within these findings and conclusions, the parties acknowledge that they engaged in creative movement of assets in order to protect Alex from exposure to liability from his failed business venture. While the project was created prior to the marriage, the litigation was in full swing during the marriage and the parties moved money around in ways not anticipated by the prenuptial agreement to protect their assets from collection by creditors. The Scottrade and Ameritrade accounts were created and placed in Jenny's name alone during the marriage to protect assets from creditors associated with the Medical Center.

The Scottrade account was funded by monies from different sources, totaling $117,680.00. Jenny deposited sums from her personal savings account and her severance from Roche Labs into the Scottrade Account in the amounts of $25,000.00 and $31,000.00. The balance of the account was funded in part by a portion of the parties' income tax refund and monies from Alex's personal accounts. The Ameritrade account was funded solely with proceeds from the parties' income tax refund.

Evidence and testimony indicate that Jenny liquidated these accounts over a short period of time. Jenny testified that she was forced to liquidate these assets in order to obtain cash because Alex failed to provide support for the marital household and that she used a portion of the funds from these accounts to purchase the home in which she currently resides.

Jenny has testified consistently as to Alex's refusal to fully fund household expenses. Alex complains that Jenny withheld money from him that was rightfully his. The Court believes the testimony of both parties. Jenny is credible when she testifies that Alex was not forthcoming in his payment of marital expenses and Jenny was forced to juggle bills and expenses. Alex is credible when he maintains that Jenny liquidated some of the monies in the investment accounts that would qualify as his nonmarital property were the Agreement strictly followed.

> The Court finds that Jenny had no option but to liquidate funds to pay the marital expenses of the family, including the children, during the period of separation, and prior to her move to a separate household. *To* apply the provisions of the Agreement and *force Jenny to repay monies that were used for household expenses would produce an unconscionable result*.
>
> Therefore, the Court concludes that the Agreement does not apply to these accounts which the Court now finds to be marital in nature. The Agreement is unenforceable in regard to these investment accounts, based on the parties' conduct in conflict with the Agreement. As a result, the arguments advanced by each party in support of their position that a portion of the accounts are non-marital fail by operation of law. Claims of a non-marital interest in an asset require sufficient evidence to rebut the presumption that the acquisition of an asset during marriage is marital in nature. The positions of the parties with respect to these two accounts rest on contractually created grounds which are no longer applicable. Thus, the Court concludes that the *accounts* are wholly marital in nature and each party shall be entitled to one-half of the value of the *account*. This conclusion is exclusive of the $15,000.00 for the apartment in Greece as same was restored to Alex through the PNC account discussed above.

(Emphasis added.)

One guiding principle of interpreting a judgment is that "effect must be given to that which is unavoidably and necessarily implied in a judgment, as well as that which is expressed in the most appropriate language." *Furlow v. Sturgeon*, 436 S.W.2d 485, 486 (Ky. 1969) (citation omitted). Here, we interpret the family court's ruling regarding the PNC account, and its subsequent ruling regarding the Scottrade and Ameritrade investment accounts, as one and the same.

As to why, the family court was aware Jenny had liquidated and closed the Scottrade and Ameritrade accounts over a year prior to the date of its January 27, 2014 order. And, the part of the family court's order under the heading "SCOTTRADE and AMERITRADE INVESTMENT ACCOUNTS" acknowledges Jenny took three courses of action with the monies she liquidated from the Ameritrade and Scottrade accounts: (1) she used them as "support for the marital household;" (2) "she used a portion of the funds from these accounts to purchase the home in which she currently resides;" and (3) she deposited the remainder of the "accounts" into an "account."

The identity of the "account," referenced in the second to last sentence of the family court's "SCOTTRADE and AMERITRADE INVESTMENT ACCOUNTS" analysis, is the PNC account that was titled in Jenny's name only. That much is evident from the last sentence: The family court acknowledged that Alex was entitled to $15,000 of the PNC account funds, representing an amount from Alex's father relating to the purchase of an apartment in Greece that the parties agreed originated from the Scottrade account; and, the family court concluded that Alex was entitled to "one-half of the value of the *account* . . . exclusive" of that amount. (Emphasis added.)

Keeping this in mind, the family court explained Alex was not entitled to reimbursement of any liquidated funds that Jenny "used for household purposes"—an amount the family court never calculated in its order—because it "would produce an unconscionable result." Earlier in its order, the family court

also determined that Jenny's new home qualified as her separate property "free and clear of any claim or contribution by Alex."

This left only the liquidated funds that remained on deposit in Jenny's PNC account. Alex's award was limited to $15,000 from the PNC account (representing George's $15,000 reimbursement payment to Alex for his share of the apartment in Athens, Greece), plus half of the remaining balance. Thus, to the extent that the family court awarded Alex any amount representing funds Jenny liquidated from the Scottrade and Ameritrade accounts, Alex's award only encompassed liquidated funds Jenny deposited in the PNC account, divided in the manner set forth above in the family court's respective—and duplicative—"PNC BANK ACCOUNT" and "SCOTTRADE and AMERITRADE INVESTMENT ACCOUNTS" analyses.

As to why we find no error in the family court's judgment, our analysis also adheres to another guiding principle of interpretation:

> [I]t will be 'presumed that the court intended to adjudge correctly in law upon the facts of the case, and of two possible interpretations of the language of the judgment, that one will be adopted which makes it valid, in preference to one which would make it erroneous.

Board of Ed. of Campbellsville Independent School Dist. v. Faulkner, 433 S.W.2d 853, 855 (Ky. 1968) (internal citation omitted).

To the extent that Alex has offered a different interpretation of the family court's decision, we again note Alex testified that all of the Scottrade and Ameritrade funds—like the 2011 BMW vehicle—were titled in Jenny's name "to

avoid the creditors." A person who conveys property or titles it in another's name to avoid the reach of creditors is generally at his grantee's mercy as to whether he will ever get his property back. Here, the family court only awarded Alex the portion of the liquidated funds Jenny agreed to give back to him. It would have been error for the family court to have awarded him more.

3. *Jenny's and Alex's joint 2011 federal and state income tax refunds*

Below, Alex contended that because the prenuptial agreement specified that his income and Jenny's income were to remain separate property, their joint 2011 tax refunds should be traced to their separate incomes and apportioned accordingly. Thus, by his estimation, he was entitled to approximately 90% of the proceeds.

The family court rejected Alex's argument on three bases: (1) the prenuptial agreement was silent in regard to the parties filing joint tax returns and the characterization of the parties' joint tax refunds; (2) if it could be implied that the prenuptial agreement did require tax refunds to be divided per contribution percentage, the prenuptial agreement would be unconscionable; and (3) in any event, Alex submitted insufficient evidence tracing his non-marital interest in the tax refunds. Instead, the family court determined the parties' joint 2011 federal and state income tax refunds qualified as marital property, and that Jenny's just and proportionate share was half (*i.e.*, $28,360 and $4,860, respectively).

On appeal, Alex's sole argument relative to this issue is that the family court abused its discretion by classifying the 2011 tax refunds as *marital* property. To the contrary, he contends the prenuptial agreement supports that he had a traceable *separate* property interest in those refunds.

We disagree. Alex's argument in this vein is an unexplained shift in logic from his prior argument, discussed above, that the 2009 and 2010 joint refund proceeds he and Jenny deposited into the Ameritrade and Scottrade accounts qualified as *marital* property.[16] This unexplained shift highlights a shortcoming in the prenuptial agreement: As the family court observed, the otherwise exhaustive prenuptial agreement Alex and Jenny executed does not address how Alex and Jenny wished to characterize the proceeds of any joint tax refunds. Indeed, it does not address how Alex and Jenny would share exemptions and deductions, nor does it even contemplate that they would file joint returns. Absent that, a joint tax refund, like any other property acquired by spouses during the marriage, is presumptively marital property. KRS 403.190(3). We find no error.[17]

4. *Jenny's award of half the marital contributions toward the second mortgage*

[16] We agree that under the circumstances those proceeds would have qualified as marital property. As discussed, however, Alex's fraud precludes the judiciary from assisting him with regaining any interest he may have had in those proceeds.

[17] Alex adds a new argument in his reply brief that he did not include with his appellate brief, namely, that even if the prenuptial agreement did not apply to the 2011 tax refund proceeds, the family court nevertheless failed to divide it in "just proportions," per KRS 403.190(1). We will not address this new argument because a reply brief is not a mechanism for presenting new arguments. *See Milby v. Mears*, 580 S.W.2d 724, 728 (Ky. App. 1979).

The family court awarded Jenny $42,258.02, an amount representing half of the marital contributions the parties made toward the marital residence. Alex argues the family court erred in doing so because, in his view, its ruling was contrary to Article III(B) of the prenuptial agreement. We disagree.

It is necessary to start with the entire text of the aforementioned provision. Article III(B) of the prenuptial agreement provides:

> Notwithstanding any contrary provision of this Agreement, the parties recognize, acknowledge, and agree that they will reside together during the marriage in the residence at 4100 Buttonbush Meadow Court, Louisville, Kentucky, which was purchased by Husband with his separate, nonmarital funds. The parties agree that said property has a current fair market value of $360,000 and equity of $184,000, which is and shall forever remain Husband's separate, nonmarital property. Husband and Wife acknowledge and agree that they shall each be responsible for 50% of the monthly mortgage payments until such time as the residence is sold. When the residence is sold, whether or not the residence is sold in connection with a termination of the parties' marriage, Husband will receive his separate, nonmarital contribution of $184,000, and proceeds of sale above this amount shall be divided equally between the parties.
>
> If either party commences an action for the judicial termination of the marriage or for a legal separation within two years of the date of marriage, Husband shall be entitled to exclusive possession and occupancy of the residence and Wife shall be required to vacate the residence not later than 60 days after the action for termination of the marriage or legal separation is filed. Husband shall pay to Wife an amount equal to Wife's principal and interest contributions to the mortgage made from the date of marriage through the date Wife vacates the residence, and Wife shall have no other claim to the residence.

> If either party commences an action for the judicial termination of the marriage or for a legal separation more than two years from the date of marriage, Husband shall be entitled to exclusive possession and occupancy of the residence and Wife shall be required to vacate the residence not later than 60 days after the action for termination of the marriage or legal separation is filed. If, however, the parties have minor children at the time either party files for the judicial termination of the marriage or for a legal separation, the residence shall be listed for sale, and Wife shall be entitled to exclusive occupancy of the residence until such time as the residence is sold. This clause shall apply to any later residences that the parties reside in as well.

To re-emphasize: If Jenny and Alex had no children, and Jenny or Alex filed for divorce *within* two years of the date of marriage, Jenny would have been required to vacate the marital residence "not later than 60 days" later, and the extent of her interest in the marital residence would have been limited to "an amount equal to [her] principal and interest contributions to the mortgage made from the date of marriage through the date [she] vacate[ed] the residence."

Conversely, if Jenny and Alex had minor children, and Jenny or Alex filed for divorce *after* two years of the date of marriage, Jenny could force Alex to vacate the marital residence; the marital residence would be sold; and, upon its sale, Alex would first receive an amount representing the equity he had built in the residence prior to the marriage (*i.e.*, $184,000, representing, as of October 10, 2007, a stipulated fair market value of $360,000, minus an existing mortgage of $176,000); and the remaining sale proceeds would be divided equally between the spouses.

In theory, this latter course should have been followed. When Jenny filed for divorce, she and Alex had been married for *over* two years and had two minor children.

In practice, Alex made following this latter course impossible. After Jenny filed for the judicial termination of the marriage, Alex refused, in contravention of the prenuptial agreement, to leave the marital residence. Alex also decided he did not want to sell the marital residence.

And, prior to when Jenny filed for divorce, Alex had altered his non-marital equity in the marital residence. As discussed, Alex had satisfied most of the $176,000 mortgage mentioned in the prenuptial agreement with his separate funds. But, in the words of one of the pleadings he filed below, he then "monetized a portion of his nonmarital equity in the residence" and thus "reduced the value of his nonmarital equity in the residence."[18] Stated differently, he mortgaged the marital residence again,[19] and kept the $255,000 mortgage proceeds for himself as an "asset protection" maneuver (*i.e.*, for use in part of the capital he contributed toward funding his interest in Digenis Properties, LLC).[20]

In its order, the family court took note of these circumstances and the fact that Jenny was willing to compromise. It held as follows:

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[18] This language derives from a motion to alter, amend, or vacate that Alex filed on February 16, 2014.

[19] Only Alex signed the promissory note associated with this second mortgage.

[20] This language derives from a motion to alter, amend, or vacate that Alex filed on February 16, 2014.

The marital residence [. . .] was excepted from the provision in the Agreement regarding restoration of property owned prior to the marriage of the parties. Included in the document was the information that the equity in the residence at the time of the marriage was $184,000 and it has been agreed between the parties that same is Alex's non-marital property. Upon sale of the property, said amount was to be restored to Alex while any amounts greater than that would be divided equally between the parties.

The parties contributed equally to the monthly mortgage payment for a period of approximately a year. In November 2008 Alex satisfied the entirety of the outstanding mortgage on the marital residence. Thereafter, in 2009, the parties obtained a new mortgage on the home in the amount of $255,000, resulting in a new monthly mortgage payment in the amount of $1,707.58. They paid this sum until September 2012 when Jenny left the marital residence.

The refinancing was an attempt to protect the asset from exposure in litigation arising from Alex's failed business venture. Upon refinancing, the home was titled in both parties' names and placed in trust as a part of the estate planning process to protect this major asset.

The marital residence shall be awarded to Alex as that is the agreement of the parties. Additionally, Alex shall be restored the $184,000.00 in non-marital equity.

A dispute arises over how to distribute the marital contribution to the mortgage payments for the one year prior to the satisfaction of the original mortgage as well as the thirty-two months following the refinance and Jenny's move from the marital home.

The marital residence is valued at $345,000.00 and has an outstanding mortgage in the amount of $242,360.19. The parties made total marital contributions over the course of time outlined above in the amount of $84,516.04. The Court finds that, in light of the way the parties handled the restoration of the home and

> premarital equity in same, the proper way to divide the marital contributions to the home is to make an equal division of same in compliance with the provisions of the Agreement contained in Article V. Thus, each party is entitled to one-half of $84,516.04, or $42,258.02. Alex shall pay said amount to Jenny within thirty (30) days of the entry of these findings of fact and conclusions of law. The remaining amount above the marital contribution is Alex's non-marital property free and clear of any claim or contribution by Jenny. Upon satisfaction, Jenny shall execute the appropriate documents to convey her interest in the property to Alex. Likewise, Alex shall execute any and all documents to remove Jenny from the current mortgage and he shall assume sole responsibility, and hold her harmless, for same.

In short, Jenny agreed not to force Alex to leave or sell the marital residence. Jenny agreed to allow Alex to keep the marital residence. Furthermore, Jenny agreed to allow Alex to keep whatever equity remained in the marital residence, along with whatever equity he had "monetized" as an asset protection maneuver. Instead, Jenny was willing to accept a remedy similar in nature to what she would have been entitled to receive under the prenuptial agreement if the marriage had lasted *less* than two years, and *no* children had been born of it: An amount equal to her five years of principal and interest contributions to the mortgage made from the date of marriage through the date *she* vacated the residence, which was "one half of $84,516.04, or $42,258.02."

As noted, Alex's sole appellate argument regarding this issue is that the family court resolved it in a manner contrary to the prenuptial agreement. Alex is incorrect; the family court resolved an issue of his own making that the prenuptial agreement never anticipated. Because the family court could not have

followed the prenuptial agreement, it instead used the prenuptial agreement as a pattern to formulate an equitable solution.

Without guidance from the prenuptial agreement, and in light of Alex's conduct, the family court was justified in formulating an equitable solution. And, although Alex does not raise the point, we also find no inequity in how the family court resolved this matter. Therefore, we find no basis for reversal.

5. *Jenny's $10,000 refund of her investment in Alex's LLC*

Below, Jenny contended Alex still owed her $10,000 to refund her investment in Alex's LLC. Alex, on the other hand, claimed that a few months after Jenny had made her investment, he had actually given her a *secret* refund by depositing a nondescript $10,594 into one of Jenny's separate accounts. As to why it needed to be a secret refund, he testified:

> The reason why I did not uh, put any, there's not a check is because *it would have defeated the purpose of preventing the creditors from saying it was conveyance*. The whole idea was to transfer money in Jenny's name into a Delaware trust that would be a, or not a Delaware trust, an LLC that's a multi-member LLC. A multi-member LLC as I understand it is much more difficult to attack and that's why Jenny was included as well as my father.

(Emphasis added.)

Following its own review of this matter, the family court agreed with Jenny that she remained entitled to a $10,000 refund. It explained:

> Alex testified that he restored Jenny's investment to her in June 2011. He submitted a check[21] in the amount of $10,594.00 which he claims was written and deposited into Jenny's bank account for the sole purpose of restoring her initial investment.
>
> Jenny testified that Alex's check was actually a deposit representing money to pay family expenses. Both parties testified to the shuffling of money, etc. as a result of the impending garnishments and legal actions associated with a failed hospital investment and Jenny testified that Alex would deposit money in her account rather than the joint account to protect it so it would not be subject to garnishment by Alex's creditors. The Court finds that insufficient evidence has been submitted to establish that Alex restored to Jenny her investment in Digenis Properties, LLC.

On appeal, Alex argues he provided substantial evidence supporting that he refunded Jenny's investment.

But, Alex's argument misses the point. Having acknowledged the debt, Alex not only had the burden of producing substantial evidence supporting that he repaid it; he also had the burden of persuasion. In gauging the persuasiveness and substance of Alex's evidence, the family court was justified in considering any other evidence that reasonably detracted from it. *See Kentucky Bd. of Nursing v. Ward*, 890 S.W.2d 641, 643 (Ky. App. 1994).

As noted above, the family court considered a number of evidentiary factors that detracted from Alex's evidence. In light of those factors, the family court was ultimately unpersuaded that Alex's frankness about giving Jenny a secret

[21] Alex did not submit a check or a copy of a check in this amount. He submitted a deposit entry on a checking account statement for an account used by the parties to fund their household expenditures; and the deposit entry did not indicate where this money came from.

refund for the purpose of "preventing the creditors from saying [his LLC and trust scheme] was conveyance" translated into compelling evidence of his honesty and credibility. We are not at liberty to re-weigh the evidence, nor is the family court's decision on this point indicative of clear error. Thus, we must affirm. *See* Kentucky Rule of Civil Procedure (CR) 52.01.

II. Child Support

A. Background

The relevant background information relating to Alex's arguments regarding his child support obligation was discussed in the following section of the family court's order:

> Jenny has not worked outside the home since the birth of the children in October 2010. Her employment previously yielded annual incomes in the amounts of $98,975.00, $105,278.00 and $70,945.00 respectively. Her income in 2011 was strictly from severance pay as Jenny had lost her employment as a result of downsizing while she was on maternity leave. Pursuant to with [sic] KRS 403.212(d), the Court shall not impute income to Jenny as, at the time of trial, she was caring for two children under the age of three (3) to whom the parents owe a joint legal responsibility. Jenny will be receiving maintenance (discussed further at a separate juncture of these findings and conclusions).
>
> The evidence submitted regarding Alex's income for 2012 was incomplete as it consists merely of a financial statement from the third quarter of 2011. Jenny employed an accounting expert, Ms. Helen Cohen, who testified that, if these numbers were annualized, it would reflect gross income of approximately $699,246.00. She further testified that the practice retained greater earnings than it had in prior years and, if Alex's share of those increased retained earnings were added back into his

income, his 2012 annual income would increase by $182,156.00. In the years of 2007 through 2011 Alex's annual income was $1,038,239.00; $990,877.00; $696,699.00; $716,825.00; and $806,808.00, respectively. These numbers reflect only the income earned from his medical practice. Alex also has additional income from his other business interests, returns on investments, etc.

It is clear that the income of the parties exceeds the uppermost levels of the child support guidelines. In such cases, per KRS 403.212(5) the Court may use its discretion to deviate from the guidelines and determine an appropriate child support amount. As noted earlier herein, the Court previously ordered *pendente lite* child support in the monthly amount of $4,329.77; an amount set after the Court reviewed the expenses submitted by Jenny and modified them in light of what the Court determined to be reasonable to meet the needs of the children.

The Court now has more detailed information regarding the expenses of the children, incomes of the parties, standard of living, etc. In Downing v. Downing, 45 S.W.3d 449 (Ky. App. 2001), the Court of Appeals was clear that, when setting child support above the guidelines, the Court must base its decision primarily on the needs of the children, and, in determining same, the Court may consider the standard of living enjoyed during the marriage as well as the standard of living enjoyed by each parent.

In the present matter, both parties came to the marriage earning substantial incomes and led comfortable lifestyles. After marriage, despite ongoing litigation with Alex's hospital investment and Jenny's loss of employment, they continued to live a very handsome lifestyle, as evidenced, for example, by the baptism party hosted for the two infant boys. Moreover, although Alex asserts he has always been rather "frugal", the parties had the ability to vacation, entertain, attend rather exclusive social functions, give substantial gifts, and enjoy other

> amenities as a result of the income received by both during marriage.
>
> Jenny submitted evidence which she claims establishes that the children's reasonable needs are over $4,000.00 per month, less the cost of health insurance, co-pays, medications, etc. She asserts that these items should be shared pursuant to the parties' respective income percentages.
>
> Alex, on the other hand, argues that child support should be ordered only in the amount of $2,158.34. He suggested certain modifications to most of the expenses submitted by Jenny, arguing that they are overstated and/or unnecessary. The adjustments suggested by Alex, however, appear to the Court to be simply arbitrary.
>
> The Court reviewed the expense lists submitted by each party and the proposed modifications/adjustments. Furthermore, the Court has compared the lists with that considered by the Court when making the *pendente lite* award. The Court concludes that Jenny's list more accurately reflects the reasonable needs of the children.
>
> The family court ultimately adjudged Alex's total child support

obligation at $3,631.30 per month. In a subsequent order, the family court further elaborated:

> Case law is clear that when deviating from the guidelines, particularly in high income cases, the Court may determine a child support award based on numerous factors. In light of the evidence with regard to the lifestyle the boys have been afforded in their short lives, the expenses offered by [Jenny] are consistent to those testified to during the trial.

B. Analysis

Alex offers a series of arguments regarding why, in his view, the family court erred in determining his child support obligation. We will address each of them.

1. *Apportionment and downward deviation from the guidelines*

Alex argues the family court attributed no percentage of the children's monthly costs to Jenny and effectively expected him to pay almost all of the children's costs while they are with her. He argues the family court should have considered: (1) Jenny's four years ($50,000 per year) of court-ordered maintenance income; (2) Jenny's "sizable tax-free earnings of $150,000 from the marriage;" and (3) Alex's expansion of parenting time, which would, he argues, result in fewer expenses to Jenny. Furthermore, Alex argues the family court failed to consider whether a *downward* deviation from the child support guidelines, as opposed to an upward deviation, could have been proper under the circumstances.

As an aside, Alex fails to indicate where in the record he either preserved these arguments or asked for additional findings in these respects. From our own review of the record, it appears he did not preserve these arguments or ask for additional findings. Consequently, these arguments are not properly reviewable. CR 76.12(4)(c)(v); *see also Skaggs v. Assad, By and Through Assad*, 712 S.W.2d 947, 950 (Ky. 1986) ("It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court .") (Internal citations omitted).

Moreover, no manifest injustice resulted. Alex cites no authority and we are aware of no authority that requires a court to apportion costs between parents where, as here, the court has calculated child support in excess of the guidelines because one parent's income exceeds the highest level contemplated by the guidelines.

2. *Reduction for medical expenses*

Alex's next argument is best stated in the words of his appellate brief:

> At trial, Jenny requested $4,259.93 for child support. In its Findings of Fact and Conclusions of Law, the trial court lessened this amount by an unspecified $128.63. The final Order amended child support (due to the BMW) and determined that out-of-pocket health amounts were to be paid 90% by Jenny and 10% by Alex. Jenny's "list" identified $628.63 spent on monthly medical costs. In the Findings of Fact and Conclusions of Law, the trial court established, "Jenny submitted evidence which she claims establishes the children's reasonable needs are over $4,000 per month, ***less*** the cost of health insurance, co-pays, medication, etc." Jenny's "list" does not deduct health costs but rather *includes* them in her monthly budget, essentially ordering Alex pay [sic] these costs twice.
>
> As such, $628.63 should have been deducted by the trial court in its final calculation, leaving Alex to pay $3,002.67 per month plus his 10% of the health costs. In effect, the trial court has allowed Jenny to "double dip" by allowing the inclusion of these costs but then also reapportioning them outside of the support figure as dictated by KRS 403.211(7)(a) and (9). Such calculation is arbitrary, unreasonable, unfair, or unsupported by sound legal principles and as such constitutes and abuse of discretion of the trial court.

(Internal footnotes omitted.)

Contrary to what Alex argues, however, the family court *did* deduct the $628.63 in medical costs Jenny otherwise requested from his overall child support obligation. As Alex indicates, Jenny requested $4,259.93 for child support. Included in this figure were the costs of health insurance ($545.30), co-pays ($43.33), and medication ($40) for the children, which totaled $628.63. As Alex indicates, the family court awarded Jenny what she requested, *less* the amount of those costs. $4,259.93 minus $628.63 equals $3,631.30—exactly what Alex was ultimately ordered to pay in child support.

What Alex has confused (he complains of an "unspecified $128.63" reduction) is that in its initial order, the family court subtracted the $628.63 in medical costs from Jenny's requested child support award of $4,259.93, and then added another $500—resulting in $4,131.30. The difference between $4,259.93 and $4,131.30 is, of course, $128.63.

As to why the family court proceeded to add $500 to the award, Alex hints at the answer in his own argument: "The final Order amended child support (due to the BMW)." In her overall list of expenses, Jenny included a footnote explaining that if she "receives the BMW, there is no loan payment and moderate maintenance expense of $50.00 per month. If [she] receives no car, she anticpates [sic] a car payment of $500.00 per month." Even though the family court awarded Jenny the BMW, it *also* awarded her an additional $500 per month representing the car payments Jenny anticipated if she received no car. Jenny brought this mistake

to the family court's attention in a subsequent CR 59.05 motion. The family court then corrected its mistake in a subsequent order, explaining:

> [Jenny] acknowledges that the Court should modify child support with respect to expenses assessed to the children regarding transportation. As the Court awarded Petitioner the BMW the expenses should be reduced by the amount anticipated for acquiring transportation had she not been awarded the car. Said reduction would result in a modification of child support to $3,631.3 [sic] per month.

In short, Alex's argument is merely the product of his incorrect arithmetic. It provides no basis for reversal.

3. *Findings regarding the children's reasonable needs and upward deviation from child support guidelines*

Finally, Alex asserts the family court committed error by upwardly deviating from the child support guidelines. As to why, he argues: (1) the children's needs were not extraordinary; (2) prior to the divorce, he had always required the family to live a "frugal" lifestyle; and (3) Jenny did not produce substantial evidence supporting that $3,631.30 per month represented the actual or reasonable cost of caring for their children.

The standard for reviewing this type of issue was recently set forth in *McCarty v. Faried*, 499 S.W.3d 266 (Ky. 2016):

> We review the establishment, modification, and enforcement of child support obligations for abuse of discretion. *Plattner v. Plattner*, 228 S.W.3d 577, 579 (Ky. App. 2007). The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Downing v. Downing*, 45 S.W.3d 449, 454

> (Ky. App. 2001) (citing *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)). "[And] generally, as long as the trial court gives due consideration to the parties' financial circumstances and the child's needs, and either conforms to the statutory prescriptions or adequately justifies deviating therefrom, this Court will not disturb its rulings." *Van Meter v. Smith*, 14 S.W.3d 569, 572 (Ky. App. 2000) (citing *Bradley v. Bradley*, 473 S.W.2d 117 (Ky. 1971)).
>
> . . .
>
> A trial court's first step when establishing child support is to attempt to comply with Kentucky's statutory guidelines as codified in Kentucky Revised Statute (KRS) 403.212. In a typical case, a court will calculate the parents' combined monthly adjusted gross income and then determine the appropriate child support obligation amount from the guidelines table. KRS 403.212(2)–(7). However, because the table ends at $15,000 in combined monthly income, KRS 403.212(5) provides: "The court may use its judicial discretion in determining child support in circumstances where combined adjusted parental gross income exceeds the uppermost levels of the guideline table."

Id. at 271.

> [A] trial court's decision, when setting child support over and above the guidelines, must be based on the best interest of the child. When making that determination, a trial court may use its judicial discretion with regard to weighing factors such as: the needs of the child, the financial circumstances of the parents, and the reasonable lifestyle the child may have been accustomed to before or after the parents separated. On review, an order setting child support above the guidelines will be affirmed so long as the trial court sets out specific supportive findings and the award, as a whole, is reasonable in light of those findings and the record.

Id. at 273.

In short, "the proper role of a reviewing court is to judge whether the trial court abused its discretion by ordering a clearly unreasonable amount of child support or failing to support its award with specific findings." *Id*.

Here, Alex acknowledges Jenny's sole income at the time of divorce was limited to $50,000 per year in court-ordered maintenance, but that his gross income alone was well in excess of $15,000 per month. Moreover, the family court heard four days of the parties' testimony regarding their standard of living. As the family court noted, Alex and Jenny presented ample evidence that they vacationed in Greece; attended and hosted exclusive and expensive social functions (their children's baptism party, for example); and gave substantial gifts during their marriage. The family court also found Jenny's testimony and her list of expenses to be more credible than the testimony and list of expenses offered by Alex. It was the family court's prerogative to weigh the evidence, and in light of the evidence presented we cannot find its award of child support clearly unreasonable or its supportive findings inadequate. We find no error on this point.

III. Attorney's Fees

Below, Jenny sought an award of attorney's fees from Alex.[22] In response, Alex "remind[ed] the Court that he consistently made clear to the Court that he fully understood and expected that he would be required to make some

[22] As indicated in the caption of this case, Jenny's attorney was included as a party on appeal because the award of attorney's fees was made directly to her.

reasonable contribution to the fees incurred by Jenny in this case."[23] His argument, however, was that he should only have to pay $25,000 of Jenny's attorney's fees. Nevertheless, the family court directed Alex to pay Jenny's attorney a total of $67,832.69, an amount representing most of Jenny's costs and attorney's fees.

On appeal, Alex does not contest the amount of attorney's fees and costs that the family court awarded Jenny.[24] Rather, he presents an entirely new argument: He contends he should *not* have understood or expected that he would be required to make *any* contribution to the fees incurred by Jenny in this case. This, he explains, is because the terms of the prenuptial agreement excused him from paying these amounts.

With that said, there are at least three reasons why Alex's argument does not supply a basis for reversal. First, it was not raised or preserved below. Second, he waived it by conceding, to the contrary, that he *was* liable for some part of her attorney's fees. Third, in the context of dissolution actions, a private agreement of the parties, in and of itself, does not control the court's discretion to determine whether such an award should be made. *See Ford v. Blue*, 106 S.W.3d 470, 473 (Ky. App. 2003). Thus, we find no error.

IV. Remaining Issues

[23] This quote appears on the second page of a post-judgment, June 3, 2014 pleading Alex styled as "Respondent's Response to Petitioner's Motion for Additional Attorney's Fees and Costs."

[24] After Jenny noted this point in her appellee brief, Alex filed a reply brief that included an alternative argument to the effect that, if attorney's fees *were* allowed, they were excessive. We will not address Alex's "excessive fee" argument because a reply brief is not a mechanism for presenting new appellate arguments. *See Milby*, 580 S.W.2d at 728.

Jenny filed two additional appeals in this matter, designated as No. 2014-CA-001749-MR and 2015-CA-000036-MR.

In No. 2014-CA-001749-MR, Jenny raised issues relative to the division of medical expenses between herself and Alex. Prior to our review, and during the pendency of this appeal, those issues were resolved in Jenny's favor by the family court pursuant to CR 60.01. Alex did not appeal the family court's CR 60.01 amendment of its order; Jenny presents no arguments pressing the issues she otherwise raised in this appeal; and, accordingly, this appeal is dismissed as moot.

In No. 2015-CA-000036-MR, Jenny raised issues relative to the amount of the supersedeas bond set by the family court. But, Jenny included no arguments in her brief relative to these issues. Consequently, we dismiss this appeal.

CONCLUSION

We have reviewed the breadth of the arguments presented by the parties. Finding no error, we AFFIRM as to Appeal No. 2014-CA-001086-MR. Jenny's appeals and cross-appeal are also DISMISSED for the reasons discussed above.

JOHNSON, JUDGE, CONCURS.

ACREE, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

ACREE, JUDGE, CONCURRING, IN PART, AND DISSENTING, IN PART: Respectfully, and in part only, I dissent. Although I concur with the greater portion of the majority opinion, my view of this case differs in two ways.

First, I cannot concur with those sections of the opinion that apply an anachronistic, even obsolete, rationale to create a new equity-based ground for refusing to enforce an unambiguous prenuptial contract that was not unconscionable when executed and that was not unconscionable *as to the parties to that contract* when enforcement was sought. Enforcing the prenuptial contract does not make this Court complicit in any wrongdoing. However, equitably estopping enforcement of portions of this contract – for that is the effect – is inconsistent with, and therefore erodes, bedrock contract law principles.

Second, irrespective of this first difference of opinion, I would reverse the trial court's ruling that the 2011 federal and state income tax refunds are marital property because Article I of the prenuptial contract, which is not unconscionable, makes the income tax refunds divisible as non-marital property.

In Section I.B. of its opinion, the majority analyzes the trial court's rulings regarding distribution of property and finds unconscionable certain portions of the prenuptial contract addressing that topic. The underlying rationale is grounded in coverture-era jurisprudence. As explained below, this reasoning is unsuited to resolving property division questions in the modern era of prenuptial contracts, a type of contract deemed violative of public policy until well after coverture was abandoned. *See Stratton v. Wilson*, 185 S.W. 522 (Ky. 1916),

overruled by Gentry v. Gentry, 798 S.W.2d 928 (Ky. 1990), *abrogated by Edwardson v. Edwardson*, 798 S.W.2d 941 (Ky. 1990).

The authority on which the majority relies for declaring part of the prenuptial contract unconscionable is "a long line of decisions [in marital dissolution cases holding] that property will not be restored to a grantor [husband] who himself conveyed it [to his grantee wife] for the fraudulent purpose of defeating his creditors."[25] *Lankford v. Lankford*, 117 S.W. 962, 963 (Ky. 1909). Each of the cases in this long line applied fraudulent conveyance law to resolve a property division issue in favor of a *feme covert*.[26] However, that line of cases came to an end in 1966, the last year it was directly referenced in *Taylor v. Taylor*, 400 S.W.2d 677 (Ky. 1966). During nearly all that time, Kentucky courts presumed the doctrine of coverture,[27] "the common law rule of disability [of

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[25] The bulk of those cases is listed in *Taylor v. Taylor*, 400 S.W.2d 677, 679 (Ky. 1966) as: "*Lankford v. Lankford*, Ky., 117 S.W. 962 (1909); *Coleman v. Coleman*, 147 Ky. 383, 144 S.W. 1, 39 L.R.A., N.S., 193 (1912); *Bean v. Bean*, 164 Ky. 810, 176 S.W. 181 (1915); *Honaker v. Honaker*, 182 Ky. 38, 206 S.W. 12 (1918); *Jagoe v. Jagoe*, 194 Ky. 101, 238 S.W. 185 (1921); and *Justice v. Justice*, 310 Ky. 34, 219 S.W.2d 964 (1949)."

[26] "*feme covert* (fem kəv-ərt) [Law French 'covered woman'] (17c) *Archaic*. A married woman. The notion, as Blackstone put it, was that the husband was the one 'under whose wing, protection, and cover, she performs every thing.' 1 William Blackstone, *Commentaries on the Laws of England* 430 (1765). See coverture." FEME, Black's Law Dictionary (10th ed. 2014).

> Once married, the *feme covert*'s legal identity was "merged" with that of her husband under the legal fiction of "marital unity." Under this doctrine the wife lost the legal rights she had as a *feme sole*, such as rights to her property and her labor, access to courts, and the right to contract independently of her husband.

Kristin Collins, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in Miller v. Albright*, 109 Yale L.J. 1669, 1682 (2000).

[27] Coverture is "[t]he condition of being a married woman; under former law, a woman under coverture was allowed to sue only through the personality of her husband." COVERTURE, Black's Law Dictionary (10th ed. 2014).

women] as to claims between spouses, . . . should still prevail."[28] *Hays v. Hay's Adm'r*, 290 S.W.2d 795, 797 (Ky. 1956).[29] In those days, "the status of women in this society was decidedly second class." *Edwardson*, 798 S.W.2d at 944.

Notwithstanding women's status in those days, and arguably to avoid the impact of coverture, our courts rendering that line of cases employed a rationale that empowered them to award real and personal property to a wife in divorce. The husband's alleged bad conduct toward a third party offered the courts an out, an opportunity to restore a woman's sovereignty over property – a right and power coverture deprived her while married. We apparently never saw the irony of these decisions – an irony that makes them all the less applicable here.

So, here's the irony. At a time of greater patriarchy in our jurisprudence, this line of cases avoided a harsh consequence – leaving a divorced woman, often caring for minor children,[30] with too little property to avoid poverty. Weren't these decisions likely a product of patriarchy? That is, weren't patriarchal judges affected by their experience and their times,[31] by a zeitgeist impelling them

[28] The majority of the cases in this long line set out in the previous footnote predate the legislative end to coverture in 1937. *Louisville Cooperage Co. v. Rudd*, 124 S.W.2d 1063, 1067 (Ky. 1938). However, as noted, many Kentucky judges perceived common law coverture as lasting into the 1950s.

[29] In 1953, in another example of the decades-long reluctance to embrace legislatively identified women's rights, our high court said: "The Kentucky Married Womans Act [of 1894] appears to be as broad as plain words can make it. But through the years this Court apparently has assumed, without much argument or discussion, that a married woman cannot sue her husband for a tort against her person." *Brown v. Gosser*, 262 S.W.2d 480, 483 (Ky. 1953).

[30] In the *Taylor v. Taylor*, *supra*, and four of the six cases cited as representative of that "long line," minor children are involved.

[31] As our Supreme Court said when holding that prenuptial contracts were enforceable:

> The words of Justice Holmes are appropriate here:

to presume (or pretend) these wives were mere dupes in their husbands' schemes, incapable of a knowing participation that would have denied them the right to keep the property? *Heck v. Fisher*, 78 Ky. 643, 646 (Ky. 1880) (even though "acquiescence of the wife in the perpetration of a fraud by her husband, or by any one else, will prevent her from deriving any benefit from the fraud[,]" the acquiescing wife in this case was allowed to retain ownership of the property). Did judges deem it more just to turn a blind eye to complicity and award a secreted property to a woman departing what judges considered the fealty and protection of coverture than it would have been to place the property where it could once again be reached by the husband's creditors? Regardless of the motivation, the result was judicial assurance that one part of the husband's plan would succeed – keeping a property from the reach of the husband's creditors. What an odd result. But one we again reach in the instant case.

I believe the rationale of the line of cases ending in *Taylor v. Taylor* has never fit in our post-coverture jurisprudence. The majority notes, however, that there is another, related "long and unbroken line of cases" that survives as the "[a]ncient offspring of Equity . . . usually expressed by the maxim: 'He who comes into Equity must do so with clean hands'." *Sherman v. Sherman*, 290 Ky. 237, 160

> "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." Holmes, *The Common Law* (1881); Harvard Univ. Press (1963).

Edwardson v. Edwardson, 798 S.W.2d 941, 944-45 (Ky. 1990).

S.W.2d 637, 639 (1942) (citing *Asher v. Asher*, 278 Ky. 802, 129 S.W.2d 552, 553 (1939)). Consequently, we continue to "refuse[] relief to one, who has created by his fraudulent acts the situation from which he asks to be extricated." *Mullins v. Picklesimer*, 317 S.W.3d 569, 577 (Ky. 2010) (quoting *Asher*, 129 S.W.2d at 553). The two lines of cases make up the majority opinion's bulwark.

My problem is that none of the cases in either long line, nor their precedents or progeny, ever applied these equity principles in the context of a prenuptial contract. To my knowledge, the case now before us is the first.

I have no doubt the majority applied the factors deemed relevant to its conclusion in a deliberate and sober fashion, carefully balancing the relative merits of each. However, as I do the same thing, I am not convinced equity determines this case. Our modern courts simply do not turn to equity as readily as the courts in the era of coverture. As our Supreme Court said in *Bell v. Commonwealth, Cabinet for Health and Family Services, Dept. for Community Based Services*, 423 S.W.3d 742 (Ky. 2014):

> Modern jurisprudence is first a creature of the governing constitutions, then of code (statutes), and of case law precedent. To the extent the courts are given rule-making authority, those rules are also binding. Equity practice, in general, is merged with law, or the statutory provisions. Only when there is no law or precedent does a court have the authority to exercise pure equity. *Cf. Vittitow v. Keene,* 265 Ky. 66, 95 S.W.2d 1083, 1084 (1936) ("[E]quity principles . . . cannot be given effect, nor may they be resorted to when to do so would be in direct conflict with settled legislatively enacted rules of practice approved and followed by courts of equity from an ancient day to the present time."). Thus, "the equity

> powers of the courts have definite limits." *Barger v. Ward,* 407 S.W.2d 397, 400 (Ky. 1966).

Bell, 423 S.W.3d at 747. Therefore, analysis in this case should start with the constitutional protections prohibiting governments from interfering with the "obligation of contracts[.]" U.S. CONST. ART. I, § 10, CL. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts"); KY. CONST. § 19 ("No . . . law impairing the obligation of contracts, shall be enacted"). This constitutional right allowed Alex and Jenny to "define by agreement their rights in each other's property, regardless of any rights which would otherwise have been excluded or conferred by KRS 403.190." *Gentry*, 798 S.W.2d at 934. Our Supreme Court in *Gentry* made it clear that, even with regard to prenuptial contracts, the primacy of contract law remains intact. This is not the kind of case described by *Bell* in which "there is no law or precedent" and so we do not "have the authority to exercise pure equity" under these facts. Our abundance of contract law must control.

Long ago, we "embraced the view that ante-nuptial agreements are not per se invalid as against public policy." *Lane v. Lane*, 202 S.W.3d 577, 579 (Ky. 2006) (citing *Gentry*, *supra* (overruling *Stratton*, *supra*)). Our high court said, just as with any contract, the first inquiry is whether the contract is ambiguous. Like all other contracts, where there is no ambiguity, "[t]he operative provisions must therefore be given effect[.]" *Gentry*, 798 S.W.2d at 933. In this case, there is no ambiguity and none was asserted as a ground for refusing enforcement. Of course, that is not the basis for the majority opinion.

Despite their commonality with all other contracts, it is also true that prenuptial contracts bear distinctions.[32] Some were noted in *Edwardson, supra,* decided the same day as *Gentry*. However, even after taking those distinctions into account, I still cannot agree that the contract is unconscionable even as to creditors.

"The first limitation . . . [*Edwardson* recognized] is the requirement of full disclosure." *Id.* at 945. Neither party claims the other failed to fully disclose his or her respective assets. Again, that is not the basis for the majority opinion.

However, the majority does find the prenuptial contract unenforceable because of the second limitation – "that the agreement must not be unconscionable at the time enforcement is sought."[33] *Id.* The majority opinion holds that it was. This is where the majority loses me.

In *Blue v. Blue*, this Court said "the definition of the word 'unconscionable' remains the same for both separation and prenuptial agreements . . . [, *i.e.*,] that it is manifestly unfair and unreasonable." 60 S.W.3d 585, 589 (Ky.

[32] Generally, prenuptial contracts differ from ordinary contracts in three ways: (1) the prenuptial contract's subject matter – *e.g.*, the marital bond, property and support rights during and after marriage, the education, care, and rearing of children – is of greater interest to the state than is the subject matter of ordinary commercial contracts; (2) "the relationship of the parties to each other is a confidential relationship involving parties who are usually not evenly matched in bargaining power"; and (3) prenuptial agreements "are to be performed in the future, in the context of a relationship which the parties have not yet begun and which may continue for many years after the agreement is executed and before it is enforced. The possibility that later events may make it unwise, unfair, or otherwise undesirable to enforce such agreements is also greater than in the case of ordinary contracts." Judith T. Younger, *Perspectives on Antenuptial Agreements: An Update*, 8 J. Am. Acad. Matrim. Law. 1, 3-4 (1992).

[33] Of course, the contract must not be unconscionable at the time of its making either – a concept with which, as the Court noted, trial courts were already familiar by virtue of KRS 403.180 and KRS 403.250. *Edwards*, 798 S.W.2d at 945 fn2. The first distinction, full disclosure, is part of that analysis.

App. 2001).[34] We then said "[t]he opponent of the agreement has the burden of proving the agreement is invalid or should be modified." *Id.*; *accord Edwardson*, 798 S.W.2d at 946 (giving guidance for "Courts reviewing antenuptial agreements and faced with *a claim of unconscionability*"; emphasis added). Jenny was not an "opponent to the agreement" and did not claim the prenuptial contract was unconscionable, so she never attempted to satisfy the burden identified in *Blue*. On the contrary, except for provisions irrelevant to this case, Jenny actually sought to enforce the contract, albeit according to her interpretation.[35]

Jenny did not consider the prenuptial contract unconscionable as to her; at least she never said so. Nor did the majority find the prenuptial contract has become manifestly unfair and inequitable to Jenny. Instead, the majority finds the contract manifestly unfair and inequitable to Alex's creditors. I do not believe that is enough to refuse enforcement of a prenuptial contract otherwise enforceable as between the parties to it. Consider a case the majority relies on – *Blue v. Blue.*

When the wife in *Blue* (unlike Jenny) asserted unconscionability as a reason for the court to refuse enforcement of her prenuptial contract, we said she

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[34] Unlike prenuptial contracts, separation agreements are governed by statute. It is the statute that requires the court to consider the conscionability of the agreement. KRS 403.180(2), (3). Still, "[t]he law places a 'definite and substantial burden' of proof upon a party seeking modification of a separation agreement. *Peterson v. Peterson,* Ky. App., 583 S.W.2d 707, 711 (1979). . . . [A] party seeking to set aside a separation agreement *can satisfy his or her burden of proof* by evidence of fraud, undue influence or overreaching. *Shraberg v. Shraberg*, 939 S.W.2d 330, 334-35 (Ky. 1997) (Cooper, J., concurring) (emphasis added).

[35] According to the judgment: "Jenny asserts that Articles VII(D) [regarding the children's faith] and VIII [providing for the children's college attendance] are not enforceable. The parties assert that all other articles of the agreement are valid and enforceable . . . ." (R. 410).

"must establish that the agreement is oppressive or manifestly unfair *to her* at the time of dissolution." *Blue*, 60 S.W.3d at 591 (emphasis added). Jenny's prenuptial contract was not oppressive or manifestly unfair *to her*[36]; she knew it was not, and that surely factored into her decision not to claim it was.

Furthermore, contrary to the majority opinion, I do not believe Alex was all that effective at keeping his property from the reach of his creditors. Let's not forget that, by operation of the prenuptial agreement, Alex never transferred equitable ownership to his wife as did the husbands in the coverture-era cases on which the majority opinion relies. Equitable ownership of Alex's non-marital properties remained vested in him and could still be reached by his creditors. Perhaps it is true that prior to filing a collection action, Alex's creditors would only learn from the public record that, for example, the BMW was titled in Jenny's name or that his residence was titled in both Alex's and Jenny's names. However, once a creditor filed suit,[37] and especially after judgment established the amount of Alex's debt,[38] his sworn testimony would reveal the true extent of his equitable

[36] As discussed below regarding Section I.B.2. of the majority opinion, no express provision of the contract justified Alex's demand that Jenny restore certain accounts after she used the money to sustain the parties' home and children. Interpreting the contract that way would have been manifestly unfair to Jenny and, therefore, such a contract interpretation or application would have been unconscionable as to her.

[37] Two creditors filed collection actions, one in August 2010 and one in February 2011.

[38] As noted in another opinion of this Court involving Alex's creditors' claims, Alex's debt based on his guaranties to the holder of the mortgage on the hospital was $529,984.

> After the Medical Center defaulted on its mortgage, RL BB Financial instituted a foreclosure action in Indiana. The Medical Center filed a Chapter 11 bankruptcy petition in September 2010. In early September 2011, the Indiana court entered a judgment in favor of RL BB Financial and against the investor physicians, including appellee, Dr. Alexander Digenis, and [two other physicians] for their personal guaranties associated with the Medical Center's debt. The guaranties were limited to a certain amount based upon the percentage of ownership of the

ownership of property, even property titled in Jenny's name. The creditors' access to Alex's equitable ownership in property (if still needed to satisfy Alex's debt) will continue until this case becomes final. That will be when equitable ownership of certain property (like the BMW) – which remained Alex's under the prenuptial contract – will become vested in Jenny and placed beyond his creditors' reach. In that one respect, this case is, in fact, like the coverture-era cases.

But there is a real distinction between this case and those. The coverture-era cases do not lend themselves to the possibility that the wives were complicit in their husband's supposed defrauding of creditors. By contrast, Jenny acknowledged she knew of and participated with Alex "in creative movement of assets[.]"[39] (R. 428). To the extent the doctrine of unclean hands applies to this case, both husband and wife skipped a trip to the wash basin. And so, to whatever degree the majority believes it is thwarting the wrongful efforts of one party with unclean hands, it must admit it is rewarding the other.

I also have a concern that in order to find the prenuptial contract unenforceable, this Court first concluded, without benefit of an actual case or controversy over the specific issue, that Alex violated laws against fraudulent conveyances. How akin is that determination to an advisory opinion? Our

> total interest in the Medical Center through KI. The judgment against Dr. Digenis was for $529,984. On September 28, 2011, the Indiana judgment was domesticated in Kentucky; RL BB Financial then sought judgment against the Kentucky-based physicians listed in the Indiana judgment.

Stavens v. Digenis, 2015-CA-000359-MR, 2017 WL 1203395, at *1 (Ky. App. Mar. 31, 2017).

[39] The full sentence from the court's judgment is: "As noted elsewhere within these findings and conclusions, *the parties acknowledge that they engaged* in creative movement of assets in order to protect Alex from exposure to liability from his failed business venture." (R. 428; emphasis added).

preliminary conclusion that Alex fraudulently conveyed property which forms the basis of the unconscionability determination would not have preclusive effect in a subsequent action by, for example, one of Alex's actual creditors seeking relief pursuant to KRS 378.010.[40] That is because the issue was never "actually litigated and finally decided[.]" *Kentucky Retirement Systems v. Carson*, 495 S.W.3d 135, 140 (Ky. 2016). I do not see why we would give a preliminary conclusion that Alex defrauded creditors such preclusive effect here to decline enforcement of the contract between Alex and Jenny.[41]

The fraudulent conveyances statutes were designed to provide creditors with a right of action to undo the conveyance of equitable ownership of property. Again, that did not occur here. Even if it had, a creditor's use of the statute is not compulsory. Even a conveyance that is "*presumptively* fraudulent . . . is merely voidable at the option of the creditor, who pursues his remedy within the statutory period." *Dwiggins Wire Fence Co. v. Patterson*, 179 S.W. 224, 227 (Ky. 1915) (emphasis added). Many factors come into play in the collection of a debt,

[40] The applicable statute at the time was KRS 378.010, *et seq*. The legislative scheme has been amended. Effective July 2016, fraudulent conveyances are prohibited by KRS 378A.040(1)(a) and (2)(a)-(k). Under the new legislative scheme, the burden of proof is a mere preponderance of the evidence. KRS 378A.050(3). Under the prior scheme, fraudulent conveyance had to be proved by clear and convincing evidence. *Russell County Feed Mill, Inc. v. Kimbler*, 520 S.W.2d 309, 311 (Ky. 1975) ("In an action to set aside a conveyance for fraud, the general rule is that the fraud must be established by clear and convincing evidence.").

[41] While Alex said things on the record that may certainly be considered admissions against his own interest, they never amounted to his confession of fraudulently conveying property. Even if he had pleaded guilty to violating KRS 517.070, Defrauding judgment creditors, "a plea of guilty to a criminal charge is competent evidence in a civil case involving the same occurrence, but it is not conclusive and may be explained." *Johnson v. Tucker*, 383 S.W.2d 325, 326 (Ky. 1964) (citation omitted; guilty plea in criminal case is mere admission against interest in civil case and defendant is entitled to offer evidence in explanation of his conduct).

especially one of the magnitude Alex faced, joint and several with multiple partners who, unlike himself, took bankruptcy.[42] Alex's creditors chose to work with him and that led to at least one settlement of $600,000 in 2012, two years before the judgment in this case. If, in the process of memorializing that settlement Alex misrepresented his actual assets, the creditors are not without recourse.

Summarizing, "[c]ontracts . . . must be construed from the *standpoint of the parties*, and the terms employed must be given effect from that standpoint." *Collings v. Scheen*, 415 S.W.2d 589, 593 (Ky. 1967) (emphasis added; citation omitted). This prenuptial contract was not construed in that way. "[T]he court's primary objective is to effectuate the intentions of the parties." *Kentucky Shakespeare Festival, Inc. v. Dunaway*, 490 S.W.3d 691, 695 (Ky. 2016). The majority opinion does not accomplish that primary objective. Even *Edwardson* says the court should "give effect to the agreement as nearly as possible providing the agreement was not procured by fraud or duress." *Edwardson*, 798 S.W.2d at 946. This contract was not given its intended effect despite not being procured by fraud or duress. The prenuptial contract should not have been found unconscionable for the reasons the majority opinion offers.

[42] As to the complexity of the collection efforts related to the failed enterprise of the physician group, see the following cases, each of which addressed different and various aspects of it. *KMC Real Estate Inv'rs, LLC v. RL BB Financial, LLC*, 968 N.E.2d 873 (Ind. Ct. App. 2012); *Buridi v. Leasing Group Pool II, LLC*, 447 S.W.3d 157, 171 (Ky. App. 2014): *Buridi v. RL BB Financial, LLC*, 994 N.E.2d 762 (Ind. Ct. App. 2013); *Stavens v. Digenis*, 2015-CA-000359-MR, 2017 WL 1203395 (Ky. App. Mar. 31, 2017).

I would apply the contract terms to resolve the property disputes except where existing jurisprudence compels a finding that its application has become unconscionable *as to Jenny*.

That means I must dissent from Section I.B.1. of the majority opinion. In the absence of a written memorialization of Alex's express donative intent as required by the prenuptial contract, the BMW should have been awarded to Alex as his non-marital property (with adjustment for any part of the eleven $459.77 payments that may have come from Jenny directly or from a joint account).

Regarding Section I.B.2., I agree we should affirm the trial court, but not entirely for the reasons stated therein. Circumstances changed from those contemplated by the prenuptial contract when the parties separated. Alex placed Jenny in a position that compelled her to use funds in the Scottrade and Ameritrade accounts to maintain the marital home and care for the parties' children. That was to the parties' mutual and joint benefit. There was no claim Jenny's expenditures were extravagant. Whatever character as marital or non-marital property the funds in the account may have had before those changed circumstances, the necessity Jenny faced and addressed altered it. Alex's demand that Jenny be compelled to restore the accounts to a previous status quo so the funds could be distributed according to the prenuptial contract was properly denied. It would have been manifestly unfair and inequitable to Jenny, and therefore unconscionable, to apply (or even interpret) the prenuptial contract so as to attempt the undoing of these changed circumstances. However, it was unnecessary, in my opinion, for the

analysis in the last paragraph of Section I.B.2. to add to the trial court's reasoning that Alex should receive no more than Jenny was willing to give him because "all of the Scottrade and Ameritrade funds—like the 2011 BMW vehicle—were titled in Jenny's name 'to avoid the creditors[.]'"

As previously indicated, I believe the 2011 joint federal and state tax refunds[43] addressed in Section I.B.3. of the majority opinion, should be divided in accordance with the plain wording of the prenuptial contract. Therefore, I dissent from that section. Those refunds unquestionably began as separate property and can be traced by simple mathematics and in accordance with the contract which says, in pertinent part:

> Each party shall continue to own and to solely and independently control, manage, direct, enjoy, use or dispose of . . . all property hereafter separately acquired . . . . The phrases . . . "separately acquired" as use in this Agreement shall include: . . .
>
> 7. all employment, personal service, commission and other forms of income of each party, both now and in the future; . . .
>
> 10. Each of these subparagraphs shall refer to each other so that . . . property . . . separately acquired shall include increases, appreciation, accretion and earnings on property acquired in exchange or substitution therefor.
>
> For purposes of this Agreement, the property described above shall be deemed to be and shall always remain the separate property of the respective party, shall remain non-marital in nature, and may be referred to in this Agreement as "separate, non-marital property." Additionally, both parties specifically reject the concepts of (i) unintentional creation of marital property or (ii)

[43] Unlike the 2009 and 2010 federal and state income tax refunds, the 2011 refunds were not deposited in the Scottrade, Ameritrade, or PNC accounts, which were addressed in Section I.B.2. of the majority opinion.

> unintentional transmutation of non-marital or separate property into marital property.

Each party had earnings and from those earnings paid taxes. Both earnings and taxes paid were the fruit of the labor of the respective party. Each party agreed that such fruits were non-marital property and would never "transmute" to become marital property. Allowing federal and state governments to hold those funds for a time before refunding a portion certainly did not transmute them. The trial court ignored this part of the agreement and should not have. Alex paid 93.2% of the parties' joint federal tax liability of $249,052; he should have been awarded 93.2% of the $28,360 federal refund as his non-marital property. He paid 91.6% of the parties' joint state tax liability of $48,556; he should have been awarded 91.6% of the $4,860 state refund as his non-marital property. I simply see no manifest injustice from following the prenuptial contract regarding the refunds. Unlike the majority, I cannot agree with the trial court that applying the contract here is unconscionable.

Neither Section I.B.4. nor Section I.B.5. is based on a finding that the prenuptial contract is unconscionable. I agree with the reasoning in those sections and, therefore, concur.

Finally, I fully concur with the majority's analysis and reasoning in Section II., Section III., and Section IV. of the majority opinion.

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