

RENDERED: NOVEMBER 16, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001564-ME

SONYA R. THOMPSON (NOW COLE)

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. CHRISTINE WARD, JUDGE
ACTION NO. 11-CI-504131

ROBERT L. THOMPSON, M.D.

APPELLEE

AND

NO. 2016-CA-001859-ME

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v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. CHRISTINE WARD, JUDGE
ACTION NO. 11-CI-504131

ROBERT L. THOMPSON, M.D.

APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND JONES, JUDGES.

JONES, JUDGE: These consolidated appeals arise out of several orders of the Jefferson Circuit Court concerning the parties' dissolution of marriage action.

Following review of the record and applicable law, we affirm.

I. BACKGROUND

Sonya R. Thompson ("Sonya") and Robert Thompson ("Tommy") were married in 1996. Sonya and Tommy have one child together ("Child") who was born in 2003. In 2011, Sonya filed a petition for legal separation, which was later amended to a petition for a decree of dissolution of marriage in February of 2012. In addition to requesting the parties' marriage be dissolved, Sonya's petition requested the trial court to: grant the parties joint custody of Child, with Sonya being the primary residential custodian; establish a reasonable parenting-time schedule for Tommy; order Tommy to provide child support; restore Sonya's nonmarital property to her; equitably divide the parties' marital property; award Sonya maintenance; and order Tommy to pay Sonya's reasonable attorney fees. The trial court entered a *status quo* order and both parties filed preliminary verified disclosure statements.

Sonya and Tommy acquired numerous assets during their marriage. The parties owned two homes in Shelby County—one was the marital residence, which Tommy claimed as his nonmarital property, the other was a home purchased for Sonya with marital funds. Sonya’s home had been acquired by the parties in light of their separation. At the time she filed her petition for dissolution of the marriage, Sonya was not yet residing in that home as it required substantial renovations. Both homes were encumbered by mortgages. The parties owned “get-away” condominiums in Nashville, Tennessee; Lexington, Kentucky; and Indianapolis, Indiana as well as two business condominiums. Additionally, the parties acquired interests in several businesses during their marriage, and both had various retirement/investment accounts and bank accounts.

In May of 2013, Tommy moved the court to appoint an expert to value the parties’ business interests. His motion stated that he was a part-owner in three medical practices: Injury Rehabilitation Specialists of Louisville, PLLC; Thompson & Chou Center for Physical Medicine and Rehabilitation, PLLC; and Shepherdsville Family Health Clinic. Tommy was also a part-owner in Eagle Properties, Inc., which is a real estate holding company. Sonya was the sole owner of Therapy Works, Inc. Both parties were part-owners in Sims Entertainment Group, LLC/TK Entertainment, which operated, the Art Bar a dance club in Lexington, Kentucky, and both parties held 25% ownership interests in TMV

Properties, Inc. All of these business interests were established during the parties' marriage. Tommy requested valuation of all listed business entities, except for TMV Properties, as the parties had agreed they would each retain their respective 25% interests in that business. Tommy's motion also indicated that the parties had agreed that the proper valuation of Eagle Properties would be to have the real estate owned by it appraised. The trial court entered an order on May 21, 2013, appointing an expert to value Injury Rehabilitation Specialists of Louisville, Shepherdsville Family Health Clinic, Thompson & Chou, Therapy Works, and TK Entertainment. The parties were ordered to advance the appraisal fees, with Tommy paying 75% of the fees and Sonya paying 25%.

Sonya filed a motion seeking *pendente lite* (interim) child support, maintenance, and an advance of attorney fees on May 29, 2013. In that motion, Sonya alleged that Therapy Works was losing one of its major clients, and therefore, she had not drawn a salary from it for the last several months. Sonya stated that her monthly income was limited to the \$12,000 she received from her interest in TMV Properties. Sonya noted that she provided health insurance for her family and alleged that her and Child's combined monthly expenses were, at a minimum, \$27,263. This amount did not include expenses related to her new residence. In contrast, Sonya noted that Tommy's annual gross income was at least \$342,053. Also on May 29, 2013, Sonya filed a motion requesting the trial

court: to require Tommy to provide Sonya with a complete accounting of funds he had expended on the parties' business interests since their separation; to require Tommy to provide details of any transfers of shares in any business interests; to prohibit Tommy from investing any marital funds in any of the parties' businesses without her written consent; and to prohibit Tommy from handling any funds distributed to Sonya by any of the parties' business interests.

The trial court entered a temporary support order on November 8, 2013. In that order, the trial court found that Sonya was a certified occupational therapist assistant ("COTA") and owned her own business, which Sonya testified was currently operating at a loss. In 2012, Sonya had received \$69,459 in wages from Therapy Works, but she had only received \$1,1624 in wages so far in 2013. The trial court found that Sonya had loaned money to Therapy Works, but that she was able to run certain expenses—such as her car payment and insurance payment—through Therapy Works. The trial court found that Tommy earned a monthly gross income of \$30,164 from all his business interests and that he claimed monthly expenses for Child and himself of \$20,923. The court noted that both parties claimed that they were paying the mortgage on the parties' Nashville condo, but that they agreed that Tommy was paying property taxes and condo fees on all three of the parties' condos. The trial court found that the Art Bar was currently operating at a loss. The trial court concluded that, at that juncture, Sonya

lacked sufficient income and met the threshold requirements for temporary maintenance. The trial court considered the factors set out in KRS¹ 403.200(2), imputed income to Sonya in the amount of \$3,000 per month, and ordered Tommy to make payments to Sonya of \$4,000 per month. Of that \$4,000, \$2,750 was considered maintenance and \$1,250 was considered child support.

Thereafter, the parties worked on having their businesses and real property appraised. In December of 2013, Sonya filed a motion alleging that Tommy had violated the trial court's *status quo* order by selling or transferring his interest in Injury Rehabilitation Specialists of Louisville. Sonya contended that this business was a marital asset, which still needed to be valued. The Nashville condo was sold, and the parties divided the proceeds by agreed order entered February 19, 2014. On March 19, 2014, the parties entered an agreed order in which Sonya agreed that she would not contest Tommy's decision to stop participation in and dissolve Injury Rehabilitation Specialists of Louisville and agreed that the dissolution of that business did not violate any court order. However, the agreed order also stated that Sonya did not waive any dissipation claim she might have with respect to assets and/or income from that business while it was operating.

¹ Kentucky Revised Statutes.

On August 26, 2014, Sonya moved the trial court to appoint an expert for a business valuation of Eagle Properties. In that motion, Sonya disagreed with Tommy's earlier assertion that Eagle Properties could be valued by appraising the real estate it holds. Sonya contended that Eagle Properties was an ongoing business, and, accordingly, had value as a business in addition to the value of its real estate. On August 27, 2014, Sonya filed another motion concerning the appraisals of the parties' business interests. Therein, Sonya noted that the calculation reports the parties had received for Thompson & Chou and the Shepherdsville Family Health Clinic were "as of December 31, 2012," while the calculation report for Therapy Works was "as of December 31, 2013." Sonya requested that the court order the appraisals of Thompson & Chou and the Shepherdsville Family Health Clinic be updated to be valued "as of December 31, 2013." Sonya noted that no valuation report had been completed for Injury Rehabilitation Specialists of Louisville or TK Entertainment. Additionally, Sonya requested that an expert be appointed to value TMV Properties. On September 10, 2014, the trial court entered the following orders concerning appraisals: an order that the Shepherdsville Family Health Clinic and Thompson & Chou calculation reports be updated through December 31, 2013, with the parties splitting any additional costs 50/50; an order denying Sonya's motion to have TK Entertainment appraised; an order denying Sonya's motion to have Eagle Properties appraised by

a business valuator; an order denying Sonya's motion to have TMV Properties appraised; and an order denying Sonya's motion to have Injury Rehabilitation Specialists of Louisville appraised.

On September 15, 2014, the parties attended mediation and executed a Mediated Agreement. That agreement represented the final settlement of all property issues and attorney fees, except for personal property, which was reserved. Maintenance, child support, and child-related financial issues were also reserved. Pursuant to the Mediated Agreement, each party received roughly \$841,000 in marital property. Specifically related to the parties' real property and business interests, Sonya retained: her residence, with an equity value of \$270,000; the business condo located in New Albany, Indiana, with an equity value of \$113,000; Therapy Works, with a value of \$16,000; and her 25% interest in TMV Properties. Tommy retained: the marital residence, which was deemed nonmarital property; the Indianapolis condo, with an equity value of \$70,000; his 50% interest in Thompson & Chou, valued at \$173,000; his interest in the Shepherdsville Health Clinic, valued at \$24,000, and the building valued at \$35,000; and his interest in Eagle Properties, with a value of \$103,000 in equity and \$24,000 in its bank account.

An evidentiary hearing on the issues of maintenance and child support was scheduled for October 24, 2014. Prior to the hearing, both parties submitted

pretrial memoranda. In his memorandum, Tommy noted that the parties had agreed to joint custody and joint time sharing of Child. Tommy contended that Sonya's annual gross income, in combination with what she received under the Mediated Agreement, was sufficient for her to maintain her lifestyle without maintenance payments. He stated that if the court did choose to award Sonya maintenance, the duration should be for no more than three years. Tommy contended that under the Kentucky Child Support Guidelines, his child support payment should be \$139 a month, plus 58% of the Child's health insurance costs. Tommy requested that the court divide Child's health insurance, work-related childcare, uninsured medical expenses, extracurricular activities, and camps in proportion to the parties' incomes. In her memorandum, Sonya stated that she and Child had combined monthly expenses of \$45,757.99. Sonya requested that Tommy's child support obligation be increased to \$2,500 per month and that maintenance payments be increased to \$7,500 per month, for a duration of eight years.

Sonya testified first at the evidentiary hearing. She testified that she had been a COTA for twenty-seven years and currently held a license in Indiana. She indicated her desire to complete a masters program in occupational therapy so that she could have better job opportunities. Sonya stated that she is the sole owner of Therapy Works, which provides occupational and speech therapy

services to nursing homes. Sonya stated that she is only compensated for therapy services performed at Therapy Works, but that the majority of her duties are administrative in nature and she is not compensated for those duties. She indicated that she has back and shoulder problems, which make it difficult for her to perform therapy services. Sonya stated that she had looked for employment elsewhere, but she was not hired because of her physical restrictions. Sonya testified that she receives \$12,000 a month in income from her interest in TMV Properties. She does not pay taxes on that amount; TMV Properties issues an annual check to cover any tax payments. Sonya also receives a gross amount of \$1,000 per month for renting out the New Albany condo. Sonya testified as to her submitted list of her and Child's monthly expenses. She acknowledged that many expenses listed were not currently incurred. Sonya stated that she had cut back on many of her previous expenses, but that she still needed maintenance payments in order to enjoy the same standard of living as she had enjoyed during the parties' marriage. Sonya testified that she had Tommy had equal parenting time with Child.

On cross-examination, Sonya acknowledged that she had taken a salary of about \$70,000 per year from Therapy Works through December of 2012. She also indicated that Therapy Works has traditionally paid her car payment, car insurance, part of her cell phone bill, and the family's health insurance. Sonya testified that she has had to loan money to Therapy Works for it to make some

payments. She testified that Therapy Works employs two PRN-COTAs² and one full-time COTA, in addition to herself, for therapy services. Sonya stated that she usually performs less than five hours per week in therapy services. She indicated that she has been working on getting contracts with nursing homes for Therapy Works.

For his case-in-chief, Tommy first called Melissa DeArk, a CPA. Ms. DeArk offered testimony on Sonya's before-and-after tax earnings to meet her living expenses. Ms. DeArk presented three different scenarios to the court, each of which included expected distributions from TMV Properties of \$237,250 for 2014 and net income of \$8,400 for 2014 from rent collected for the New Albany condo. The difference in the scenarios was the amount of income imputed to Sonya. The first scenario imputed \$36,000 per year to Sonya, as the circuit court had done in its temporary maintenance order. The second scenario imputed \$50,000 per year to Sonya, as based on the typical salary a COTA in the Louisville area could earn. The third scenario imputed \$62,387 to Sonya, which was based on Sonya's 2012 tax return. After applying the income tax rate for each scenario, Ms. DeArk testified that Sonya's estimated annual gross income ranged from \$281,650 to \$331,037 per year and her estimated annual net income ranged from \$180,319 to \$212,026 per year.

² "As needed" COTAs.

Tommy testified that, throughout the parties' marriage, he had practiced medicine and Sonya had worked as a COTA. Tommy testified that he works six days a week doing inpatient rehab. He stated that his current salary from Thompson & Chou is \$131,000 per year, in addition to \$1,500 per month for allowed expenses. Tommy stated that his previous salary with Thompson & Chou had been \$162,000 per year, but his salary was decreased in 2013 when his partner, Dr. Chou, wanted to change from their previous model of splitting profit equally to an "eat what you kill" model. Tommy stated that his work habits have not changed, but that Dr. Chou does earn a higher salary because he performs outpatient rehab, for which he can bill at a higher rate. Tommy testified that he is currently the medical director for a nursing home called Richwood, where he receives about \$800-\$1,000 per month gross in payments. He stated that he is a part-owner of the Shepherdsville Family Health Clinic and that he goes to the Health Clinic about once every three to four weeks and does not take a regular salary from the Health Clinic. Tommy testified that he and Dr. Chou are co-owners of Eagle Properties, which owns the building in which Thompson & Chou is housed. Tommy testified that neither he nor Dr. Chou take distributions from Eagle Properties, but use any income earned to make mortgage payments. Tommy testified that the Art Bar had been shut down and that he had assumed all debt associated with that business. He testified that he had previously made about

\$5,000-\$7,000 per month working at Injury Rehabilitation Specialists of Louisville, but that he had left that job because of a number of concerning issues within the business. Tommy contested that Sonya had monthly expenses of \$45,000 per month. He stated that they could not have afforded such expenses, even during their marriage.

On October 27, 2014, the trial court entered a decree of dissolution of marriage. That decree awarded the parties joint custody of Child and reserved the issues of maintenance, child support, and other child-related issues. On November 6, 2014, Tommy moved the court for an order requiring Sonya to return \$20,000 in funds she had removed from one of the parties' joint checking accounts. Tommy alleged that Sonya had removed the funds the day after the hearing. He stated that, while the account was in both parties' names, he had been using the account exclusively since July of 2013. Tommy acknowledged that, per the terms of the Mediated Agreement, he owed Sonya's attorney fees in the amount of \$10,000 and that he was to make a child support payment to Sonya in the amount of \$4,000 on November 1, 2014. Tommy requested that the trial court deduct those amounts from the amount taken by Sonya and enter an order requiring Sonya to pay him \$6,000 by November 12, 2014. On November 11, 2014, Sonya responded to Tommy's motion and denied that the funds were "stolen." Sonya attached an affidavit in which she averred that before the hearing on October 24, 2014, she and

Tommy had reached a verbal agreement whereby she was allowed to withdraw the entire amount held in the joint checking account. Tommy then filed a responsive affidavit denying any agreement.

On December 10, 2014, the trial court entered an order incorporating the Mediation Agreement into the decree of dissolution. On December 12, 2014, the trial court entered its findings of fact, conclusions of law, and supplemental decree of dissolution. Looking first to Sonya's claim for maintenance, the trial court found that Sonya had testified that much of her work at Therapy Works was noncompensable. The trial court noted that, in recent years, Sonya had received income from Therapy Works of nearly \$70,000 per year and that Sonya had testified that Therapy Works' business had greatly declined. Additionally, the trial court noted that Sonya had testified that her physical issues prevented her from performing compensable work, but that Sonya had provided no evidence concerning her ability to provide therapy services currently or in the future. The trial court found that Sonya's personal 1040 Federal and State income returns for 2013 indicated a loss of over \$10,000, despite the fact that Sonya had received gross distributions from TMV Properties of \$252,830 in 2013. The trial court noted that Sonya did not claim to be working at Therapy Works full time, even in an administrative capacity. The court opined that it was unclear why Therapy

Works had not generated more new business since the temporary maintenance order.

The trial court found that Tommy's income at Thompson & Chou had steadily declined since 2010, when he earned nearly \$340,000. The court found that, prior to 2013, Tommy and Dr. Chou had each received half of Thompson & Chou's earnings, but that the profit-sharing scheme had changed at Dr. Chou's request. The trial court noted Sonya's belief that Tommy and Dr. Chou had agreed to temporarily reduce Tommy's income because Sonya was seeking maintenance and child support. However, the trial court found that both Tommy's testimony and Dr. Chou's deposition testimony confirmed that the change in Tommy's salary was due to the discrepancy in "production" of income between the Tommy and Dr. Chou. The trial court found that Tommy did not personally receive income from Eagle Properties, but that any profit earned by the company was used to pay down its mortgage. It found that Tommy received income from the Shepherdsville Family Health Clinic of about \$10,000 to \$20,000 per year. The trial court listed the parties' respective claimed monthly expenses and expressed that both parties continued to live beyond their means.

The trial court concluded that it was reasonable to continue to impute \$3,000 per month in income to Sonya, while noting that the low-average income for a COTA in the Louisville area is \$50,000 annually. It found that Sonya had

received assets of over \$900,000 in property, retirement accounts, proceeds from the sale of the Nashville condo, and future proceeds from sale of the Lexington condo, which the parties had agreed to divide evenly. Additionally, it found that Sonya would continue to receive \$12,000 per month in passive income from her interest in TMV Properties, would continue to receive income from renting the New Albany condo, and had the training, skills, and experience to earn between \$36,000-\$62,000 annually. The trial court found that Sonya's testimony concerning the parties' living standards and her reasonable needs was not credible. Sonya had stated that she and Child have expenses of \$45,000 per month; however, this would have required the parties to jointly earn annual net income of \$540,000, which they had never done. Based on the above, the trial court concluded that Sonya was not entitled to maintenance after December 31, 2014.

In next addressing child support, the trial court attempted to parse out the parties' claimed expenses for Child, which each had lumped together with their personal monthly expenses. The trial court deviated from the Kentucky Child Support Guidelines, as the combined monthly gross income of the parties exceeded the guideline chart of KRS 403.211(3)(e). The trial court stated that it was difficult to determine what expenses listed by Sonya were actual and reasonable, when considering the parties' "high lifestyle," and which were "well over the top."

Ultimately, the trial court ordered Tommy to pay Sonya \$1,500 per month in child support. Additionally, the trial court ordered that:

Tommy shall pay 59% of [Child's] health insurance, extraordinary medical costs, work related child care, camps and agreed upon activities such as music lessons and athletic programs. Sonya shall pay 41% of the cost of the above itemed expenses.

R. 631. The trial court addressed Tommy's motion for return of funds in the same order. The trial court found that it was more likely than not that the parties had never agreed for Sonya to remove money from the joint checking account. Accordingly, it ordered that Sonya pay Tommy \$20,000 within ten days.

On December 22, 2014, Sonya filed a motion to alter, amend, or vacate³ the trial court's order entered December 12, 2014, and for additional findings of fact. In February of 2015, the case was reassigned from Division 5 to Division 6.⁴ On March 4, 2015, Tommy moved to strike certain arguments and exhibits that Sonya had included in her motion to alter, amend, or vacate. The motion to strike was granted in part and denied in part on June 12, 2015.

Sonya refiled a corrected motion to alter, amend, or vacate on July 20, 2015. The amended motion again alleged numerous factual errors or omissions

³ While styled as a motion to alter, amend, or vacate under Kentucky Rules of Civil Procedure (CR) 59.05, the motion also requested relief under CR 59.01, CR 59.07, CR 60.02, and requested the trial court to make specific findings of fact under CR 52.01 and CR 52.04.

⁴ Judge Garber, who had been presiding over the case, retired and the judge who proceeded her in Division Five disqualified herself. Hereinafter, where relevant, we will refer to the newly assigned court as the "Div. 6 trial court" and the previous court as the "Div. 5 trial court."

made by the Div. 5 trial court, including its: incorrect descriptions of the parties' respective homes; an incorrect statement concerning Dr. Chou's 2013 income; the trial court's finding that Tommy had earned \$5,000-\$7,000 per month through Injury Rehabilitation Specialists of Louisville until October 2013, when, in fact, Tommy had earned \$22,000 from August 29, 2013, through October of 2013; failure to make findings as to why it imputed income to Sonya and did not impute income to Tommy regarding the income he received from Injury Rehabilitation Specialists of Louisville; failure to make findings as to why the cost of Sonya returning to school was not allowed as a reasonable and necessary expense; failure to make numerous findings related to Tommy's income from and interest in the Shepherdsville Family Health Clinic; requiring Sonya to pay the entire amount to have the business valuations of the Shepherdsville Family Health Clinic and Thompson & Chou updated; failure to adequately review and make findings about the parties' monthly expenses; and improper calculation of Tommy's income.

The Div. 6 trial court entered an order denying Sonya's motion on September 14, 2015. In the order, the Div. 6 trial court noted that the Div. 5 trial court had previously found that Sonya did not meet the threshold requirements for maintenance, so any argument that Sonya raised concerning the factual findings regarding Tommy's income were irrelevant. The Div. 6 trial court found that the Div. 5 trial court had been in the best position to judge Sonya's credibility, and it

would not disturb the order. Sonya then filed a timely notice of appeal of the December 12, 2014, supplemental decree of dissolution and the September 14, 2015 order denying her motion to alter, amend, or vacate.

On May 20, 2015, while Sonya's motion to alter, amend, or vacate was pending, Sonya filed a motion requesting the Div. 6 trial court to increase child support, reinstate maintenance, alter the parties' parenting schedule, and award her attorney fees. On October 14, 2015, Sonya moved the Div. 6 trial court to set a hearing date on her motion to increase child support and reinstate maintenance. In the affidavit in support of her motion, Sonya averred that she was not receiving monthly distributions from TMV Properties. Additionally, she noted that TMV Properties had not issued a check for tax refunds, which would make her liable for the taxes on payments made through February of 2015. Sonya stated that she was not making the income that had been imputed to her, and went into detail about Tommy's substantial income. Sonya requested \$7,500 per month in maintenance.

On December 29, 2015, Tommy filed a motion to dismiss Sonya's motion for an increase in child support and reinstatement of maintenance or, in the alternative, to change the hearing on the motion to a sufficiency hearing. In his motion, Tommy stated that the change of circumstances complained of by Sonya no longer existed, as TMV Properties had resumed making dividend payments in

November 2015. Additionally, Tommy noted that the reason that dividend payments had been suspended was because Sonya had filed a lawsuit against TMV Properties in February of 2015. As a result of the lawsuit, the owners of TMV Properties had decided to stop making distributions to shareholders in order to stockpile cash that may be needed to defend the lawsuit and pay any possible judgment. Tommy also noted that, during the time that Sonya had not been receiving her payments from TMV properties, Tommy had likewise not been receiving payments. Tommy urged the Div. 6 trial court not to consider Sonya's argument that she was not making the income that had been imputed to her by the Div. 5 trial court, as that issue had already been litigated and decided. On January 21, 2016, the Div. 6 trial court entered an order denying Tommy's motion to dismiss, finding that Sonya had met the minimum threshold requirements for the court to hear the matter in full. The hearing on Sonya's motion was continued.

On September 6, 2016, Sonya filed a motion requesting the Div. 6 trial court to compel Tommy to respond to certain discovery requests. Specifically, Sonya requested the following information: a complete copy of Tommy's 2014 income tax return and the 2014 income tax returns for all of Tommy's businesses; a copy of all of Tommy's bank accounts with signatory authority or any interest from January 1, 2014, to the present; a copy of all documents Tommy intended to introduce as exhibits at the hearing for Sonya's

motion to increase child support and reinstate maintenance; a complete list of assets owned by Tommy; Tommy's most recent statements from all IRA accounts, 401(k) accounts, profit sharing, and/or retirement accounts in which he has an interest; a complete list of Tommy's monthly expenses; and a copy of the signed 2014 state and federal tax returns for Thompson & Chou, along with any attachments.

In his response to Sonya's motion to compel, Tommy acknowledged that he had objected, and refused to respond, to many of Sonya's discovery requests. However, Tommy contended that those requests were only relevant to Sonya's motion to reinstate spousal maintenance. Tommy pointed out the maintenance issue was the subject of a pending appeal. Accordingly, Tommy argued that the court lacked jurisdiction to consider Sonya's argument that maintenance should be reinstated.

The court entered an order regarding Sonya's motion to compel on October 7, 2016. The court agreed with Tommy that it was divested of jurisdiction to consider Sonya's arguments to reinstate maintenance payments, as Sonya had already appealed the denial of maintenance to this Court. Additionally, the court concluded that, while an order awarding maintenance is modifiable post-decree, an order finding that maintenance is unwarranted is non-modifiable. The court clarified that it was denying Sonya's request for a hearing on the issue of

reinstatement of maintenance. In light of its findings, the trial court granted Sonya's motion to compel Tommy to produce his complete 2014 and 2015 tax returns, but it denied the motion to compel in all other respects.

On October 17, 2016, Sonya filed a motion to alter, amend, or vacate the order of October 10, 2016. Sonya contended that the fact that she had appealed the denial of maintenance did not necessarily divest the trial court of the authority to award maintenance while her appeal was pending. Sonya contended that, since the date of the trial court's order finding that she was not entitled to maintenance, she had suffered a substantial change in her finances—she had lost the \$12,000 per month income from TMV Properties, she had lost her rental property, and she was receiving no income from Therapy Works. The court denied Sonya's motion to alter, amend, or vacate, by order dated November 10, 2016. Sonya appealed this aspect of the maintenance issue as well.

II. ANALYSIS

On appeal, Sonya raises the following assignments of error: (1) the trial court erred in finding that Sonya was not entitled to maintenance; (2) the trial court granted an insufficient amount of child support; (3) the trial court erred in ordering Sonya to return any funds taken from the parties' joint checking account; (4) the trial court erred in not ordering all properties to be appraised as of the same date and in denying Sonya's motion to have Eagle Properties and Injury

Rehabilitation Specialists of Louisville appraised; and (5) the trial court erred in concluding that it lacked jurisdiction to reinstate maintenance and, accordingly, in denying her motion compel Tommy to produce documents relevant to her claim to reinstate maintenance. We consider each argument in turn.

A. Initial Denial of Maintenance

“In determining awards of maintenance, we may not set aside the findings of the family court unless they are clearly erroneous.” *Age v. Age*, 340 S.W.3d 88, 94-95 (Ky. App. 2011) (citing CR 52.01). “Further, the trial court is afforded a wide range of discretion, which is reviewed under an abuse-of-discretion standard.” *Id.* at 95. An abuse of discretion occurs when the trial court’s decision is “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Artrip v. Noe*, 311 S.W.3d 229, 232 (Ky. 2010).

On appeal, Sonya contends that the trial court erred in determining that she did not meet the threshold requirements for an award of spousal maintenance under KRS 403.200(1). Sonya contends that the evidence presented at the October 24, 2014, hearing demonstrated that her monthly income, including the income imputed to her by the trial court, is insufficient to meet her reasonable needs, especially in light of the high standard of living the parties enjoyed during their marriage. Sonya argues that her request for maintenance is reasonable in

light of Tommy's income and expenses, but that the trial court erroneously calculated Tommy's actual income.

KRS 403.200(1) sets out the required findings for a spouse to be eligible for an award of maintenance. Under KRS 403.520(1), "there must first be a finding that the spouse seeking maintenance lacks sufficient property, including marital property, to provide for his reasonable needs." *Drake v. Drake*, 721 S.W.2d 728, 730 (Ky. App. 1986). "Secondly, that spouse must be unable to support himself through appropriate employment according to the standard of living established during the marriage." *Id.* (citing *Lovett v. Lovett*, 688 S.W.2d 329, 332 (Ky. 1985)). Once a trial court determines that a spouse is entitled to receive maintenance, it looks to the factors listed in KRS 403.200(2) to determine the amount and duration of maintenance payments.

The trial court underwent a lengthy analysis in determining that Sonya was not entitled to receive maintenance. It first noted that the parties had enjoyed a high standard of living during their marriage, and that both parties were attempting to continue that standard of living post-divorce. The trial court found that Sonya had received \$903,435 under the terms of the Mediated Agreement. It found that Sonya received income from her rental property in New Albany as well as from her interest in TMV Properties. The trial court noted that the evidence presented indicated that both parties had received \$12,000 per month and

additional distributions of \$56,250 and \$25,000 from TMV Properties in 2014. The trial court found that Sonya had an Associate of Arts degree in occupational therapy and was a COTA. While the trial court noted Sonya's testimony that her business, Therapy Works, was currently operating at a loss and she was no longer receiving a salary, it also noted that until 2012 Sonya had earned approximately \$70,000 per year from Therapy Works and that Sonya did not claim to currently be working full-time. The trial court also noted Sonya's testimony that she had physical issues making it hard for her to work, but it found that Sonya had not presented any medical evidence to support this claim. All of these findings are supported by the testimony and evidence presented at the October 24, 2014 hearing. Because of Sonya's testimony concerning her income and work done at Therapy Works, the trial court found that it was appropriate to impute income of \$3,000 per month. Including imputed income, this gave Sonya a total annual gross income of \$281,650. The trial court found that Sonya's expected monthly net income would be \$14,000-\$17,000.

Sonya's claimed expenses for Child and herself totaled \$45,757.99 per month. The trial court found Sonya's testimony on these expenses was not credible, characterizing Sonya's list of monthly expenses as a "fairy tale statement of 'needs.'" The trial court noted that Sonya had acknowledged on cross-examination that many of the expenses she had listed were not currently being

incurred. For example, Sonya had listed monthly expenses of: \$2,900 for Child's college fund; \$2,800 for her 401(k); \$1,667 for athletic and country clubs; \$800 in golf cart fees; and \$1,400 for plastic surgery. Additionally, the trial court noted that both Tommy and Sonya continued to live beyond their means. The trial court specifically noted that Sonya claimed monthly expenses of: \$4,500 for housing; \$2,200 for groceries and eating out; and \$2,500 for clothing.

Having reviewed the record, we discern no abuse of discretion in the trial court's denial of maintenance. The denial was based on findings of facts supported by the evidence of record. The trial court did not abuse its discretion.

B. Child Support

Sonya next argues that the trial court awarded an insufficient amount of child support. Trial courts are vested with broad discretion in the establishment of child support. *Bjelland v. Bjelland*, 408 S.W.3d 86, 87 (Ky. App. 2013).

“Accordingly, this court reviews child support matters under an abuse of discretion standard, *i.e.*, whether the decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Id.* (citing *McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008)). The trial court's findings of fact will be upheld unless clearly erroneous. CR 52.01.

KRS 403.212 provides guidelines for a trial court to use when establishing child support. In many cases, a trial court can calculate an appropriate

child support obligation by combining the parents' monthly adjusted gross income and utilizing the guidelines table found at KRS 403.212(7). The guidelines table, however, ends at \$15,000 in combined monthly income. When, as is the case here, the parties' combined monthly income exceeds \$15,000, "[t]he court may use its judicial discretion in determining child support[.]" KRS 403.212(5). "[A] trial court's decision, when setting child support over and above the guidelines, must be based on the best interest of the child." *McCarty v. Faried*, 499 S.W.3d 266, 273 (Ky. 2016), *as modified* (Sept. 22, 2016). In making its determination, trial courts are instructed to consider 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." *Id.*

Sonya contends that the trial court failed to consider the lifestyle to which Child was accustomed in determining the appropriate amount of child support. Sonya suggests that the trial court simply added together the parties' claimed monthly expenses for Child. She contends that this was erroneous, as the amount used by the trial court did not include a portion of her household expenses, which are needed to maintain Child's lifestyle.

There is no indication in the record that the trial court decided the amount of child support arbitrarily. In its order setting child support, the trial court noted that both parties spend equal time with Child and that both parties provide

Child with a large home, clothing, food, and entertainment that more than meet his needs. The trial noted that Sonya claimed \$2,100 in monthly expenses for Child, and that Tommy claimed \$875 in monthly expenses for Child. However, despite Sonya's contention, there is nothing in the order to suggest that the trial court merely added those expenses and then divided them to reach the amount owed in child support. Likewise, we do not agree with Sonya that the trial court ignored Child's lifestyle in reaching its determination. In looking to Sonya's claimed monthly expenses for Child, the trial court noted that some of those expenses were "unduly extravagant, nonrecurring, or to be 'wish list' items." For example, Sonya claimed \$300 per month for Child's allowance/savings and \$485 per month for Child's music lessons, which Sonya acknowledged he had never taken. The trial court acknowledged that it was difficult to determine, based on Sonya's list, which expenses were real and reasonable, in consideration of Child's lifestyle, and which expenses were inflated or over-the-top. Ultimately, it reached the conclusion that \$1,500 per month in child support was an appropriate amount to cover Child's reasonable monthly expenses. It did not abuse its discretion in so concluding.

C. Order to Return Stolen Funds

Next, Sonya contends that the trial court erred awarding Tommy a common law judgment against her for the funds she removed from the parties' joint checking account. Sonya has never denied that she removed \$20,000 from

the checking account. Sonya argued to the trial court that she and Tommy had agreed that she could remove those funds and the trial court rejected that contention. Sonya dropped that argument in her motion to alter, amend, or vacate, instead arguing that the court should vacate the judgment in light of the fact that the joint account was not included in the parties' Mediated Agreement and was, therefore, marital property. Sonya maintains this argument on appeal. Tommy has always acknowledged that the joint account itself was not mentioned in the Mediated Agreement. However, because the funds held in the joint checking account represented a distribution made to him by virtue of his ownership interest in TMV Properties and the parties' respective interests in TMV Properties were addressed in the Mediated Agreement, Tommy contends that the trial court properly concluded that the funds were his property.

The trial court decided the issue based on competing affidavits filed by the parties. It ultimately rejected the version of events contained in Sonya's affidavit and accepted the statement of facts in Tommy's affidavit—that the money in the joint checking account represented the remainder of the \$25,000 TMV Properties distribution received by Tommy. Sonya has never disputed this fact. As the trial court was in the best position to judge the credibility of the witnesses, we give deference to its findings. *Rearden v. Rearden*, 296 S.W.3d 438, 441 (Ky. App. 2009).

Any interest in property not disposed of by agreement or by a decree of dissolution “remains ‘in the same posture as if the court had so adjudged [the parties’] respective interests.’” *Fry v. Kersey*, 833 S.W.2d 392, 393 (Ky. App. 1992) (quoting *Ping v. Denton*, 562 S.W.2d 314, 317 (Ky. 1978)). The parties contracted and agreed, as reflected in the Mediated Agreement, that Tommy would retain his 25% interest in TMV Properties. The Mediated Agreement was then found to not be unconscionable and incorporated into the decree of dissolution. Therefore, pursuant to the Mediated Agreement, as incorporated into the decree of dissolution, any funds Tommy received by virtue of his ownership in TMV Properties were not marital property; the funds belonged exclusively to him. The trial court was correct in ordering Sonya to return the funds to Tommy.

D. Valuation of Businesses

Sonya next argues that the trial court erred by not ordering that the business valuations for Thompson & Chou and the Shepherdsville Family Health Clinic be updated; by not requiring Injury Rehabilitation Specialists of Louisville to be appraised; and by not ordering that Eagle Properties be appraised as a business, instead of in accordance with the real property it holds. Sonya contends that because of the trial court’s errors, she was unable to make an informed decision at mediation, but rather was forced to enter the agreement.

We note that the trial court *did* grant Sonya's motion to have the business valuations for Thompson & Chou and the Shepherdsville Family Health Clinic updated and ordered the parties to split any costs incurred in doing so equally. R. 411. For whatever reason, the parties chose not to have the business valuations updated. Instead, the parties valued all businesses in which they had an interest and divided those interests in the Mediated Agreement.

Sonya's argument that the trial court's orders concerning the appraisals caused her to be uninformed when entering the Mediated Agreement, and somehow forced her to enter the Mediated Agreement, are not properly before this court. Sonya has never before argued that Mediated Agreement was unconscionable and should be set aside. Contrary to Sonya's arguments, the trial court ordered updated valuations with the parties to split the costs. Sonya apparently knew that the valuations had not been updated when she entered into the Mediated Agreement. She could have moved to compel the updated evaluations at that time. Instead, she went forward with the mediation, entered into an agreement, and presented it to the trial court. The trial court then incorporated the agreement into the final decree. Sonya has never moved to have the agreement set aside. The trial court did not abuse its discretion with respect to the business valuations.

E. Motion to Reinstate Maintenance

Next, Sonya challenges the trial court's refusal to consider her motion requesting the court to "set maintenance." Sonya's motion was made following the trial court's denial of her original request for maintenance and her appeal of that determination. The trial court indicated that it would not consider the maintenance issue while the appeal was still pending. It explained: "The Court made a determination that maintenance was not warranted in this case and Petitioner has pursued her proper remedy by appealing the decision, and therefore, the Court will not consider the issue further."

On appeal, Sonya argues that the trial court erred when it refused to take up her motion to modify during the appeal. We disagree. The trial court originally determined that Sonya did not qualify for maintenance because her property and education/vocational skills enabled her to support herself adequately. Accordingly, it never reached the questions of amount and duration. Sonya cannot "modify" an award she never qualified for in the first instance. In order for the trial court to "modify" the award, it would have to revisit the same issues Sonya appealed. In other words, the trial court would have to determine that Sonya did qualify for an award. Having reviewed the record, we are convinced that Sonya failed to put forth an actual change in condition that would justify modification. Instead, her motion to modify was merely an attempt to reargue issues already decided by the trial court.

The trial court was not divested of jurisdiction to make a modification during the pendency of the appeal. This fact, however, does not mean the trial court was compelled to exercise its jurisdiction to rule on Sonya's motion. If a trial court determines that a motion to modify is nothing more than "an additional attack on maintenance and child support as originally granted, the trial court in its sound discretion may properly refuse to exercise jurisdiction during the pendency of an appeal of that same question." *Ogle v. Ogle*, 681 S.W.2d 921, 924 (Ky. App. 1984). Here, the trial properly determined that Sonya's motion to modify amounted to nothing more than an attempt to undo the trial court's original decision to deny maintenance. As such, it did not err when it refused to consider the motion during the pendency of the appeal.

III. CONCLUSION

In conclusion, we affirm the orders of the Jefferson Circuit Court as related to these appeals.

ALL CONCUR.

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