

RENDERED: OCTOBER 19, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2016-CA-000812-MR  
&  
NO. 2016-CA-000888-MR

THOMAS FOWLES

APPELLANT/CROSS-APPELLEE

v. APPEAL AND CROSS-APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE LISA O. BUSHELMAN, JUDGE  
ACTION NO. 03-CI-01715

LINDA MARIE FOWLES

APPELLEE/CROSS-APPELLANT

OPINION  
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

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

MAZE, JUDGE: This appeal arises from the Kenton Circuit Court entering a divorce decree and making findings of facts and conclusions of law *in re* the marriage of Thomas William Fowles and Linda Marie Fowles. Thomas contends that the trial court's division of property was in error and an abuse of discretion.

Linda cross-appeals, contending that the trial court erred in not including post-judgment interest on Thomas's financial settlement award. After a careful review of the record, we affirm in part, reverse in part, and remand.

### Background

Thomas William Fowles, Appellant and Cross-Appellee, and Linda Marie Fowles, Appellee and Cross-Appellant, were married on June 26, 1981. They lived together in Richmond, Kentucky. During their marriage in 1997, Thomas moved to Louisville to attend medical school at the University of Louisville. Linda stayed in Richmond with their minor children. Thomas and Linda continued to hold themselves out as a married couple. Thomas graduated from medical school in 2000. Thomas then began his residency in Northern Kentucky. It was anticipated that Linda and the kids might move to Northern Kentucky to join Thomas there. However, Thomas was involved in an extramarital affair and had plans to leave Linda, though he did not disclose these intentions to Linda.

On June 27, 2003, Thomas filed for dissolution of marriage. The trial court found that the parties separated in June of 2003. The divorce action remained pending for several years. During this time, Thomas spent thousands of dollars on his paramour and continued accruing marital assets. Finally, on September 30, 2011, the trial court bifurcated the case and entered a dissolution of

marriage to stop the accruing of alleged marital assets. Then, on March 25, 2016, the trial court entered findings of fact and conclusions of law identifying and dividing Thomas's and Linda's marital property. On May 6, 2016, the trial court entered an order denying in part and granting in part a motion to alter, amend, or vacate the March order. This appeal followed. Further facts will be developed as necessary to assist with the analysis.

### Standard of Review

Classifying property as marital or non-marital “involves an application of the statutory framework for equitable distribution of property upon divorce and therefore constitutes a question of law . . . .” *Holman v. Holman*, 84 S.W.3d 903, 905 (Ky. 2002). Accordingly, we review a trial court's rulings regarding the classification of marital property *de novo*. *Young v. Young*, 314 S.W.3d 306, 308 (Ky. App. 2010). Once classified, the division of marital property is within the sound discretion of the trial court. *McGregor v. McGregor*, 334 S.W.3d 113, 119 (Ky. App. 2011). “We review a trial court's determinations of value and division of marital assets for abuse of discretion.” *Young*, 314 S.W.3d at 308 (citing *Armstrong v. Armstrong*, 34 S.W.3d 83, 87 (Ky. App. 2000)).

Additionally, the amount and duration of the maintenance award are matters within the sound discretion of the trial court. *Gentry v. Gentry*, 798 S.W.2d 928, 937 (Ky. 1990). “As an appellate court . . . this Court is [not]

authorized to substitute its own judgment for that of the trial court on the weight of the evidence, where the trial court’s decision is supported by substantial evidence.” *Leveridge v. Leveridge*, 997 S.W.2d 1, 2 (Ky. 1999) (quoting *Combs v. Combs*, 787 S.W.2d 260, 262 (Ky. 1990)).

### Analysis

On appeal, Thomas contends that the trial court abused its discretion in awarding Linda \$300,695 as a portion of his income. He also contends that the trial court erred in awarding Linda \$50,375 as reimbursement for his improper use of marital funds. Third, Thomas argues that the trial court abused its discretion when it failed to account for encumbrances on the real property when dividing the property. Thomas also contends that the trial court’s division of the marital property constitutes an abuse of discretion. Lastly, Linda cross-appeals arguing that the trial court abused its discretion by not including post-judgment interest on the settlement award of \$470,511.70. We will discuss each issue in turn.

First, however, we must discuss the issue of preservation. Thomas’s counsel failed to “include a statement regarding issue preservation at the beginning of each argument.” *Ray v. Ashland Oil, Inc.*, 389 S.W.3d 140, 146 (Ky. App. 2012). CR<sup>1</sup> 76.12(4)(c)(iv) requires that “an attorney cite to the record where the claimed assignment of error was properly objected to or brought to the attention of

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<sup>1</sup> Kentucky Rules of Civil Procedure.

the trial judge. This amendment is designed to save the appellate court the time of canvassing the record in order to determine if the claimed error was properly preserved for appeal.” *Id.* (internal citations omitted). “[W]here an appellant fails to comply with CR 76.12(4)(c)(iv), a reviewing court need only undertake an overall review of the record for manifest injustice.” *Id.* at 147 (internal citations omitted). However, while we are permitted to review Thomas’s brief for manifest injustice, we will instead decide this case on the merits. We will not be as lenient in the future.

\$300,695

On appeal, Thomas first contends that the trial court abused its discretion in awarding Linda \$300,695 as credit for her value of contribution as a homemaker. We disagree but reverse and remand for further findings.

The Kentucky Supreme Court in *Travis v. Travis*, 59 S.W.3d 904, 909 (Ky. 2001) summarized the three-step process used by trial courts in dividing property. The Court explained that “(1) the trial court first characterizes each item of property as marital or nonmarital; (2) the trial court then assigns each party’s nonmarital property to that party; and (3) finally, the trial court equitably divides the marital property between the parties.” *Id.* (footnotes omitted). Marital property is “[a]ll property acquired by either spouse after the marriage and before a decree of legal separation[.]” *Id.* at 908. However, there are exceptions to this

general presumption. *Id.* See KRS 403.190. Additionally, when equitably dividing the property, the trial court may consider various factors, including the “[c]ontribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker.” *Id.*

Here, the trial court awarded Linda “25% of [Thomas’s] income from 2000, the year he obtained his medical degree until 2011, the date of bifurcation” totaling \$300,695. The trial court calculated this amount “using [Thomas’s] tax returns and social security statements . . . .” The trial court is correct that income is considered marital property. However, the trial court went back to 2000, the year Thomas graduated from medical school. But under *Brosick v. Brosick*, 974 S.W.2d 498, (Ky. App. 1998), the spouse alleging dissipation is required to present evidence showing that marital funds were expended for non-marital purpose. *Id.* at 502. Until such a showing is made, individuals are not generally required to account for income prior to separation. *Barriger v. Barriger*, 514 S.W.2d 114, 115 (Ky. 1974). Therefore, the finding should have been based on income earned from the date of separation in 2003 to dissolution of the marriage in 2011, unless there is evidence of dissipation of income during that period or evidence of expenditures exceeding reasonable expenses. We reverse and remand with instructions for additional findings of fact.

\$50,375

Next, Thomas contends that the trial court erred in awarding Linda \$50,375 as reimbursement for dissipated assets. We disagree.

“Dissipation occurs when ‘marital property is expended (1) during a period when there is a separation or dissolution impending; and (2) where there is a clear showing of intent to deprive one’s spouse of her proportionate share of the marital property.’” *Heskett v. Heskett*, 245 S.W.3d 222, 227 (Ky. App. 2008) (quoting *Brosick v. Brosick*, 974 S.W.2d 498, 500 (Ky. App. 1998)). Here, the trial court found that Thomas should pay Linda for the money and gifts he gave to his paramour “during the course of the marriage until September 30, 2011.” The court explained that the

spending was happening during a period of separation or impending dissolution, as [Thomas] and [Linda] were not living together and shortly thereafter a Petition for Dissolution was filed...[Thomas] used these marital funds to purchase vacations and gifts for his paramour, non-marital purposes, with the intent to eventually marry her . . . [d]uring this time he was contemplating and acting on the notion of divorce from his wife.

We find that the court’s findings were supported by substantial evidence and fit well within the trial court’s broad discretion. In *Brosick*, the Court explained that the party claiming dissipation has the initial burden of showing that there were funds or property in the possession of the other party that were not accounted for. *Id.* at 501-02. Once Linda met that burden, the burden shifted to Thomas to show

that the funds were actually spent for a marital purpose. *Id.* Here, it looks like Linda met that initial burden as Thomas made substantial gifts to his paramour both prior to and after separation. The court also found that Thomas failed to show that the gifts were made with non-marital funds or that the money was spent on a proper marital purpose. Additionally, the court, based on a CR 52.02 motion, amended its order and gave Thomas credit for the “difference between the parties’ retirement accounts (\$12,000), which were not equally divided between the parties so as to offset the dissipation of marital assets.” The amount was, therefore, reduced to \$38,375. We, therefore, affirm on this issue.

#### *Real Property Encumbrances*

Thomas also contends that the trial court abused its discretion by failing to account for the encumbrances on the real property when dividing it between the parties. This Court will not address this issue. Counsel did not specifically address this issue in their CR 52.02 motion for specific findings. There is no mention on the issue of lien encumbrances in the CR 52.02 motion. “It is a matter of fundamental law that the trial court should be given an opportunity to consider an issue, so an appellate court will not review an issue not previously raised in the trial court.” *Marksberry v. Chandler*, 126 S.W.3d 747, 753 (Ky. App. 2003).



Division of Marital Property

Thomas essentially contends that the court's allocation of property was an attempt to punish him and was therefore an abuse of discretion. Counsel, however, does not cite to any specific evidence in the record suggesting that the trial court's intention was to punish Thomas. The trial court clearly found no merit in this argument as the court did not address the issue in its Order reacting to the CR 52.02 motion. Also,

a party may not spend marital assets or funds for non-marital purposes, and then expect to receive an equal share from the diminished marital estate. The "fault" considered is not blame for the dissolution of the marriage. Rather, the court will deem the wrongfully dissipated assets to have been received by the offending party prior to the distribution.

*Brosick*, 974 S.W.2d at 500. We, therefore, affirm on this issue.

Cross-Appeal

On cross-appeal, Linda contends that the trial court abused its discretion by not including post-judgment interest on Linda's award of \$470,511.70. Counsel contends that while they did not file a motion to alter, amend or vacate on this issue, this issue is a plain error which can be corrected without formal preservation.

KRS 360.040(1)<sup>2</sup> states that “a judgment, including a judgment for prejudgment interest, shall bear six percent (6%) interest compounded annually from the date the judgment is entered. A judgment may be for the principal and accrued interest.” Under KRS 360.040, a trial court has the discretion to award interest at a rate less than six percent. *See Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 584 (Ky. 2009); *Morgan v. Scott*, 291 S.W.3d 622 (Ky. 2009); and *Hazel Enterprises, LLC v. Ray*, 510 S.W.3d 840, 843 (Ky. App. 2017). But given the statute’s express language requiring imposition of post-judgment interest, the trial court is required to make findings explaining its reason for declining to award interest at the statutory rate. If the judgment is merely silent on the issue, then post-judgment interest runs as a matter of law.

Here, the trial court did not deny imposition of interest. Instead, the court’s order was silent as to the imposition of interest. Therefore, the interest will run as a matter of law in accordance with the statute. There is nothing to reverse because the court did not deny imposition of interest. Therefore, we affirm.

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<sup>2</sup> The legislature changed the amount from 12% to 6% effective June 29, 2017. All interest from the date of the judgment to the effective date will be calculated at 12% and interest from the date of the effective date on will be calculated at 6%.

Conclusion

For the reasons stated herein, we both affirm and reverse determinations of the trial court and remand for further action in accordance with this opinion.

ALL CONCUR.

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