

RENDERED: SEPTEMBER 28, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000894-ME
AND
NO. 2017-CA-000912-ME

BRIAN WORTINGER

APPELLANT/CROSS-APPELLEE

v. APPEAL AND CROSS-APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 14-CI-01787

HEATHER WORTINGER (NOW DAVIS) APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * * * * *

BEFORE: DIXON, NICKELL, AND THOMPSON, JUDGES.

DIXON, JUDGE: In this dissolution of marriage action, Brian Wortinger appeals from the final judgment of the Hardin Circuit Court, contending the court erred in the division of marital property and by awarding attorney's fees to his ex-wife,

Heather Wortinger Davis. On cross-appeal, Heather contends the court erred in its allocation of marital debt, division of property, and by failing to award her a child support arrearage owed by Brian. After careful review, we affirm in part, reverse in part, and remand both the appeal and cross-appeal.

Brian and Heather were married in 1995, and two children were born during the marriage. Heather filed a petition to dissolve the marriage in October 2014. At the time of the final hearing, Heather was employed as a human resources manager, earning approximately \$102,300 per year, while Brian was a lieutenant colonel in the United States Army, earning an annual salary of \$123,540. In March 2015, over Brian's objection, the court granted Heather's motion to relocate from Ft. Knox to Brandenburg, Kentucky. As a result, Brian filed a petition for a writ of prohibition along with a motion for emergency intermediate relief in this Court to prevent the circuit court from enforcing its order. This Court ultimately denied Brian's motion and writ petition.¹

Thereafter, the circuit court entered a status quo order and ordered Brian to pay child support of \$1,308, effective April 8, 2015. Prior to the final hearing, Heather filed a motion to hold Brian in contempt for failing to pay child support, and she sought an order for Brian to pay her the accrued arrearage.

¹ *Wortinger v. Addington*, 2015-CA-000414-OA (Mar. 23, 2015) denying emergency intermediate relief, and *Wortinger v. Addington*, 2015-CA-000414-OA (May 12, 2015) (denying petition for writ of prohibition).

Heather also moved for attorney's fees, contending Brian prolonged the litigation and filed a frivolous petition in this Court. The trial court reserved ruling on the pending motions until it rendered its final judgment. The court held a final hearing on June 5, 2015, to address issues of custody and division of marital assets and debts. The court heard testimony from both parties regarding their marital property, which included a house in Virginia,² and a condominium timeshare in Las Vegas. The Virginia property was encumbered by a first mortgage and a second mortgage/home equity line of credit. Two months after the hearing, the parties negotiated a partial settlement agreement resolving issues relating to custody and visitation. On August 28, 2015, the court entered a decree of dissolution, which incorporated the terms of the partial settlement agreement and reserved ruling on the remaining contested issues. Pursuant to the previously entered status quo order, Brian continued paying the mortgage payments and the associated maintenance expenses for the house and timeshare. Approximately fifteen months later, in December 2016, the court rendered findings of fact and conclusions of law resolving the remaining issues between the parties. The court ordered the Virginia property to be sold, with the proceeds divided between the parties after allowing Brian a reimbursement of \$11,400. The court further ordered the timeshare to be sold, and the court assigned each party their own credit card

² Neither party lived in the Virginia house; rather, they used it as a rental property. The tenant's lease expired at the end of June 2015.

debt. The court awarded Heather \$12,000 in attorney's fees and denied her motion regarding contempt and child support arrearages. Both parties filed post-judgment motions to alter, amend, or vacate, which were denied by the court. This appeal and cross-appeal followed.

On appeal, we will not disturb the trial court's findings of fact unless they are clearly erroneous, bearing in mind that the lower court was in the best position to weigh the evidence and assess witness credibility. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). We review *de novo* the court's application of the law to the facts. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

Brian and Heather each argue the court erred in its division of the proceeds from the sale of the Virginia property. The court's order stated, in relevant part:

2. Non-marital property-Post-Decree: At the end of the trial of this matter the court advised the parties that it would likely restore to the Respondent as his property any payments he made post-decree to maintain their marital property until it was sold or distributed. The court is required by law to do so as the court may only divide between the parties' property acquired during the marriage. KRS 403.190(2).

Virginia Rental Property: The Virginia rental property (17 Windy Way) shall be immediately placed for sale. ... The net proceeds or losses from any sale shall be divided evenly between the parties at the time of closing of the sale of the property; however, the Respondent shall first be reimbursed \$11,400.00 which is an amount that represents approximately 30% of the amounts he has paid

for the mortgage, utilities, fees, and any repairs were incurred after the date of separation but prior to the divorce decree being entered. The Court concludes that some portion of the home equity line of credit was used to preserve the marital asset, but the Court does not believe that the Petitioner derived benefit from the full amounts of monies that the Respondent acquired from the home equity line of credit during this time. During this time the Respondent was incurring other expenses for which only he derived benefits from and the Court concludes that the equitable division of this debt considering the evidence presented regarding the party who derived the most likely benefit from this debt KRS 403.190(1)(a).

The court likewise ordered the timeshare to be sold, with the proceeds divided evenly between the parties. The court determined that Brian should be responsible for paying all expenses related to the property from the time of separation until it was sold.

The division of the Virginia property is disputed by both parties; for clarity, we will address Heather's argument first.³ She contends the court abused its discretion by awarding Brian a reimbursement of \$11,400 from the sale of the house because the indebtedness on the home equity line of credit was a post-separation, nonmarital debt attributable to Brian.

We review the court's findings of fact regarding the division of debt for an abuse of discretion. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001). The debt associated with the home equity line of credit was a contested

³ Brian did not respond to the arguments raised in Heather's cross-appeal.

issue. Heather testified she had no access to the account, and she asserted Brian unilaterally withdrew funds on the line of credit after the parties separated. Brian introduced a billing statement that reflected a balance of \$40,200 on the home equity line of credit; however, Brian contended the debt was entirely marital and used to preserve the marital property. The court ordered Brian to be reimbursed \$11,400 before the proceeds of the sale were divided between the parties; however, the court failed to make specific findings as to the marital or nonmarital character of the line of credit debt. It is well-settled that a court must determine whether a debt was marital or nonmarital before the debt can be assigned to a party. *Id.* Based upon the court's failure to make specific findings whether the line of credit constituted marital or nonmarital debt, we reverse the court's division of the Virginia property awarding \$11,400 to Brian and remand this issue to the trial court for additional findings.

We now address Brian's arguments on direct appeal regarding the real property. He contends he was entitled to reimbursement for his payment of the mortgage and property-maintenance costs after the date of separation as his non-marital property. He also asserts the court erred by failing to order reimbursement for his post-decree mortgage payments.

Under KRS 403.190(2), property acquired by either spouse after marriage is considered marital property unless it meets one of five exceptions:

- (a) Property acquired by gift, bequest, devise, or descent during the marriage . . . ;
- (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.

Here, Brian’s payments for the mortgage and property-maintenance obligations did not meet any of these exceptions. The law is well-settled that an interest in property acquired after a physical separation, but prior to the entry of a decree of dissolution, is marital property. *Stallings v. Stallings*, 606 S.W.2d 163, 164 (Ky. 1980). Accordingly, Brian’s argument that he acquired a non-marital interest in the property after the date of separation is without merit.⁴

⁴ Brian alternatively argues the court abused its discretion by failing to order Heather to reimburse him for one-half of his post-separation expenses for property maintenance at the Virginia house and the timeshare. He did not cite any authority to support this contention; consequently, we decline to address it. *See Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005) (“Our courts have established that an alleged error may be deemed waived where an appellant fails to cite any authority in support of the issues and arguments advanced on appeal.”).

Brian next contends the court erred by failing to order reimbursement for the mortgage payments he made after the dissolution decree was entered on August 28, 2015. We agree.

Where one party makes post-decree mortgage payments, he is entitled to reimbursement for the amount those payments reduced the principal indebtedness when the property is sold. *Gibson v. Gibson*, 597 S.W.2d 622, 623 (Ky. App. 1980). In *Drake v. Drake*, 809 S.W.2d 710, 712 (Ky. App. 1991), this Court explained:

Once the parties are divorced, the payments which reduce the indebtedness on the mortgage increase the husband's equity in the residence, not the marital equity. Thus, it would be unfair not to offset the mortgage reduction paid by the husband.

Here, Brian made the mortgage payments on the Virginia property each month after the divorce decree was entered on August 28, 2015; consequently, the court erred by failing to award him a credit for the amount his payments reduced the mortgage debt. Having already determined the court's division of the Virginia property must be reversed, on remand the trial court must also make additional findings addressing Brian's equity in the house after August 28, 2015.

Finally, Brian asserts the court abused its discretion by ordering him to pay \$12,000 toward Heather's attorney's fees.

Heather filed a motion for attorney's fees in the amount of \$16,185.

Heather alleged she was entitled to attorney's fees because Brian was in contempt of the status quo order, he had unnecessarily prolonged the litigation, and he had filed a frivolous writ petition in this Court. In its final judgment, the court stated:

The parties' divorce was extremely caustic and protracted. The Respondent appealed an earlier decision from this court that although his legal right to do this court finds was a frivolous appeal and added substantial costs to the divorce proceedings for the Petitioner. Therefore, taking into consideration the Petitioner incurred attorney fees to pursue a meritless appeal and also considering the differences in their incomes the court shall award to the Petitioner the sum of \$12,000 in attorney's fees

“KRS 403.220 authorizes a trial court to order one party to a divorce action to pay a ‘reasonable amount’ for the attorney's fees of the other party, but only if there exists a disparity in the relative financial resources of the parties in favor of the payor.” *Neidlinger*, 52 S.W.3d at 519. It is acceptable for a court to consider litigation misconduct in awarding fees pursuant to KRS 403.220; however, the main purpose of the statute “is simply to ensure that the proceedings do not impose an unreasonable or an unfair burden on the party with fewer financial resources.” *Rumpel v. Rumpel*, 438 S.W.3d 354, 365 (Ky. 2014).

Brian contends the trial court was without authority to base its attorney fee award, at least in part, on his decision to file an original action in this Court. We agree. The authority to grant relief from frivolous appeals to this Court

is vested with this Court; consequently, the circuit court lacked the authority to sanction Brian for what it believed to be a frivolous appellate action. CR 73.02(4). We believe the court abused its discretion by basing the attorney's fee award, in part, on Brian's decision to file an original action in this Court. We reverse the award of attorney's fees and remand this issue for additional findings of fact consistent with KRS 403.220.

We now address the remaining issues in Heather's cross-appeal. First, she contends the court erred by allocating to her approximately \$30,000 in marital credit card debt. Heather contends the assignment of the debt to her was unfair because the court failed to consider she was the primary caretaker of the children and Brian's income exceeded hers by \$20,000.

We review the court's findings of fact regarding the division of debt for an abuse of discretion. *Neidlinger*, 52 S.W.3d at 523. Where debts are incurred after separation, the court may consider whether the debt was "for the sole benefit of the party by whom it was incurred" and assign the debt to that party alone. *Id.* at 522. Further, there is no "presumption that debts must be divided equally or in the same proportions as the marital property." *Id.* at 523.

Upon considering all the evidence, the court noted Heather and Brian had lived apart since April 2013, when Brian was transferred from Ft. Knox to a military base in Washington State. The court found Heather earned a substantial

salary during that time, and her income was supplemented by Brian's salary. The court concluded Heather's credit card debt was incurred for her own benefit while living separately from Brian. Although Heather believes the court's determination was unfair, the trial court was free to exercise its discretion in allocating the debt, and the court was not obligated to divide the debt equally. *Id.* at 523. After reviewing the evidence, we are not persuaded the court abused its discretion in its assignment of debt to Heather.

Finally, Heather contends the court erred by denying her motion for child support arrearages of \$5,232. Heather asserted at trial, and Brian admitted, he had not paid child support following the entry of the April 2015 order. "In this jurisdiction, it is settled that support payments, once accrued, are fixed and may not be modified by the trial court[.]" *Wolfe v. Wolfe*, 433 S.W.3d 368, 369 (Ky. App. 2014). Here, Heather asserted a claim for child support arrearages, and we conclude the trial court erred by denying her motion without addressing the merits. Each missed payment became a liquidated debt that the court had no authority to modify. *Pursley v. Pursley*, 144 S.W.3d 820, 828 (Ky. 2004). The decision denying Heather's motion for child support arrearages is reversed, and the matter is remanded for further proceedings to determine if a child support arrearage exists, and if so, what amount.

For the foregoing reasons, the final judgment of the Hardin Circuit Court in Appeal No. 2017-CA-000894-ME and Cross-Appeal No. 2017-CA-000912-ME is affirmed in part, reversed in part and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
APPELLEE:

William D. Tingley
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BRIEF FOR APPELLEE/CROSS-
APPELLANT:

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