RENDERED: DECEMBER 7, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000476-ME

KENNETH JASON MONIN APPELLANT

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE SAMUEL TODD SPALDING, CHIEF JUDGE
ACTION NO. 16-CI-00026

SUNNIE DAE MONIN APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, J. LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: This is an appeal from the findings of fact and conclusions of law of the Marion Circuit Court in a dissolution of marriage action.

Kenneth Jason Monin (Ken) and Sunnie Dae Monin were married in 2008, and their son was born in 2010. Although the exact date is disputed, Ken and Sunnie separated in late January or early February 2016. On December 1,

2017, a decree of dissolution was entered, with findings of fact and conclusions of law entered on January 10, 2018.

Ken appeals from the findings of fact and conclusions of law arguing the circuit court erred as follows: (1) not awarding him child support; (2) assigning an arbitrary figure of $5,000 as the marital portion of certain tools; (3) not accurately calculating Ken's non-marital interest in the marital residence; (4) arbitrarily finding Ken's non-marital interest in property located at 146 E. Main St. based on a 2003 appraisal; (5) finding $40,000 Sunnie withdrew from marital accounts to pay her taxes were non-marital; and (6) not equitably dividing their marital assets. We affirm because the circuit court did not abuse its discretion.

When the parties married in 2008, Ken owned a construction company and Sunnie was a nurse. They earned similar incomes until July 2012, when Sunnie began attending graduate school in Nashville to obtain her master's degree to be a nurse anesthetist. Ken and son remained in Lebanon, Kentucky, while Sunnie lived in Nashville four days a week until October 2014, when she returned to Lebanon. While Sunnie lived in Nashville, on most weekends, she either rejoined Ken and son in Lebanon or they traveled to Nashville.

Sunnie did not work while attending school. She used money previously earned as a nurse and student loans to pay for living expenses and tuition and Ken also provided support.

In December 2014, Sunnie finished her master's degree. In January 2015, she began working as a nurse anesthetist, with a starting annual salary of $120,000. In July 2015, Sunnie began a new anesthetist job earning $150,000 her first year, with the understanding that she would earn $170,000 her second year and $190,000 thereafter.

In its findings of fact and conclusions of law, the circuit court awarded Ken the bulk of the marital property including the marital home and four other properties (three of which had homes), three vehicles, items associated with his construction company (including a dump truck, tractor, bush hog and tools), three bank accounts and his construction company account. Sunnie was awarded two properties (one with a home and one with only land), her 401K, a vehicle and assigned her student loan debt of $78,000. Ken was ordered to make an equalization payment to Sunnie so that she would receive equal value for the marital property he was awarded.

During the pendency of this action, Ken and Sunnie, who both continued to reside in Lebanon, shared joint custody and exercised equal timesharing of son, first by their own agreement and, then later, through two different agreed orders. No child support was ordered during the pendency of the action. In its findings of fact and conclusions of law, the circuit court awarded Ken

and Sunnie joint custody and equal timesharing of son. The circuit court did not award either party child support.

Ken filed a motion to alter or amend, which was denied except for an alteration in the marital valuation of one item as it was jointly owned with Ken's father, which slightly changed the total Ken would have to pay Sunnie.

Ken argues the circuit court erred by not awarding him child support. We disagree.

Before the parties separated, son began attending St. Augustine Catholic School during the 2015-2016 school year for preschool when he was three. Son attended the following year when he was four and continued to attend for kindergarten.

For child support purposes, the circuit court determined Ken had a gross annual income of $70,000 a year and Sunnie had a gross annual income of $160,000. Sunnie also provided health insurance for son, paying $250 a month. The circuit court declined to award Ken child support, finding as follows:

> [Sunnie] has paid [son's] tuition at St. Augustine Elementary School in the 2017-2018 academic year [son's kindergarten year]. The Court finds [Sunnie] should continue to pay this educational expense. Provided [son] is enrolled in St. Augustine and [Sunnie] is paying this expense, neither party should be required to pay child support to the other. In the event [son] were to leave St. Augustine and this private school tuition was not being paid, the Court will reconsider [Ken's] request for child support. The Court finds each party has ample

> financial resources to provide for [son] while in the custody of each without any financial contribution from the other.

Ken argues the circuit court abused its discretion in not awarding him child support without making a finding of an appropriate extraordinary reason within Kentucky Revised Statutes (KRS) 403.211, the child support guidelines. Those guidelines "serve as a rebuttable presumption for the establishment or modification of the amount of child support. Courts may deviate from the guidelines only upon making a specific finding that application of the guidelines would be unjust or inappropriate." *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001). Ken argues that Sunnie's payment of parochial school tuition is not an extraordinary reason for deviation from the guidelines under KRS 403.211(3)(b). He argues the guidelines require that he receive child support of $327 a month using the circuit court's calculations and that even if tuition could offset the child support due him, the amount of tuition, $2,111 per year or $167.58 per month, was not equivalent to what was owed.[1] Ken argues there was no agreement between the parties regarding paying for son's school tuition.

[1] Ken argues he was entitled to the difference between the amount of child support Sunnie would owe Ken if Ken was the primary custodian, which would be $776, was subtracted from the amount he would owe Sunnie if she were the primary custodian, which would be $449. He also argued that the circuit court miscalculated his income to his detriment, but this ruling is supported by the evidence.

Sunnie argues that Ken is precluded from challenging the denial of child support because he failed to bring to the circuit court's attention its failure to make specific findings of fact on an essential issue in his motion to alter or amend as required by Kentucky Rules of Civil Procedure 52.04. We agree with Ken that the circuit court's findings in supporting the deviation were adequate for review.

Sunnie also argues that the circuit court could properly determine that her being solely responsible for son's parochial school tuition qualifies under KRS 403.211(3)(g) as a "similar factor of an extraordinary nature specifically identified by the court." She argues it was proper for the circuit court not to award child support given the parties' incomes, health insurance cost and educational expenses of son.

In Kentucky, "trial courts have been given broad discretion in considering a parent's assets and setting correspondingly appropriate child support. A reviewing court should defer to the lower court's discretion in child support matters whenever possible." *Downing*, 45 S.W.3d at 454 (footnote citation omitted). We will not disturb the trial court's decision "[a]s long as the trial court's discretion comports with the guidelines, or any deviation is adequately justified in writing[.]" *Id*.

KRS 403.211(3) and (4) provide:

> (3) A written finding or specific finding on the record that the application of the guidelines would be unjust or

> inappropriate in a particular case shall be sufficient to rebut the presumption and allow for an appropriate adjustment of the guideline award if based upon one (1) or more of the following criteria:
>
> > (a) A child's extraordinary medical or dental needs;
> >
> > (b) A child's extraordinary educational, job training, or special needs;
> >
> > (c) Either parent's own extraordinary needs, such as medical expenses;
> >
> > (d) The independent financial resources, if any, of the child or children;
> >
> > (e) Combined monthly adjusted parental gross income in excess of the Kentucky child support guidelines;
> >
> > (f) The parents of the child, having demonstrated knowledge of the amount of child support established by the Kentucky child support guidelines, have agreed to child support different from the guideline amount. However, no such agreement shall be the basis of any deviation if public assistance is being paid on behalf of a child under the provisions of Part D of Title IV of the Federal Social Security Act; and
> >
> > (g) Any similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate.
>
> (4) "Extraordinary" as used in this section shall be determined by the court in its discretion.

By permitting the trial court to deviate from the guidelines, the child support guidelines "provide a measure of flexibility[.]" *Plattner v. Plattner*, 228

S.W.3d 577, 579 (Ky.App. 2007). As the Court observed in *Plattner*, "[t]he period of time during which the children reside with each parent may be considered in determining child support, and a relatively equal division of physical custody may constitute valid grounds for deviating from the guidelines." *Id*.

In *Dudgeon v. Dudgeon*, 318 S.W.3d 106, 110-11 (Ky.App. 2010), the Court held that "nearly equal physical time with the children, nearly equal income, and nearly equal expenditures for child-related expenses . . . are of 'an extraordinary nature' rendering application of the guidelines inappropriate and unjust under KRS 403.211(3)(g)." However, when only the equal timesharing factor is present, a circuit court *may* deviate from the guidelines, pursuant to appropriate findings but is not required to do so. *Maclean v. Middleton*, 419 S.W.3d 755, 775 (Ky.App. 2014); *Penner v. Penner*, 411 S.W.3d 775, 783 (Ky.App. 2013); *Plattner* 228 S.W.3d at 579. Even with equal timesharing, child support *may* still be appropriately awarded pursuant to the guidelines where one parent earns significantly more than the other and the parent awarded child support "simply does not earn the money necessary to support the children in a lifestyle similar to that which they experienced when the marriage was intact." *Penner*, 411 S.W.3d at 784.

As these cases establish, a court properly acts within its discretion and may deviate from the guidelines based upon equal time sharing where parents will

still have adequate resources to support their children. However, the circuit court did not base its decision to deny child support to Ken solely on those factors. It also considered that Sunnie paid son's private school tuition. In its findings of fact and conclusions of law, it noted that the child support issue would be reconsidered if son does not attend private school.

It appears that Ken fully supports son's attending St. Augustine. Ken does not argue that son should attend public school. Instead, Ken wants to both be awarded guideline child support and for Sunnie to continue to pay son's tuition.

Absent proof that a child has special needs that cannot be served in the public school, private school tuition cannot constitute "extraordinary educational needs" qualifying for a deviation pursuant to KRS 403.211(3)(b). *See Miller v. Miller*, 459 S.W.2d 81, 83-84 (Ky. 1970); *Smith v. Smith*, 845 S.W.2d 25, 26 (Ky.App. 1992). However, parents may enter into an agreement to provide for more support than that required by the guidelines, which may include the provision of school tuition. *See Pursley v. Pursley*, 144 S.W.3d 820, 825–26 (Ky. 2004) (explaining a settlement agreement in which the obligor agreed to pay for the children's undergraduate and graduate education could be enforced). A deviation from the guidelines to fund a private or parochial school education can be justified under KRS 403.211(3)(f) or (g), based on the history of the parents' intentions

about their children's education. *Giacalone v. Giacalone*, 876 S.W.2d 616, 620 (Ky.App. 1994).

In *Giacalone*, the parties' written settlement agreement provided the basis for a deviation from the guidelines to fund tuition. *Id*. at 619. However, in unpublished opinions, this Court has upheld deviations for tuition "implied by prior conduct of the parties" such as where the parties have "a long standing-agreement" to send their children to private school. *West v. Kinsella*, No. 2012-CA-001515-ME, 2013 WL 3234269, 2 (Ky.App. 2013) (unpublished).[2]

The circuit court acted within its discretion when it deviated from the guidelines and did not award child support to Ken. Both parents had equal timesharing of son and the court determined that each parent had adequate resources to support son. Additionally, there was evidence that Ken and Sunnie both wanted son to continue to attend St. Augustine based on his attendance for two and one-half school years at the time of the final order. Under these

[2] Pursuant to Kentucky Rules of Civil Procedure 76.28(4)(c), we may properly consider this and other unpublished decisions as there are no published opinions that adequately address these issues. *See e.g. Zink v. Zink*, No. 2010-CA-002172-MR, 2013 WL 845256, 17–18 (Ky.App. 2013) (unpublished); *Pippin v. Pippin*, No. 2005-CA-002087-MR, 2007 WL 2460713, 8 (Ky.App. 2007) (unpublished); *Hibberd v. Cecil*, No. 2001-CA-000420-MR, 2003 WL 1786443, 2 (Ky.App. 2003) (unpublished) (all upholding deviations from the guidelines based on the parties' previous conduct, with tuition either being part of child support or ordered to be paid by one of the parties). *But see Nurre v. Nurre*, No. 2010-CA-002151-MR, 2013 WL 5676981, 2 (Ky.App. 2013) (unpublished) (expressing preference for private education not enough to infer agreement to provide one).

circumstances, the circuit court properly considered the award of equal timesharing, the sufficient resources both parents had and the requirement that Sunnie pay son's tuition in finding that a deviation was appropriate. We are satisfied that the circuit court made sufficient findings to justify its decision to deviate from the guidelines as authorized by KRS 403.211(3)(f) and (g).

The remaining issues concern the classification of property and disposition of the marital property. In reviewing such issues in a dissolution action, we are governed by KRS 403.190.

> Under KRS 403.190, a trial court utilizes a three-step process to divide the parties' property: (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. An item of property will often consist of both nonmarital and marital components, and when this occurs, a trial court must determine the parties' separate nonmarital and marital shares or interests in the property on the basis of the evidence before the court. . . . Kentucky courts have typically applied the "source of funds" rule to characterize property or to determine parties' nonmarital and marital interests in such property. The "source of funds rule" simply means that the character of the property, *i.e.*, whether it is marital, nonmarital, or both, is determined by the source of the funds used to acquire the property.

Sexton v. Sexton, 125 S.W.3d 258, 264-65 (Ky. 2004) (internal quotation marks and citation footnotes omitted).

> The presumption in Kentucky is that all property acquired during the course of the marriage is marital property, unless the property can be shown to have originated in one of the excepted ways outlined in KRS 403.190(2). A party claiming that property acquired during the marriage is other than marital property, bears the burden of proof.

Terwilliger v. Terwilliger, 64 S.W.3d 816, 820 (Ky. 2002).

Pursuant to KRS 403.190(1), marital property is to be divided in "just proportions" considering the enumerated factors listed in the statute. The statute does not mandate an equal division. *Lawson v. Lawson*, 228 S.W.3d 18, 21 (Ky.App. 2007). "What constitutes a just division lies within the sound discretion of the family court and will not be disturbed absent an abuse of discretion." *Hempel v. Hempel*, 380 S.W.3d 549, 553 (Ky.App. 2012).

Ken argues the circuit court erred in arbitrarily assigning a marital value to his tools of $5,000. He argues the only evidence on valuing the tools was his testimony that they are worth $7,100, and $3,550 was a fair marital portion of the tools based on when they were acquired.

The circuit court properly acted within its discretion in valuing, classifying and dividing the marital portion of the tools. Ken was not able to establish which items predated the marriage and accurately value them and Sunnie did not agree with Ken's marital valuation of the tools. Under KRS 403.190(2)-(3), the circuit court had to presume that items acquired during the marriage and

not adequately traced were marital and then assign a value. The circuit court properly acted within its discretion in determining the marital value of the tools was higher than Ken asserted.

Ken argues the circuit court erred in the calculation of the nonmarital portion of the marital residence purchased with funds from the sale of property located at 150 East Main, Lebanon, Kentucky, which Ken owned prior to the marriage. While the circuit court acknowledged Ken's testimony that his only post-marital improvements to 150 East Main were the replacement of six windows, and additions of siding, painting, a tub, toilet and sink, which Ken valued at $1,815, the circuit court found the additions after marriage increased the value of the house and lot at 150 East Main Street by $6,000. It then applied the *Brandenburg* formula in determining the marital interest in the marital residence before assigning the marital residence to Ken.

In response to Ken's motion to alter, amend or vacate, the circuit court clarified its reasoning in regard to the marital value of the improvements to 150 East Main Street. It observed that "out-of-pocket expenses to increase the value of real estate is not a true indicator of increase of fair market value that any repairs might generate" and gave the example that installing landscaping for $1,000 might increase the value of real estate by a significantly greater amount.

The circuit court's ruling was in accord with *Travis v. Travis*, 59 S.W.3d 904, 911 n.17 (Ky. 2001), which held that the trial court in a dissolution action could properly consider a spouse's contribution through "sweat equity" as a marital contribution:

> While monetary investments can increase the value of real property, clearly non-monetary contributions can do the same. If property's value increases as a result of one's labor and the mortgage against the property remains the same, it naturally follows that the equity in the property has increased. If, as was the case here, a party to a marriage increases the value of the property by his or her labors, then the increase in the value of the property resulting from this effort is acquired during the marriage and, thus, marital property, regardless of whether the property itself is otherwise characterized as one spouse's nonmarital property.

Ken's labor in installing the improvements had marital value. The circuit court did not abuse its discretion by making its finding that after being installed by Ken, these improvements reasonably increase the home's value by $6,000.

Ken argues the circuit court erred in its calculation of the marital portion of property located at 146 East Main Street, Lebanon, Kentucky, which he also owned prior to the marriage. The circuit court used a 2003 appraisal to determine the premarital value of 146 East Main Street rather than assigning a midpoint value between the 2003 appraisal and the 2012 appraisal based on the parties marrying in 2008.

The circuit court accepted Ken's evidence that the appraised value of 146 East Main was $55,000 on September 18, 2003, and $82,400 on December 26, 2012, was accurate. However, before determining 146 East Main should be valued at $55,000 at the time of the parties' marriage, the circuit court noted the testimony by Ken and his father that numerous renovations were made to it after the parties' marriage.

Based on that evidence, the circuit court did not err in making the factual finding that the renovations rather than appreciation through the passage of time raised 146 East Main's value. Simply averaging the appraisal values rather than considering the improvements would not have adequately accounted for this evidence and the circuit court properly acted in its discretion in making a finding as to which factor was responsible for the increase in value.

Ken argues the circuit court erred by considering the $40,000 Sunnie withdrew from marital accounts to pay her taxes (which resulted in a substantial refund and overpayment) to be non-marital. Ken argues this money was from marital accounts and not earned by Sunnie post-separation and that even if she withdrew the money eight days after their separation, she could not have earned it post-separation.[3]

[3] Ken argues that they separated on the same day that she withdrew this money from their accounts, February 3, 2016, while Sunnie claims they separated on January 24, 2016.

Ken misinterprets the circuit court's ruling. The circuit court ruled Sunnie's 2016 tax refund was her separate property. The circuit court made no specific ruling on the nature of the money paid to satisfy her taxes or the additional overpayment of $18,098 applied to her 2017 tax-year liability. The circuit court further found Ken received income from the parties' rental properties for almost two years between their separation and the final division of their property and the circuit court did not require him to reimburse Sunnie for any of that income.

In response to Ken's motion to alter, amend or vacate, the circuit court denied Ken's request for a recalculation of the equity regarding the $40,000 Sunnie withdrew to pay her taxes, explaining that during the tax years 2015 and 2016, Sunnie made quarterly payments of $1,800 for state income taxes and $10,000 for federal income taxes out of her tax account and this account had a balance of $1,014.52 as of July 2017. The court again noted that Ken kept all rental income and construction income after the separation.

While Ken is correct that Sunnie could not "earn" the tax money from her separate income before it was withdrawn, this is beside the point. Sunnie's nurse anesthetist salary was part of the marital money possessed by Ken and Sunnie from which the $40,000 was withdrawn. The first month of Sunnie's 2016 tax obligation was incurred prior to the parties' separation and, thus, was marital in nature.

Neither party has explained how much rental income Ken earned in the almost two years between their separation and the final order. However, it does not matter if this amount equaled the amount of marital money Sunnie expended for her taxes to pay the tax burden on her post-separation earnings. In dividing property in just proportions, that division does not have to be equal. There was a reasonable justification for not assigning any of this money to Ken where he received rental income from their jointly owned property during the period of their separation. By having the bulk of the rental property assigned to him, Ken will continue to receive said income. We conclude the circuit court did not abuse its discretion.

Ken argues Sunnie should have received a lower proportion of the marital property because she did not have income while obtaining her degree and he supported their family and took care of son. He points out that in addition to her student loans, it cost $54,450 to support her during this time and, because the parties separated shortly after Sunnie acquired her master's degree, there was no marital benefit to that degree.

The circuit court disagreed with Ken's reasoning, explaining as follows:

> [Ken] argues [Sunnie] was gone for over two years while furthering her education in Nashville and did not make any payments on the marital residence or rental properties. He believes she is not entitled to

reimbursement for one-half of any equity accumulated in the rental properties or marital residence during this two-year period because of her filing this divorce action one year after she obtained her post-graduate degree.

[Ken] testified he expended $37,893 to further [Sunnie's] education and she only withdrew $9,247.00 from a savings account. [Ken] introduced as Exhibit 10 Account #3759, an account he claims [Sunnie] utilized, reflecting expenditures or withdrawals of $54,450.00 from July 2012, until February, 2015. [Ken] further testified he paid $8094.32 on credit card expenditures while she was in school.

[Ken's] testimony was largely contradicted by his own expert, tax preparer and CPA Michael Jarboe. Mr. Jarboe testified that in Account #3759 between July 2012, and February 2015, [Ken] deposited $21,016.36, [Sunnie] deposited $28,168.28 and student loans on behalf of [Sunnie] were deposited of $21,513.00.

The Court further notes that during the two years [Sunnie] was furthering her education very little equity would have been accumulated in the marital residence or rental properties because the parties have existing mortgages on all assets. Further, [Sunnie] reimbursed [Ken] $10,000 for her education after receiving a $20,000.00 bonus from Taylor County Hospital. Furthermore, [Sunnie], as noted previously, has received no rental income in the two years since the parties separated and has student loans of $78,000.00 she will have to repay without reimbursement by [Ken]. [Ken] also conceded on cross-examination that "all transfers between the accounts was marital money." The Court finds that no reimbursement is appropriate or warranted for expenditures incurred by [Sunnie] while furthering her education.

There was evidence, including Ken's expert testimony, that while marital money was used to support Sunnie while she obtained her degree, this money was derived both from Sunnie's and Ken's earnings. Although the circuit court could have considered the marital investment made toward Sunnie's degree as well as Ken's increased parenting responsibilities during this time, it was not required to award Ken more than fifty percent of the marital property. *See Schmitz v. Schmitz*, 801 S.W.2d 333, 336 (Ky.App. 1990) ("Although the professional degree cannot be viewed as marital property under Kentucky law, it can be considered as an asset of the marriage in looking at the parties' respective contributions when the court is dividing marital property and allocating responsibility for marital debts.") The circuit court properly considered the relevant factors, including that Ken's economic circumstances would not be quite as favorable as Sunnie's, pursuant to KRS 403.190(1)(d), in deciding to assign the rental properties as well as the marital house to Ken.[4] Ken greatly benefitted from this decision as it provided him with an ongoing stream of income. Although Ken was required to make an equalization payment, this result was not unjust.

[4] Although Sunnie was assigned one rental property, 214 Forrest Street, it appears she was intending to make it her home rather than using it as rental property as six months earlier she had requested an order permitting her to live there during the pendency of the action. Sunnie, unlike Ken, had to rent housing from a third party during the pendency of the dissolution action.

Accordingly, we affirm the findings of fact and order of the Marion Circuit Court regarding child support and the distribution of marital property.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Michael E. Coen Bardstown, Kentucky	Joseph R. Stewart Lebanon, Kentucky