

RENDERED: MARCH 29, 2019; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2017-CA-000069-MR  
AND  
NO. 2017-CA-000128-MR

DALE URBAN

APPELLANT/CROSS-APPELLEE

v. APPEAL AND CROSS-APPEAL FROM MEADE CIRCUIT COURT  
HONORABLE BRUCE T. BUTLER, JUDGE  
ACTION NO. 14-CI-00192

MARY KATHLEEN WIMPEE

APPELLEE/CROSS-APPELLANT

OPINION  
VACATING AND REMANDING APPEAL NO. 2017-CA-000069-MR  
AND  
AFFIRMING CROSS-APPEAL NO. 2017-CA-000128-MR

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

TAYLOR, JUDGE: Dale Urban brings Appeal No. 2017-CA-000069-MR from an October 28, 2016, Order of the Meade Circuit Court, dividing marital property, assigning marital debt, and awarding maintenance. Mary Kathleen Wimpee brings Cross-Appeal No. 2017-CA-000128-MR from the same order. Urban's motion to

alter, amend or vacate was denied by order entered December 1, 2016. For the reasons stated, we vacate and remand Appeal No. 2017-CA-000069-MR and affirm Cross-Appeal No. 2017-CA-000128-MR.

### **I. Background**

Urban and Wimpee lived together from 1998 until their marriage on September 27, 2013. Shortly thereafter the parties separated and Urban filed a divorce petition on June 17, 2014. The parties were divorced by a “limited decree” of dissolution on September 22, 2014. Issues pertaining to property division, marital debts, and maintenance were referred to the court’s Domestic Relations Commissioner (DRC).

The DRC conducted a hearing on Wimpee’s motion for temporary maintenance in August 2014<sup>1</sup> and conducted a final hearing on all pending issues in March 2015. In November 2015, the DRC filed a short report which in relevant part recommended Wimpee be granted a 61-acre tract of land (Greer Road property), as her nonmarital property, presumably as a gift from Urban prior to the marriage and that Urban be responsible for payment of maintenance of \$1,256.66 per month for twelve months. The report did not address marital debts. As to maintenance, the DRC’s discussion went as follows:

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<sup>1</sup> The Domestic Relations Commissioner (DRC) did not issue any written ruling on Mary Kathleen Wimpee’s motion for temporary maintenance. Rather, the DRC denied the motion orally at the final hearing in March of 2015, which Wimpee has not challenged on appeal.

During the parties' marriage, [Wimpee] was injured and is unable to work full[-]time. [Wimpee] is currently receiving short[-]term disability payments. During the time of the marriage, both parties had substantial incomes. After considering the factors set forth in KRS [Kentucky Revised Statutes] 403.200, the Commissioner recommends [Urban] pay [Wimpee] \$1256.66 per month, for one year (the length of the parties' marriage).

Urban filed lengthy objections to the DRC's report. In January 2016, the trial court issued an order remanding the case back to the DRC for additional findings. The DRC's final report was filed on May 9, 2016. In relevant part, the DRC summarily concluded that "[a]fter reviewing the testimony of the parties, the Commissioner recommends that [Urban] be responsible for ½ of [Wimpee's] medical bills as they were incurred during the marriage."<sup>2</sup> Additionally, the DRC reaffirmed her previous recommendation that the Greer Road property was a gift to Wimpee and thus was her nonmarital property. As for maintenance, the DRC merely adopted her initial determination that Urban pay Wimpee \$1,256.66 for one year without further explanation.

Urban again filed detailed objections with the circuit court, arguing in relevant part that the DRC erred by: a) ordering him to pay one-half of Wimpee's

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<sup>2</sup> Unfortunately, neither the DRC nor the trial court specified what debts were affected by this ruling. At the final hearing, Wimpee testified that her medical debts were about \$5,000 and the medical debts were incurred by Wimpee as a result of serious injuries sustained in a four-wheeler accident shortly after the marriage. The parties seem to agree these are the only marital debts at issue.

medical debts simply because they were incurred during the marriage; b) awarding Wimpee the Greer Road property as her nonmarital property; and c) failing to make sufficient findings regarding the maintenance recommendation. Wimpee did not file any objections germane to this appeal.

By order entered October 28, 2016, the trial court sustained Urban's objection regarding the Greer Road property, concluding it should be awarded to Urban as his nonmarital property. As for Wimpee's medical debts, the court ordered Urban to be responsible for one-half of the debts as they were incurred during the marriage. The court did not address the maintenance issue, presumably adopting the DRC's recommendation.<sup>3</sup>

Urban then filed a motion to alter, amend or vacate pursuant to Kentucky Rules of Civil Procedure (CR) 59, specifically arguing the lack of findings by the court regarding maintenance and medical debts. In response, Wimpee requested \$900 in attorney's fees incurred for responding to the CR 59 motion. The trial court "overruled" Urban's CR 59 motion by order entered December 1, 2016. The order did not address Wimpee's claim for attorney fees. This appeal and cross-appeal followed. Each party raises two issues in their respective appeals, which we shall address in the order presented.

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<sup>3</sup> The court summarily overruled all objections not specifically discussed in its order, which included Dale Urban's objections to the maintenance award.

## **II. APPEAL NO. 2017-CA-000069-MR**

On direct appeal, Urban raises two issues: 1) the trial court erred in ordering Urban to pay one-half of Wimpee’s medical bills incurred during the marriage; and 2) the trial court erred in ordering Urban to pay Wimpee maintenance for one year. We briefly address each issue.

### **A. Division of Marital Debt**

The only debts at issue in this appeal are medical bills incurred by Wimpee during the marriage. The trial court nor the DRC identified the debts or the actual amount thereof.

In Kentucky, there is no presumption that a debt incurred during marriage is marital. *Allison v. Allison*, 246 S.W.3d 898, 907 (Ky. App. 2008). Rather, the allocation of debts that arise during a marriage is based upon many factors, such as extent of participation in acquiring the debt, receipt of benefits of the debt, and the “economic circumstances of the parties” to repay the debt. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001), *overruled on other grounds by Smith v. McGill*, 556 S.W.3d 552 (Ky. 2018). And, the burden of proof regarding whether a particular debt is marital falls upon the party that incurred the debt. *Allison*, 246 S.W.3d at 907. Our standard of review of the lower court’s decision regarding the allocation of marital debts is abuse of discretion. *Allison*, 246 S.W.3d at 908.

As noted, the only marital debts at issue are medical bills incurred by Wimpee during the marriage. The exact amount of the debt was not established in either the DRC's report or the court's final order. Additionally, neither the court nor DRC made any findings on why the debt was being allocated equally to the parties based upon the *Neidlinger* factors. Accordingly, we believe the trial court abused its discretion in ordering Urban to pay one-half of Wimpee's medical bills without the proper legal analysis as set forth herein, including why the debt is marital, how much debt exists, and the legal basis for allocation of the debt to the respective parties. Upon remand, we direct the trial court to follow the *Neidlinger* analysis and make appropriate findings thereon.

### **B. Maintenance**

Urban's final argument is that the trial court also failed to make sufficient legal findings to support the maintenance award. Again, we must agree.

In a dissolution proceeding, the decision whether to award maintenance falls within the sound discretion of the trial court which may only be disturbed upon an abuse of discretion. *Brenzel v. Brenzel*, 244 S.W.3d 121, 126 (Ky. App. 2008). In determining whether the award of maintenance is proper, a court must follow Kentucky Revised Statutes (KRS) 403.200. *Shafizadeh v. Shafizadeh*, 444 S.W.3d 437, 446 (Ky. App. 2012). That statute provides in relevant part as follows:

(1) In a proceeding for dissolution of marriage . . . the court may grant a maintenance order for either spouse *only if it finds that the spouse seeking maintenance*:

(a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and

(b) Is unable to support himself through appropriate employment . . . .

(2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and *after considering all relevant factors including*:

(a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently . . . ;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(c) The standard of living established during the marriage;

(d) The duration of the marriage;

(e) The age, and the physical and emotional condition of the spouse seeking maintenance; and

(f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

KRS 403.200 (emphasis added). Thus, KRS 403.200 “requires the [trial] court to engage in a two-step process prior to granting a party maintenance.” *Shafizadeh*, 444 S.W.3d at 446. First, the court “must determine whether the party seeking

maintenance is entitled to it by ascertaining whether that party is able to meet his or her reasonable needs.” *Id.* If the court concludes maintenance is warranted, then it must “establish the amount and duration of the maintenance award by considering several factors set forth in KRS 403.200(2).” *Id.*

A trial court does not have to make explicit findings as to each statutory factor. *Id.* However, the court must make adequate findings based upon the statutory factors or its decision will be vacated. *See, e.g., Wood v. Wood*, 720 S.W.2d 934 (Ky. App. 1986).

In this case, the trial court made virtually no findings. The trial court’s final order does not address the maintenance issue. Unfortunately, the DRC’s second report merely adopts her original report, which itself cursorily breezed through the issue by only stating that she had “consider[ed] the factors set forth in KRS 403.200” without any analysis. We do not doubt that the DRC considered the relevant factors, but a court speaks through its written orders and her report contains no discussion to support her decision making process. *See Kindred Nursing Centers Ltd. P’ship v. Sloan*, 329 S.W.3d 347, 349 (Ky. App. 2010).

This Court has specifically held that “mere lip service [to the KRS 403.200 factors] is insufficient.” *Shafizadeh*, 444 S.W.3d at 446. Because that is precisely what happened here, we vacate the maintenance award and remand for

the trial court to “issue additional findings of fact, following the language of KRS 403.200, in determining whether an award of maintenance . . . is warranted” and, if so, in what amount and for what duration. *See Wood*, 720 S.W.2d at 936; *see also Shafizadeh*, 444 S.W.3d at 446.

### **III. Cross-Appeal No. 2017-CA-000128-MR**

In her cross-appeal, Wimpee also raises two issues: 1) the trial court erred by sustaining Urban’s objection to the DRC’s findings and assigning him the Greer Road property as his separate nonmarital property; and 2) the trial court erred by not awarding Wimpee attorney fees in responding to Urban’s CR 59 motion.

In Kentucky, the allocation and division of property in a divorce proceeding is governed by KRS 403.190. Pursuant to KRS 403.190, the family court must engage in a three-step process when addressing property issues in a divorce. *Sexton v. Sexton*, 125 S.W.3d 258, 264-65 (Ky. 2004). First, the family court shall characterize each item of property as either marital or nonmarital; second, the court shall assign each party their nonmarital property; and third, the court must equitably divide the marital property. *Id.* There exists a presumption that property acquired by either party during the marriage is marital property; conversely, property acquired before the marriage is generally nonmarital property.

KRS 403.190(3). The third step regarding the division of marital property is not at issue in this appeal.

Upon dividing property in accordance with KRS 403.190, we then review whether the trial court's findings of fact are clearly erroneous pursuant to CR 52.01. A finding of fact not supported by substantial evidence is deemed clearly erroneous. *Rearden v. Rearden*, 296 S.W.3d 438, 441 (Ky. App. 2009). We further review *de novo* the family court's legal conclusions on whether the property is determined to be marital or nonmarital. *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006).

In this case, the trial court made independent findings of fact based upon the evidence presented before the DRC. The trial court's key findings were: the Greer Road property was purchased prior to the marriage and placed in both parties' names as joint tenants;<sup>4</sup> Urban used \$35,000 of his nonmarital funds for the down payment to purchase the property; the promissory note to pay the remaining balance was signed only by Urban; and Urban made all payments thereafter including the property taxes. Each of those findings is supported by the record on appeal, particularly Urban's testimony at the March 2015 hearing before the DRC.

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<sup>4</sup> The mere fact that the deed listed the parties as owning the property jointly is not determinative. *See, e.g., Hunter v. Hunter*, 127 S.W.3d 656, 660 (Ky.App. 2003) ("Whether title is held individually or in some form of co-ownership, such as joint tenancy, tenancy in common, or tenancy by the entirety is not determinative in classifying property as marital or nonmarital.").

In addition, the record supports the trial court's conclusion that Wimpee failed to introduce sufficient evidence to support her argument that Urban either gave or promised to give the Greer Road property to her. Additionally, Urban testified that he did not intend to give the property to Wimpee.

The trial court's findings are supported by the evidence and thus are not clearly erroneous. Specifically, the evidence established that Urban purchased the property before the marriage with his nonmarital funds and Wimpee was not liable for the note payment for the remaining balance owed. Also, Wimpee did not contribute funds to reduce the note indebtedness for the property. Accordingly, we affirm the trial court's decision to classify the property as nonmarital and assign the same to Urban pursuant to KRS 403.190.

#### **B. Attorney's Fees**

Finally, Wimpee contends the trial court erred by denying her request for \$900 in attorney's fees in responding to Urban's CR 59 motion. Under KRS 403.220, a trial court may order one party to a divorce action to pay a reasonable amount of attorney's fees of the other party after considering the financial resources of the parties. In this action, Wimpee has not sought an award for attorney's fees on appeal, except for responding to the CR 59 motion. That fee request was set out in the last paragraph of Wimpee's objection to the CR 59 motion. Wimpee did not file a specific motion seeking attorney's fees from the

trial court and thus, we have serious doubt that the issue was properly presented to the trial court.<sup>5</sup> Notwithstanding, based on our ruling in this appeal, Urban should have prevailed on his CR 59 motion, at least to the extent of the court's lack of findings on the maintenance and marital debt issues. Thus, there was no legal basis to award Wimpee attorney fees for responding to the CR 59 motion. Accordingly, we find no abuse of discretion in the denial of Wimpee's request for attorney's fees in responding to the CR 59 motion.

#### **IV. Conclusion**

For the foregoing reasons, Appeal No. 2017-CA-000069-MR is vacated and remanded for proceedings consistent with this opinion and Cross-Appeal No. 2017-CA-000128-MR is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Darren A. Sipes  
Brandenburg, Kentucky

BRIEF FOR APPELLEE:

Kenton R. Smith  
Brandenburg, Kentucky

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<sup>5</sup> The trial court's final order entered on October 28, 2016, did not award attorney's fees to either party. Likewise, the DCR's final report did not address attorney's fees as being an issue in the case.