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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000169-ME

KAREN BRAMLETT — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE ANGELA J. JOHNSON, JUDGE
ACTION NO. 14-CI-503259

ROY BRAMLETT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, JONES AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Karen Bramlett, *pro se*, appeals from the findings of fact and conclusions of law by the Jefferson Family Court in this dissolution action regarding child support, the division of marital property and debts, maintenance and attorney fees.

Karen argues that the family court erred by: (1) ordering Karen to pay child support to Roy after imputing income to her; (2) ordering the marital home at Elk River Drive sold and the proceeds divided to pay marital debt rather than awarding the home to Karen because Roy was allowed to keep personal property equal to his share in the equity of the home; (3) ordering Karen to reimburse Roy for half of the marital funds expended in purchasing the parties' one-third share of the property on Manslick Road after awarding the property to Karen, rather than ordering them to split the proceeds of their share after the home sold; (4) ordering the equal division of their retirement accounts without crediting Karen for the diminished value in Karen's retirement accounts which she paid toward their joint debts while Roy was able to retain his bonuses; (5) not ordering Roy to file joint amended tax returns and awarding Karen half of the proceeds; (6) not crediting Karen for money Roy hid; (7) not ordering Roy to pay the debt on thirteen credit cards; (8) not ordering Roy to pay the marital debt for Karen's hysterectomy; (9) not ordering Roy to pay the maintenance fees on the timeshare awarded to Karen; (10) not awarding Karen the amount of maintenance she requested for the duration she requested because she is unable to work; and (11) not granting Karen funds to reimburse her for attorney fees.

Karen and Roy were married on June 2, 1989, and have one child, H.B. (daughter), born in March 2001. Karen is also the legal custodian of A.S.

(great-nephew), born in 2005 and who is mentally disabled. Roy does not have any legal obligation to support great-nephew. Karen receives social security benefits and child support for great-nephew.

Karen and Roy separated on June 30, 2014. Shortly after their separation, daughter began living with Roy, in part because she was having difficulty living with Karen and great-nephew.

Karen filed for dissolution on October 21, 2014, and shortly thereafter retained counsel. Marital funds were advanced to aid her in hiring new counsel as her first counsel withdrew shortly before the dissolution trial was scheduled to begin. Karen was represented by this new counsel until her notice of appeal was filed.

On March 18, 2016, following the trial, a limited decree of dissolution of marriage was entered. On December 14, 2016, the findings of fact and conclusions of law were entered.

On December 27, 2016, Roy filed a motion to alter, amend or vacate. On January 13, 2017, Karen filed a *pro se* notice of appeal from the family court's December 14, 2016, findings of fact and conclusions of law, which was held in abeyance until the family court resolved Roy's motion. On January 9, 2017, the family court heard the matter and received Karen's written *pro se* response, which the family court treated as a motion to alter, amend or vacate. On May 4, 2017, the

family court entered an order resolving the issues raised by Roy's motion and Karen's response.

We summarize the family court's award made in its December 14, 2016 findings of fact and conclusions of law as amended by its May 4, 2017 order. We discuss the family court's specific findings separately where relevant to each issue discussed.

The family court granted the parties joint custody of daughter, with Roy serving as her primary residential custodian and Karen having timesharing. It imputed full-time minimum wage income to Karen and combined that with the maintenance she was awarded in calculating guideline child support due from Karen.

The family court determined that the marital property should be divided equally as follows: (1) the marital home at Elk River Drive to be sold with the proceeds divided equally (with Karen, because she was residing there, to pay the mortgage and taxes until the property sold); (2) Karen awarded the one-third share of the parties' ownership interest in the Manslick Road property, with Karen to reimburse Roy for half of the marital money they spent to acquire this interest; (3) the marital mobile home located on Roy's individually owned Harned Locust Hill Road property to be appraised and its valued divided equally with either Roy paying Karen half of any equity or the mobile home to be sold with the proceeds

split equally; (4) the timeshare assigned to Karen as she was the only party requesting it; (5) an equal division of the marital portions of both parties' retirement accounts as of the date of the decree through a Qualified Domestic Relations Order (QDRO); (6) an equal division of their joint bank accounts; (7) an equal division of their tax refunds (with Roy to either file a joint amended return or provide Karen with half of his refund); and (8) Roy and Karen to retain the vehicles currently in their possession.

As to the marital debts, Karen and Roy were each assigned half of the $15,605 owed on the BB&T revolving credit, Barclay card, BB&T credit card, two Macy's credit cards and a Discover card, to be paid from the sale of the marital residence. The family court determined Karen was individually responsible for the other credit cards she opened and her outstanding medical bills.

The family court awarded Karen rehabilitative maintenance but denied her request for attorney fees.

Before we consider the issues raised on appeal, we note why we cannot consider much of the evidence that Karen relies upon in arguing for reversal of the family court's decision. In Karen's response to Roy's motion to alter, amend or vacate, Karen attempted to introduce evidence that was not before the family court at trial but that could have been presented at that time. On appeal, as

attachments to her appellate brief, Karen submits evidence that could have been presented at trial, but apparently was not.

As to the evidence Karen presented to the trial court in her response to Roy's motion to alter, amend or vacate, even if her response was properly considered under Kentucky Rules of Civil Procedure (CR) 59.05, this rule does not permit her to introduce evidence after trial. "A party cannot invoke [CR 59.05] to raise arguments and introduce evidence that could and should have been presented during the proceedings before entry of the judgment." *Hopkins v. Ratliff*, 957 S.W.2d 300, 301 (Ky.App. 1997) (quoting 7 Kurt A. Philipps, Jr., *Kentucky Practice*, CR 59.05, cmt. 6 (5th ed.1995)). Instead, if there is newly discovered evidence, a CR 60.02 motion should be brought. *Id.* at 301-02.

Similarly, Karen cannot properly introduce evidence for the first time on appeal. "We will not consider evidence the circuit court had no opportunity to examine." *Kindred Nursing Centers Ltd. P'ship v. Leffew*, 398 S.W.3d 463, 468 n.5 (Ky.App. 2013). *See Stuber v. Snyder's Comm.*, 261 Ky. 338, 87 S.W.2d 614, 617-18 (1935). Consistent with this case law, CR 76.12 prohibits the inclusion in

appellate briefs of any evidence that was not part of the record below[1] and we must refrain from considering such extraneous material on appeal. *Baker v. Jones*, 199 S.W.3d 749, 753 (Ky.App. 2006).

Pursuant to a final judgment in a dissolution action, we review a family court's decisions regarding child support, the division of assets and marital debt, maintenance, and attorney fees for abuse of discretion. *See Smith v. McGill*, 556 S.W.3d 552, 556 (Ky. 2018) (dissolution attorney fees); *Duffy v. Duffy*, 540 S.W.3d 821, 826 (Ky.App. 2018) (child support, maintenance and the division of assets); *McGregor v. McGregor*, 334 S.W.3d 113, 119 (Ky.App. 2011) (marital property division and marital debt). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

We review the findings of fact underpinning such decisions only to determine whether they are clearly erroneous. *Stipp v. St. Charles*, 291 S.W.3d 720, 723 (Ky.App. 2009). We will not substitute our judgment for that of the family court so long as the family court's findings of facts are supported by

[1] CR 76.12(4)(c)(vii), which concerns the appendix to appellate briefs, states: "The index shall set forth where the documents may be found in the record" and clarifies that "materials and documents not included in the record shall not be introduced or used as exhibits in support of briefs." *Id.* CR 76.12(4)(d)(v) states the index contained in the appendix to appellee's briefs "shall set forth where the documents may be found in the record." Pursuant to CR 76.12(8)(a), it is appropriate to strike the exhibits in Karen's appellate brief that were not included in the record. *Godman v. City of Fort Wright*, 234 S.W.3d 362, 367 (Ky.App. 2007).

substantial evidence. *Combs v. Combs*, 787 S.W.2d 260, 262 (Ky. 1990). We review conclusions of law *de novo*. *Stipp*, 291 S.W.3d at 723.

Karen argues the family court should not have ordered her to pay any child support because she is unable to work due to a disability. Although the family court considered Karen's testimony that she could not work due to various health issues and did not believe she would be able to work in the foreseeable future, it noted credibility problems with her claim. These included: (1) Karen did not present medical records or witnesses to support her claim; (2) Karen testified she was caring for her great-nephew, her physical disabilities did not prevent her from traveling with friends and family, and she was able to mow the lawn and perform other household chores; and (3) Roy presented recent videotape of Karen performing a back flip from a diving board. The family court determined that "[a]lthough [Karen] claims to suffer from various physical ailments and PTSD, she seems healthy and able to properly care for [daughter]."

In determining the child support Karen should pay, the family court considered Karen's past work history as an adjuster earning $20,000 per year and as a phlebotomist. The family court found a phlebotomist could currently earn between $2,080 and $2,981 per month.

The family court determined it could take Karen time to obtain a job earning as much or more than a phlebotomist after her protracted time not working,

imputed her with full-time minimum wage and considered her imputed income plus receipt of maintenance of $600 a month in determining that her monthly gross income would be $1,856.67.[2] Based on Roy's income of $6,083 minus maintenance and the cost of daughter's health insurance, it determined Karen's share of daughter's support would be $284.12 per month.

For Karen to be wholly exempt from paying any child support, the family court would need to deviate from her calculated table amount by finding it unjust or inappropriate and go below the bottom table amount of not less than sixty dollars per month. *See generally Commonwealth, Cabinet for Health & Family Servs. v. Ivy*, 353 S.W.3d 324, 328-32 and n.4 (Ky. 2011). We agree that based on the evidence and the family court's factual findings, a deviation in Karen's child support obligation would not be appropriate and there would be no justification for wholly excluding Karen from paying child support.

Besides her own testimony, Karen presented no evidence to the family court before or during the dissolution trial that she is permanently disabled. While Karen did attach medical records to her affidavit in support of a motion for a continuance and for attorney fees heard on December 21, 2015, these records established at best that Karen needed to temporarily be off work and did not

[2] The family court noted Karen receives a social security check for great-nephew's support in the amount of $733 per month, child support in the amount of $299 and receives food stamps but did not consider these amounts as part of her gross income.

establish any disability lasting until trial or longer. The progress notes from one provider stated that Karen was "histrionic."

While Karen attached documentation from medical providers in support of her claim of permanent disability to her appellate brief, we cannot consider such evidence. If Karen believes she now has evidence she is permanently disabled, her recourse is to seek a modification in her future child support obligation with the family court.[3] *See* Kentucky Revised Statutes (KRS) 403.213.

There was substantial evidence to support the family court's decision that at the time of trial, Karen was able to work, and we will not disturb its factual finding under these circumstances.

Child support is calculated based on both parents' adjusted gross income. KRS 403.212(3). Pursuant to KRS 403.212(2)(d), the family court can impute income to Karen for child support purposes based on her being voluntarily unemployed. The family court made an appropriate factual finding that based on Karen's previous work history, she should be able to earn at least minimum wage. Once minimum wage income was imputed to Karen and the amount of

[3] We note, however, that any future modification will have limited impact as daughter will have her eighteenth birthday in March 2019 and "provisions for the support of [daughter] shall be terminated by emancipation of [daughter] unless [daughter] is a high school student when [s]he reaches the age of eighteen[.]" KRS 403.213(3).

maintenance she would receive was determined, it was simply a matter of a math calculation to determine her guideline child support obligation.

Next, we consider Karen's arguments that the family court abused its discretion in the distribution of the marital property. After it is determined what property is marital, the family court "must equitably divide the parties' marital property in just proportions." *Smith v. Smith*, 235 S.W.3d 1, 5 (Ky.App. 2006). "Just proportions" does not mandate an equal division of property. *Id.* at 6.

In determining how the marital property should be divided, the family court found both Karen and Roy contributed to the marriage and they were married for twenty-five years. It then proceeded to divide the marital property equally.

Karen argues the family court erred in ordering the marital home sold instead of awarding it to her as her sole asset because the personal property Roy retained was worth more than the personal property she was awarded and equaled the equity he was awarded in the sale and division of the marital home. We disagree that the family court erred.

The parties had substantial debt and the marital home was their largest asset aside from their retirement accounts. The home was also in somewhat poor condition and would require a substantial investment to repair. It was logical to determine this asset should be sold under these circumstances and Karen would be able to find other more appropriate living arrangements given the proceeds she

would receive from its sale, the assets awarded to her and her income after she resumed working. We cannot credit Karen's estimate as to the value of the personal property Roy retained because, as the family court stated in its order on the parties' motions to vacate, "[Karen's] argument that [Roy] possesses assets equal to his portion of the equity in the home is not supported by any evidence or testimony presented at trial." Given the evidence before the family court at the time of trial, personal assets with no known value were divided fairly based on who used them. The family court did not abuse its discretion in ordering the house sold and the proceeds divided to pay marital debt.

Karen argues the family court should have ordered the parties' retirement accounts be divided equally only after she was reimbursed by Roy for the diminished value of her retirement account which occurred during the pendency of the dissolution when she had to use this money to support herself, pay credit card bills and pay the mortgage on the marital home. She argues it was unfair that she had to spend these funds when Roy was able to retain his bonuses. In finding that Karen was not permanently disabled, the family court could properly find that she could have supported herself by working rather than just spending retirement assets. Additionally, the money Karen expended on credit card debt and mortgage payments was marital money being paid on marital debt. The family court specifically found both parties acquired the credit card debt, and

we will not disturb this finding which was supported by substantial evidence. Karen does not identify any evidence in the record showing Roy retained his bonuses rather than spending them to support daughter.[4] Karen is unable to show the family court abused its discretion in dividing their remaining retirement assets equally at the time of their dissolution.

The family court also did not err in declining to order Roy to file joint amended tax returns and give Karen half the refund. The family court ordered Roy to either file amended returns in which each party would receive half of the refund or to provide Karen with half of his refund. While Karen may have received more if Roy refiled his tax returns as joint returns, it was not inequitable for the family court to not order Roy to refile his tax returns.

Karen argues the family court erred by not crediting her for money Roy hid. However, again, Karen does not show where there is any evidence in the record at trial that Roy hid money. At this juncture, her attempt to show he did is inappropriate.

Karen argues the family court erred by not ordering Roy to pay the outstanding debt on all thirteen of the parties' credit cards. The family court

[4] It appears Karen never paid child support for daughter during the pendency of the dissolution action even though she was ordered to do so. Roy had to request escrowed funds to pay necessary repairs on the mobile home in which he and daughter were residing. Karen's claim that she should be credited for items she bought for daughter by receiving a larger portion of the marital assets is without merit.

appropriately determined the debt owed on the credit cards specified was marital debt and it was equitable to divide it equally between Roy and Karen. The family court ruled Karen was individually responsible on the remaining credit card debt because she incurred it.

As discussed in *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 522-23 (Ky. 2001) (internal citations omitted), *overruled on other grounds by Smith v. McGill*, 556 S.W.3d 552 (Ky. 2018):

> There is no statutory authority for assigning debts in an action for dissolution of marriage. . . . Nor is there a statutory presumption as to whether debts incurred during the marriage are marital or nonmarital in nature. . . .
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> . . .
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> [Instead,] [d]ebts incurred during the marriage are traditionally assigned on the basis of such factors as receipt of benefits and extent of participation; . . . whether the debt was necessary to provide for the maintenance and support of the family . . . [and] the economic circumstances of the parties bearing on their respective abilities to assume the indebtedness.

We conclude there was no abuse of discretion where the family court assigned the credit card debt based on its factual findings of who owed the debt.

Karen argues the family court erred in requiring her to pay the debt incurred during the marriage for her hysterectomy. The family court assigned Karen's medical bills as her specific debt. Karen has not identified anywhere in the record that her hysterectomy debt was specifically raised as an issue of an

outstanding marital debt which needed to be divided. There is evidence that Karen had potential medical bills from a car accident which occurred after the parties separated in which she was seeking a settlement, so it was uncertain whether she would have to pay those bills. There was also evidence that Karen was seeking medical treatment that was perhaps unnecessary.

As the hysterectomy bill was to treat Karen and benefited her and there is no evidence as to whether this surgery was required or elective, the family court had no obligation to determine this was a marital debt which needed to be allocated between the parties. It is proper for the family court to assign each party's individual debt to that party. Additionally, Karen failed to raise any error in this regard during her response to the motion to alter, amend or vacate.

Karen argues the family court erred in making her responsible for maintenance fees on the timeshare. As Karen was the party who requested the timeshare be awarded to her as an asset and is retaining it for her own use, it was appropriate that she be made responsible for the maintenance fees.

Karen's argues that in awarding her the parties' one-third share in the Manslick Road property, the family court erred in ordering her to pay Roy $7,000 to reimburse him for half of the marital funds they expended in purchasing their share of the property, rather than ordering them to split the proceeds of their share after the home sold. The Manslick Road property was originally owned by

Karen's mother, but her children decided to help her financially by purchasing it from her and allowing her to reside there rent-free during her lifetime; Karen and her two siblings each purchased a one-third share of the property.

Karen's argument is based on evidence submitted at trial that Roy's and Karen's one-third share in the property could be subject to a deduction because they paid less for their one-third share than the other siblings did. At trial, Karen submitted affidavits from her siblings that it was everyone's understanding that Roy's and Karen's one-third interest in this property was encumbered by a responsibility to first discount the difference in the value they paid, $14,000, compared to the amount her siblings paid for their one-third shares which was $30,000 each, from any proceeds realized after an eventual sale. This meant that Roy and Karen would have to first pay her siblings $16,000 from Roy's and Karen's one-third share of the proceeds, meaning that they might have little actual equity in the property.

Karen argues the family court's order that she had to pay Roy for his half of their share was inequitable because it turned out to be a poor investment. She explains that after the trial her mother died, the property was sold, and she did not realize anything from her one-third share of the property after accounting for the amount she needed to pay back to her siblings and Roy.

While Karen did present evidence that she and Roy owed her siblings money on the one-third share of this property, it appears the family court did not determine the existence of such a debt and Karen failed to raise this issue in her response to the motion to alter, amend or vacate. Additionally, it was uncertain whether Karen would eventually profit from her retention of this share beyond the amount ostensibly owed to Karen's siblings and the money originally paid to purchase it. At the time of the dissolution, the property was to be retained during Karen's mother's lifetime which was an indefinite period. If Karen's mother lived for many more years, the property could have appreciated in value and resulted in a net profit to Karen even after accounting for any deduction due her family members.

The family court could not predict the future. Karen's solution would have potentially kept Roy from realizing any benefit from this marital asset for many years while he also had debts to pay and daughter to support. While the way this asset was divided may not seem fair to Karen now, it was equitable under the circumstances that existed at trial.

Karen argues the family court erred in only awarding her $600 a month of maintenance for two years rather than the $1,409 per month she sought for thirteen years based on her claim that she is unable to work. The family court did not err in failing to award Karen additional maintenance.

The maintenance the family court awarded Karen was appropriate for rehabilitative purposes.[5] The family court acknowledged Karen's claim of physical disability but noted it lacked documentation. The family court then found Karen had marketable skills, could acquire a job within a reasonable amount of time and could reasonably be expected to earn at least minimum wage when initially resuming work, in determining the amount and duration of maintenance awarded to her.[6]

As discussed above, we will not disturb the family court's findings that Karen is not permanently disabled, was able to work and was voluntarily unemployed. It is implicit in the statutory language of KRS 403.200(1)(b) and (2) "that a court may impute income to a voluntarily unemployed or underemployed spouse to determine both the spouse's entitlement to maintenance and the amount and duration of maintenance." *McGregor*, 334 S.W.3d at 117. Because the family court did not clearly err in imputing income to Karen, it could not abuse its discretion by awarding maintenance based on the amount imputed to her. *Id.* at 119. We will not disturb the family court's determination that the limited

[5] The family court found that Karen lacked sufficient property to provide for her reasonable needs given that her award of over $100,000 from her share of the marital retirement accounts would not immediately be available and she had not worked for several years

[6] The evidence could have also supported a finding imputing a higher income than minimum wage to Karen based on her work history. Instead, however, the family court made use of her past work history primarily to determine that her maintenance should be of limited duration and for rehabilitative purposes because Karen could be expected to eventually earn a similar amount to what her previous work history demonstrated she was capable of earning.

maintenance awarded was appropriate during Karen's initial foray back into the work force and nothing further was required.

Karen's final argument is that the family court erred in not granting her funds to reimburse her for $7,600 in attorney fees. Pursuant to KRS 403.220: "The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees[.]"

While KRS 403.220 allows the family court to consider whether Karen should be awarded attorney fees based on the financial resources of the parties, *Smith*, 556 S.W.3d at 555-56, pursuant to its statutory language, the family court enjoys a great deal of discretion in determining whether to award attorney fees after considering the financial resources of both parties, *Hollingsworth v. Hollingsworth*, 798 S.W.2d 145, 148 (Ky.App. 1990). The family court is not required to make specific findings on the parties' financial resources before determining whether one party should pay the other party's attorney fees. *Howard v. Howard*, 336 S.W.3d 433, 448 (Ky. 2011). Based on the family court's division of property, earlier award of attorney fees to Karen and its ruling that Karen was able to work, there was no abuse in discretion by the family court in denying Karen's request for additional attorney fees.

Accordingly, we affirm the judgment of the Jefferson Family Court in this dissolution action.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Karen Bramlett, *pro se* Louisville, Kentucky	Katherine A. Ford Louisville, Kentucky