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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001642-MR

JANET HERBENER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE PAULA SHERLOCK, JUDGE
ACTION NO. 16-CI-501480

MARC HERBENER

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GOODWINE, LAMBERT, AND MAZE, JUDGES.

LAMBERT, JUDGE: In this dissolution action, Janet Herbener appeals from the orders of the Jefferson Family Court dividing real and personal property, dividing her retirement benefits, awarding attorney's fees to her former husband, Marc Herbener, and finding her in contempt. Finding no error or abuse of discretion, we affirm.

Janet and Marc were married in Louisville, Kentucky, on November 23, 2001. They separated in 2015, and Janet filed a petition to dissolve the marriage on May 12, 2016. She requested that the court equitably divide the parties' marital property and debts. In his response, Marc requested that the court enforce the terms of the parties' prenuptial agreement and distribute the marital property as agreed upon by the parties prior to the marriage. The prenuptial agreement, signed by both parties and notarized on November 21, 2001, stated as follows:

PRENUPTIAL AGREEMENT

THIS AGREEMENT, made this nineteenth day of November 2001 is between Janet L. Gunderson and Marc P. Herbener

1. **PURPOSE.** The parties expect to be married in the near future. Each has separate property, the nature and extent of which is fully disclosed in the statements of assets and liabilities [i]n exhibits 1 and 2 attached to this agreement. Janet L. Gunderson hereby claims to own assets with a net value of at least sixty thousand dollars (\$60,000.00) on this date, and Marc P. Herbener hereby claims to own assets with a net value of at least nine hundred thousand dollars (\$900,000.00) on this date. The parties are setting forth in this Agreement their respective rights in and to all property of either owned at the date of their marriage and in and to all property that may be acquired by either or both of them after their marriage. They are also setting forth their rights regarding spousal support of maintenance.

2. **EFFECT OF AGREEMENT.** This Agreement shall take effect only upon the solemnization of the marriage between the parties. Thereafter, each of the parties shall separately retain all rights in the property he or she now owns, including all appreciation, as well as property and income acquired separately in the future (“Separate Property”), and each of them shall have the unrestricted right to dispose of such Separate Property, free and clear of any claim that may be made by the other by reason of their marriage and with the same effect as if no marriage had been consummated between them. Separate Property shall include substitutions and exchanges for such property now in existence, and income from property acquired separately hereafter, and any proceeds there from, and from any income derived from such property, and any property purchased from the proceeds or income from such property. Separate property shall also include gifts or inheritances one party receives from a third party.
3. **DISPOSITION OF PROPERTY.** In the event either party should desire to sell, encumber, convey or otherwise dispose of or realize upon his or her Separate Property or any part or parts thereof, the other will, upon request, join in such deeds, bills of sale, mortgages, renunciations or survivorship or other rights created by law or otherwise, or other instruments, as the party desiring to sell, encumber, convey or otherwise dispose or realize upon my request and as may be necessary and appropriate.
4. **JOINT PROPERTY, ETC.** This Agreement does not restrict, prohibit or condition any conveyance or transfer by the parties, or either of them alone, of the Separate Property of either party into tenancy in common, joint tenancy, tenancy by the entireties or any other form of concurrent and/or undivided estate or ownership between the parties, or the acquisition of any property in any such form of ownership by the

parties. Contributions to joint expenses and joint property made in relation to income of the respective parties shall be considered proportionally and, in the event of distribution, shall be distributed proportionally. The incidents and attributes of ownership and other rights of the parties with respect to any property so conveyed, transferred or acquired shall be determined under State law and shall not be governed by or otherwise determined with reference to this Agreement.

5. SEPARATE PROPERTY. The parties agree that the rights and obligations created by this Agreement have monetary value to each of the parties and each of the parties agrees to make no claim to the Separate Property of the other party, either during the joint lives of the parties hereto or thereafter, and, if a party is not a prevailing party (as may be legally finally determined) with respect to any such claim, to indemnify the other party against all costs, fees and expenses arising from any such claim.
6. WAIVER OF RIGHTS. Except as otherwise provided in this Agreement, each part hereby waives, releases and relinquishes any and all right, title or interest whatsoever, whether arising by common law or present or future statute of any jurisdiction or otherwise, in the Separate Property and probate estate of the other, including but not limited to distribution of intestacy, the right of election to take against the will of the other, any rights accruing by reason of the events occurring prior to their marriage, and any right to dower, curtesy, statutory allowances, and spousal support. Such waiver, release and relinquishment shall not apply and is not effective with respect to any rights or entitlements a party may have as a surviving spouse under the Social Security laws or with respect to any other governmental benefit or governmental program of assistance. This Agreement shall not limit the right of either party to make such transfers of

property to the other as he or she may wish during their respective lifetimes, or by will, or to acquire property jointly or in any other form of ownership referenced in section 4.

7. DISSOLUTION/SEPARATION/ANNULMENT.

Except as otherwise provided in this Agreement, each party specifically agrees that neither shall make any claim for or be entitled to receive any money or property from the other as alimony, spousal support, or maintenance in the event of separation, annulment, dissolution or any other domestic relations proceeding of any kind or nature, and each of the parties waives and relinquishes any claim for alimony, spousal support or maintenance, including, but not limited to, any claims for services rendered, work performed, and labor expended by either of the parties during any period of cohabitation prior to the marriage and during the entire length of the marriage. The waiver of spousal support shall apply to claims both pre- and post-judgment.

8. COHABITATION. Each party waives any and all rights or claims existing now or hereafter existing with reference to any period of cohabitation, if any, prior to the marriage of the parties, including, but not limited to, any claim to real or personal property.

9. FINANCIAL DISCLOSURE. Each party has attached a statement of assets and liabilities as exhibits to this Agreement, 1 and 2 respectively. Each party acknowledges an opportunity to inquire further as to the financial information provided by the other, and each party specifically waives any rights to any further disclosure of the property and financial obligations of the other beyond that provided by the exhibits to this Agreement.

10. RIGHT TO CONTEST. Nothing contained herein shall limit the right of either party to contest any

domestic relations suit between the parties or to file a counter suit against the other party[.] However, in any hearing on such suit, this Agreement shall be considered a full and complete settlement of all property rights between the parties. In such case, neither party shall maintain any claim or demand whatsoever against the other party for property, suit money, attorney fees and costs which is either inconsistent with or not provided for in this Agreement.

11. INTEGRATION. This Agreement sets forth the entire agreement between the parties with regard to the subject matter hereof. All prior agreements, covenants, representations, and warranties, expressed or implied, oral or written, with respect to the subject matter hereof, are contained herein. All prior or contemporaneous conversations, negotiations, possible and alleged agreements, representations, covenants, and warranties, with respect to the subject matter hereof, are waived, merged, and superseded hereby. This is an integrated agreement.
12. BINDING ON SUCCESSORS. Each and every provision hereof shall inure to the benefit of and shall be binding on heirs, assigns, personal representatives, and all successors in interest of the parties.
13. SEVERABILITY. In the event any provision of this Agreement is deemed to be void, invalid, or unenforceable, that provision shall be severed from the remainder of this Agreement so as not to cause the invalidity or unenforceability of the remainder of this Agreement. All remaining provisions of this Agreement shall then continue in full force and effect. If any provision shall be deemed invalid due to its scope and breadth, such provision shall be deemed valid to the extent of the scope and breadth permitted by law.

14. MODIFICATION. This Agreement may be modified, superseded, or voided only upon the written agreement of the parties. Further, the physical destruction or loss of this Agreement shall not be construed as modification.

15. ACKNOWLEDGEMENTS. Each party acknowledges that he or she has had an adequate opportunity to read and study this Agreement, to consider it, to consult with attorneys individually selected by each party, without any form of coercion, duress or pressure. Each party acknowledges that he or she has examined the Agreement before signing it, and has been advised by independent legal counsel concerning the rights, liabilities and implications of this document.

Janet's financial disclosure listed her assets as including \$45,200.00 from the gain on the sale of her property on Lambton Alley, a vehicle worth \$6,000.00, and 401K investments worth \$8,800.00. Marc's financial disclosure listed properties on Dixie Highway (\$450,000.00), Marie Street (\$75,000.00), Story Avenue (\$160,000.00), Frankfort Avenue (\$40,000.00), and Riverside Drive (\$150,000.00); vehicles worth \$9,000.00; a boat worth \$8,000.00; and savings/investments valued at \$40,000.00.

The court entered a *status quo* order on June 13, 2016, that prevented the parties from transferring or dissipating any property, cash, stocks, or other assets without a court order or agreed order signed by them and their attorneys. Later that month, Janet moved for permission to access the marital residence on Cardinal Harbour Road to retrieve her personal property upon 24 hours' notice to

Marc's attorney, for exclusive use of her 2008 Chevrolet Cobalt, and for an order that Marc not destroy or secrete any financial documents in his possession. The following month, on July 12, 2016, the court entered orders directing that neither party could destroy or hide any financial records in his or her possession, permitting Janet to have peaceful access to the marital residence to retrieve her personal property with 24 hours' notice, noting that she may be accompanied by a third party, and granting Janet exclusive use of the Cobalt she was presently driving. The court held a hearing in early January 2017, on the pending motions, and by order entered January 12, 2017, it granted Marc exclusive use of the Florida residence from February 1 through March 1, 2017.

Janet moved the family court for a partial summary judgment in January 2017, related to the formation and management authority of Motel Keys, LLC, (Motel Keys) and its initial acquisition of real estate. She contended that the parties' respective interests in the business were marital property and that it was subject to equal distribution. In his response, Marc stated that he had transferred his separate property to Motel Keys to keep those properties separate from the personal transactions and/or for liability reasons, and that these properties remained his separate property under the prenuptial agreement. The conveyances were not meant to be a gift to either Janet or the marital estate, and Marc was identified on every tax return since 2006 as the sole owner of Motel Keys.

In February 2017, Marc moved the family court to hold Janet in contempt for unlawfully entering the marital residence on February 25, 2017. This, he claimed, was in violation of the court's July 12, 2016, order and the *status quo* order entered June 13, 2016. When he was in Florida, the caregiver of his cat in Kentucky notified him that the deadbolt lock on the Kentucky residence had been broken, two security cameras had been unplugged, and internet access had been disconnected. A neighbor told him he saw two cars and a pick-up truck in the driveway, which met the descriptions of vehicles owned by Janet's mother, Janet's brother, and a friend of Janet. Shortly thereafter, Janet moved to hold Marc in contempt related to his failure to turn over bank statements from 2001 to 2003 that she needed to trace her non-marital proceeds in the Florida residence. Janet said she found some evidence when she entered the Kentucky residence after hiring a locksmith to gain access to the house. She denied unlawfully entering the residence. Janet supplemented this motion in July 2017.

Janet filed a motion *in limine* requesting that Marc not be permitted to trace his transactions through commingled accounts and through payments to and withdrawals from a line of credit. She argued that the parties' personal checking accounts, one of Marc's Ameritrade accounts, and the Motel Keys accounts were extensively commingled during the marriage and that it would be impossible to trace any non-marital claims. She also disputed his ability to claim a non-marital

portion from the Blue Lick Road property via a joint line of credit from 2005 to 2011. She argued that a line of credit could not be treated as a non-marital asset.

The matter went to trial on March 10 and July 28, 2017. At the beginning of the first day, the parties entered into several agreed stipulations, including that Janet's 3M retirement account was 30.77% marital and 69.23% non-marital, and that her Ameritrade IRA was 88.2% marital and 11.8% non-marital. The court orally denied the pending motion for summary judgment and motion *in limine*.

Janet was the first witness to testify. She was currently living in Florida, and she worked for Monroe County, Board of County Commissioners, making \$50,000.00 per year. She also worked two temporary, part-time jobs in addition to her full-time employment. She and Marc were married in November 2001, and they separated in August 2015. Motel Keys was formed in 2004, and she and Marc filed documents with the Secretary of State. They executed a deed in December transferring Marc's pre-marital assets into Motel Keys. After they were married, Janet understood that she was to be involved with the real estate, as Marc told her it was as much her responsibility as it was his. She performed bookkeeping activities for Motel Keys, made sure the expenses were paid and rents were received, did the Secretary of State filings, and was the contact for the company's CPA. She went on to describe the physical labor she performed at the

properties as well as the work she did related to the property Marc inherited or purchased from the estate. Janet said she resigned from her job at University of Louisville so that she could be with Marc in Florida and help him, as he had asked. She had a good prospect for a better position at the university while she worked there, but she decided to resign because that was what Marc wanted her to do.

Mary Vanderhaar testified next. She was hired by Janet for her opinion related to the tracing of non-marital funds, which she did through review of the Quicken account. Ms. Vanderhaar expressed concern related to the commingling of funds. Melissa DeArk then testified for Marc regarding tracing. She is a CPA, and she considered the parties' prenuptial agreement, the Quicken file, and a timeline spreadsheet Marc provided to her in reaching her opinions. She considered the terms non-marital and separate property to be interchangeable. She provided her detailed tracing opinions for the various properties.

Marc testified during his case-in-chief. He owned rental properties at the time of their marriage in 2001. He was declared disabled by Social Security in 2009 due to a spinal cord surgery and was receiving \$780.00 per month in benefits. He testified about the prenuptial agreement he and Janet had entered into and his understanding of its terms. Marc went on to testify about the property he owned when the parties were married, the inheritance he received from his mentor, who had left Marc one-third of his personal property and an IRA, and his belief that he

was the full owner of Motel Keys because the property transferred to the company was his separate property. Marc also testified about the parties' personal property and household items and his contempt allegations against Janet for removing items from their homes.

At the conclusion of the testimony, the court permitted the parties to make closing arguments. The court then orally stated that it was finding that the prenuptial agreement was enforceable and applicable in this case.

On August 24, 2017, the family court entered its findings of fact, conclusions of law, and order related to the division of marital debt and property, the restoration of non-marital property, the assignment of debts, and attorney's fees. After upholding the prenuptial agreement (Janet had disputed its validity), the court addressed the remaining issues, including tracing issues and whether property constituted separate property under the prenuptial agreement. The court opted to rely upon the expert testimony from Marc's expert, Melissa DeArk, in tracing funds and allocating interests. Regarding Motel Keys, the court determined that the real estate transferred to the business did not change its status from Marc's separate property to joint or marital property upon the transfer. The court went on to divide the parties' vehicles; retirement, stock, and bank accounts; and personal property. The court found Janet in contempt for entering the marital residence in Kentucky without prior notice and removing items, while it did not find Marc in

contempt for Janet's claim that he had violated the *status quo* order. Finally, the court reserved its decision on the issue of the parties' respective claims for attorney's fees, noting that either party could move for an award of fees once the final order was entered.

Marc moved the family court to amend the order for various reasons, as did Janet. In her motion, Janet disputed the court's findings as to tracing and the commingled funds related to the Motel Keys account and to the line of credit, pointing out alleged flaws in the court's calculations. She also disputed the division of her retirement and household goods, as well as the contempt and attorney's fees rulings. In his response, Marc stated that Janet relied on statements and exhibits that were not introduced at the trial and therefore constituted new evidence, which could not be considered by the court in ruling on post-trial motions. In reply, Janet stated that her retirement was separate property pursuant to the definition in the prenuptial agreement, not that it was non-marital. She had not stipulated as to how it should be divided.

On September 12, 2017, Janet moved the court pursuant to Kentucky Rules of Civil Procedure (CR) 60.02(f) to withhold finality of the judgment pending a determination of damage the Florida residence sustained from Hurricane Irma earlier that month. She noted that neither the property nor the furnishings had been insured for hurricane damage. Marc, in response, argued that CR 60.02 did

not provide any authority for the court to grant the relief Janet requested as the court had not yet ruled on the post-judgment motions.

By order entered September 13, 2017, the court denied Janet's motion for additional findings of fact and for amendments to its order, and it indicated it was granting Marc's motion by separate order. Janet filed a notice of appeal from the August 24, 2017, findings of fact, conclusions of law, and order, and from the September 13, 2017, order on the post-trial motions on October 12, 2017.

On September 21, 2017, Marc filed a CR 60.02(f) motion for the court to set aside the exclusive use order and allow him to access the Florida residence in order to secure it. Five days later, Janet filed a motion for CR 60.02(f) relief, also related to damage to the Florida residence. She requested time to determine whether the house could be rebuilt, the cost of rebuilding, and an assessment of the damage to the furnishings. The parties reached an agreement in October related to the Florida property to the effect that, based upon a property value of \$250,000.00, Janet would pay Marc \$151,375.00¹ within 30 days of October 9, 2017, and she would take sole title and possession of the property. If she failed to pay Marc the funds within that time, he was to take exclusive possession of the residence and be entitled to buy out Janet's interest for \$84,262.50, based upon a property value of

¹ Based upon a later motion and then agreed order, this amount Janet needed to pay Marc was amended to \$156,375.00.

\$225,000.00, lowered due to the cost of the delay in rebuilding and repairing the property. Janet complied with the agreed order by paying Marc the full amount owed.

On November 20, 2017, Janet filed a CR 60.02(f) motion to alter the division of personal property due to the Hurricane Irma damage and due to Marc's interference. The court later scheduled a hearing on Janet's motion. Marc also moved the court to enter an order consistent with the prior order by entering another order ruling on his post-trial motion. The court granted Marc's motion by entering an order ruling on his post-trial motion on December 6, 2017. Janet filed an amended notice of appeal from this order on December 18, 2017.

Both Marc and Janet filed motions seeking attorney's fees. Janet referenced her costs and fees exhibit from the trial, but reduced the expert witness fees she sought. She ultimately sought \$54,222.70 in attorney's fees and \$22,608.76 in costs for a total of \$76,831.46 pursuant to Kentucky Revised Statutes (KRS) 403.220 based upon a disparity of financial resources between them. Marc sought fees based upon two theories. First, he made an Offer of Judgment to Janet that was more favorable than what she received. She would have received \$336,139.00 under the Offer of Judgment, but only received \$160,913.00 in the court's judgment. Second, Marc argued that he was entitled to

the payment of fees based upon the terms of the prenuptial agreement because Janet made a claim for his separate property.

On January 23, 2018, Marc filed a motion asking the court to require Janet to file a list of personal property items lost due to Hurricane Irma to support her CR 60.02 motion. The court granted this motion on February 5, 2018. The hurricane damage issues were apparently resolved by way of an agreed order entered May 17, 2018, but this order is not in the certified record. Rather, it was referenced in Janet's brief.

By order entered May 7, 2018, the court addressed the attorney's fees motions. The court determined that under the terms of the prenuptial agreement relating to Marc's defense against Janet's claims to his separate property, Janet was required to pay Marc's attorney's fees in the amount of \$98,149.27. Janet filed a second amended notice of appeal on May 18, 2018.

On appeal, Janet seeks review of the family court's rulings related to the Motel Keys properties, the award of Marc's attorney's fees, the division of her retirement accounts, the division of personalty, and holding her in contempt. Marc contends that the court did not abuse its discretion in its decisions. We recognize that Janet has not disputed the court's determination that the prenuptial agreement was enforceable.

Our standard of review is set forth in *Barber v. Bradley*, 505 S.W.3d

749, 754 (Ky. 2016):

As this is an appeal from a bench trial, our standard of review is set forth in Kentucky Rule of Civil Procedure (CR) 52.01. Under CR 52.01, the trial court is required to make specific findings of fact and state separately its conclusions of law relied upon to render the court's judgment. Further, those "[f]indings of fact, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. In fact, "judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court." *Vinson v. Sorrell*, 136 S.W.3d 465, 470 (Ky. 2004) (quoting *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003)).

"If the trial judge's findings of fact in the underlying action are not clearly erroneous, *i.e.*, are supported by substantial evidence, then the appellate court's role is confined to determining whether those facts support the trial judge's legal conclusion." *Commonwealth v. Deloney*, 20 S.W.3d 471, 473-74 (Ky. 2000). However, while deferential to the lower court's factual findings, appellate review of legal determinations and conclusions from a bench trial is *de novo*. *Sawyers v. Better*, 384 S.W.3d 107, 110 (Ky. 2012).

With this standard in mind, we shall review Janet's arguments on appeal.

For her first argument, Janet argues that the parties' residences and the assets held by Motel Keys were in concurrent ownership and should be assigned as marital or non-marital property, not restored to Marc as his separate property. She

also contests the family court's ruling related to tracing. We find no merit in these arguments.

First, we reject Janet's claim that the transfer of Marc's separate properties to Motel Keys after the marriage transformed the ownership of these properties to his and Janet's concurrent ownership. We note that except for a brief mention in her motion for summary judgment, Janet did not appear to raise this specific argument until after the trial of this matter. But even if she had, the argument is not well-taken. Janet did not cite to any caselaw supporting her claim that the transfer of the properties to Motel Keys transformed them from Marc's separate property to concurrent ownership. Marc cites to a Kentucky Continuing Legal Education publication on Kentucky Real Estate Law and Practice for the propositions that concurrent ownership exists where two or more persons are the owners of real estate, and that placement of real property in an LLC is not a form of concurrent ownership.

In *United States v. Craft*, 535 U.S. 274, 279-81, 122 S. Ct. 1414, 1421, 152 L. Ed. 2d 437 (2002), the United States Supreme Court described the forms of concurrent ownership as follows:

English common law provided three legal structures for the concurrent ownership of property that have survived into modern times: tenancy in common, joint tenancy, and tenancy by the entirety. 1 G. Thompson, *Real Property* § 4.06(g) (D. Thomas ed. 1994) (hereinafter Thompson). The tenancy in common

is now the most common form of concurrent ownership. 7 R. Powell & P. Rohan, Real Property §51.01[3] (M. Wolf ed. 2001) (hereinafter Powell). The common law characterized tenants in common as each owning a separate fractional share in undivided property. *Id.*, § 50.01[1]. Tenants in common may each unilaterally alienate their shares through sale or gift or place encumbrances upon these shares. They also have the power to pass these shares to their heirs upon death. Tenants in common have many other rights in the property, including the right to use the property, to exclude third parties from it, and to receive a portion of any income produced from it. *Id.*, §§ 50.03-50.06.

Joint tenancies were the predominant form of concurrent ownership at common law, and still persist in some States today. 4 Thompson § 31.05. The common law characterized each joint tenant as possessing the entire estate, rather than a fractional share: “[J]oint-tenants have one and the same interest . . . held by one and the same undivided possession.” 2 W. Blackstone, Commentaries on the Laws of England 180 (1766). Joint tenants possess many of the rights enjoyed by tenants in common: the right to use, to exclude, and to enjoy a share of the property’s income. The main difference between a joint tenancy and a tenancy in common is that a joint tenant also has a right of automatic inheritance known as “survivorship.” Upon the death of one joint tenant, that tenant’s share in the property does not pass through will or the rules of intestate succession; rather, the remaining tenant or tenants automatically inherit it. *Id.*, at 183; 7 Powell § 51.01[3]. Joint tenants’ right to alienate their individual shares is also somewhat different. In order for one tenant to alienate his or her individual interest in the tenancy, the estate must first be severed—that is, converted to a tenancy in common with each tenant possessing an equal fractional share. *Id.*, § 51.04[1]. Most States allowing joint tenancies facilitate alienation, however, by allowing severance to

automatically accompany a conveyance of that interest or any other overt act indicating an intent to sever. *Ibid.*

A tenancy by the entirety is a unique sort of concurrent ownership that can only exist between married persons. 4 Thompson § 33.02. Because of the common-law fiction that the husband and wife were one person at law (that person, practically speaking, was the husband, *see* J. Cribbet et al., *Cases and Materials on Property* 329 (6th ed. 1990)), Blackstone did not characterize the tenancy by the entirety as a form of concurrent ownership at all. Instead, he thought that entireties property was a form of single ownership by the marital unity. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 B.Y.U.L. Rev. 35, 38-39. Neither spouse was considered to own any individual interest in the estate; rather, it belonged to the couple.

Concurrent ownership is limited to ownership by people, not by an organization. Therefore, the placement of Marc's separate property into Motel Keys, regardless of whether the LLC was owned by both of them, did not transform it into property concurrently owned by both Marc and Janet. The property retained its prior status. Accordingly, the family court properly held that "transferring the properties to Motel Keys is not sufficient to change the 'Separate' nature of the properties as defined by the Prenuptial Agreement" and assigned Marc's separate property to him.

Second, Janet disputes Marc's attempt to trace his claimed separate property. Marc correctly argues that the prenuptial agreement controls the tracing of these assets rather than KRS 403.190 and its caselaw addressing the concept of

tracing. The family court had sufficient evidence to rely upon through the testimony of Melissa DeArk to support its conclusion that Marc had adequately traced his separate property.

And third, we reject Janet’s claimed interest in the appreciation of Marc’s separate properties by her efforts and work. In the prenuptial agreement, Janet specifically waived “any claims for services rendered, work performed, and labor expended[,]” and the agreement provided that “each of the parties shall separately retain all rights in the property he or she now owns, including all appreciation[.]”

Accordingly, we hold that the family court did not commit any error in assigning Marc his separate property pursuant to the prenuptial agreement.

For her second argument, Janet asserts that the family court abused its discretion in ordering her to pay Marc’s attorney’s fees and by not ordering Marc to pay her attorney’s fees. “The amount of an award of attorney’s fees is committed to the sound discretion of the trial court with good reason. That court is in the best position to observe conduct and tactics which waste the court’s and attorneys’ time and must be given wide latitude to sanction or discourage such conduct.” *Gentry v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990). *See also Smith v. McGill*, 556 S.W.3d 552, 556 (Ky. 2018), in which the Supreme Court of Kentucky removed financial disparity as a threshold requirement to award fees

pursuant to KRS 403.220. Janet claims that (1) the indemnification provision of the prenuptial agreement never became effective because there was no separate property she could have challenged; (2) the prenuptial agreement did not require the court to award fees to Marc; and (3) the financial disparity between her and Marc entitled her to an award of fees. Marc argues that the prenuptial agreement controls in this case as Janet made an unsuccessful claim against his separate property and, in the alternative, that his CR 68 Offer of Judgment precludes her from disputing the award.

Paragraph 5 of the prenuptial agreement provides:

SEPARATE PROPERTY. The parties agree that the rights and obligations created by this Agreement have monetary value to each of the parties and each of the parties agrees to make no claim to the Separate Property of the other party, either during the joint lives of the parties hereto or thereafter, and, if a party is not a prevailing party (as may be legally finally determined) with respect to any such claim, to indemnify the other party against all costs, fees and expenses arising from any such claim.

As set forth above, we upheld the family court's ruling that the property at issue was Marc's separate property, thereby invoking the indemnification provision in paragraph 5 in the present argument. We find no abuse of discretion in the family court's decision to award Marc the amount of fees he requested based upon its observation of this extensive litigation. In addition, we find no abuse of discretion

in the family court's decision not to award Janet any fees or costs based upon her argument that there was a disparity of financial resources.

Third, Janet argues that the family court should have awarded her 100% of her retirement accounts as separate property pursuant to the prenuptial agreement. Marc argues that the family court properly divided Janet's retirement accounts pursuant to the parties' agreed stipulation. Based upon this stipulation that 30.77% of her retirement account and 88.2% of her Ameritrade IRA were marital, we find no abuse of discretion in the family court's decision on this issue. We reject Janet's argument that the family court did not find the parties had stipulated as to whether the marital and non-marital characterizations of the accounts were proper to apply and, if so, what the division would be. Those issues were not argued by the parties, and the agreed stipulation related to her retirement accounts did not include any conditions, such as a condition that it would become moot under the prenuptial agreement if that were to be upheld. Rather, the stipulation recites the parties' agreement as to how the accounts would be split.

Fourth, Janet argues that the personalty should have been divided by alternate selection. While the family court could have chosen to divide such property as Janet proposed, there is no evidence that the way the property was divided was anything other than a fair and just division.

Finally, Janet contends that the family court erred in finding her to be in contempt of court related to her entry to the marital residence in Kentucky without providing prior notice.

When a court exercises its contempt powers, it has nearly unlimited discretion. *Smith v. City of Loyall*, 702 S.W.2d 838, 839 (Ky. App. 1986). Consequently, we will not disturb a court's decision regarding contempt absent an abuse of its discretion. "The test for abuse of discretion is whether the trial [court's] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

Meyers v. Petrie, 233 S.W.3d 212, 215 (Ky. App. 2007).

By order entered July 12, 2016, the family court permitted Janet peaceful access to the marital residence in Kentucky to retrieve personal possessions and property "upon twenty-four hours' notice to counsel for [Marc.]" Janet admitted that she entered the Kentucky residence on February 25, 2017, without giving notice, hired a locksmith to gain access, and removed items. Janet's own testimony provided the family court with more than sufficient evidence to support its finding that she was in contempt of the earlier order, and we find no abuse of discretion in its ruling.

For the foregoing reasons, the orders of the Jefferson Family Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Bonnie M. Brown
Louisville, Kentucky

BRIEF FOR APPELLEE:

Melanie Straw-Boone
Louisville, Kentucky