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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000979-ME

CRAIG ROPER APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE LINDA R. BRAMLAGE, JUDGE
ACTION NO. 16-CI-00681

ERIN ROPER APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND L. THOMPSON, JUDGES.

JONES, JUDGE: Craig Roper appeals from the Boone Circuit Court's supplemental findings of fact, conclusions of law, and decree of dissolution dissolving his marriage with the Appellee, Erin Roper. The supplemental decree decided issues of child support, spousal maintenance, and marital property. In addition to contesting the trial court's findings of fact and conclusions in the supplemental decree, Craig contends that the trial court lacked subject matter jurisdiction due to the fact that he,

Erin, and their four minor children were all residing in Texas at the time the decree was entered. Following a review of the record and applicable law, we affirm in part, reverse in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Craig and Erin were married on November 20, 1999. Four children resulted from the marriage. On May 25, 2016, Erin filed a petition for dissolution of marriage, in which she sought joint custody of the parties' minor children, child support, and spousal maintenance.

From the start, the divorce proceedings were contentious. In July of 2016, Erin moved the trial court to order Craig to be cooperative with her attempts to enroll the parties' oldest two children in professional counseling. Erin contended that since learning of the divorce proceedings, the two oldest children had been extremely disrespectful to her and that her relationship with them had deteriorated. Erin additionally requested that the trial court order Craig to refrain from making disparaging remarks about her in front of their children and that Craig refrain from undermining Erin's attempts to discipline the children. Craig filed a response to Erin's motion in which he denied that he made disparaging remarks about Erin in front of the children and denied that the parties' oldest two children had any behavioral problems. Craig did agree, however, that Erin's relationship

with the oldest two children was very strained and stated that he had enrolled those children in a counseling program. On September 1, 2016, Craig filed a motion with the trial court requesting temporary custody of the parties' children with a set parenting schedule for the parties' youngest two children, sole and exclusive possession of the marital residence, and an order requiring Erin to provide her preliminary verified disclosure statement. As grounds for his motion, Craig stated that Erin had voluntarily moved out of the marital residence in July but had been coming into the home without notice to remove items. Craig additionally alleged that Erin had not seen the parties' oldest two children since she had moved out of the marital residence, and he requested that the children continue to receive counseling until their relationship with Erin was rehabilitated enough for her to exercise parenting time. On November 16, 2016, Erin filed a motion for child support, temporary maintenance, and for an order that Craig cooperate in selling the parties' Cadillac Escalade.

In February of 2017, Craig moved the trial court for an order permitting him to move the children with him to Texas that coming May. Craig informed the court that he was employed by Toyota and that his job was being relocated; he and Erin had both been made aware of the fact that the relocation would happen when they moved to Kentucky two years earlier. Craig stated that their family had no ties to Kentucky and that nothing was keeping Erin from

moving to Texas to be closer to the parties' children if she wished to do so. In his motion, Craig additionally requested the court order Erin to cooperate with the sale of the marital residence through the Toyota Relocation Program. Craig again requested that the trial court restrain Erin from entering the marital home and requested an order that Erin return all marital and personal property that she had removed from the home. The parties entered an agreed order appointing a guardian *ad litem* for their minor children on February 13, 2017. On February 22, 2017, the parties filed an agreed order agreeing to cooperate with the sale of the marital residence and with the Toyota Relocation Program.

On March 9, 2017, the trial court held a hearing on all pending motions except for Erin's motion for temporary maintenance, which was reserved. At the outset of the hearing, Craig and Erin agreed that Craig would have sole and exclusive use of the marital residence, that neither would make disparaging remarks about the other in the presence of the children, that they would not share "adult information" about the divorce with their children, and that they would agree on a different counselor for the oldest two children. Craig testified that he had worked for Toyota for the past nineteen years and that the family had voluntarily relocated to Kentucky for his job. He stated that a month after moving to Kentucky, he found out that Toyota was relocating its headquarters to Dallas, Texas, which would require him to transfer again. While he had tried to be moved

into a different division of Toyota so that he could stay in Kentucky, he was unsuccessful. Craig stated that he and Erin had discussed and planned on moving the family to Texas; they had even made trips to Texas together to look at subdivisions and school districts. Since the separation, however, Erin had informed him that she no longer wished to move to Texas. Craig stated that he and Erin share parenting time with the youngest two children, but that he has the oldest two children full time. Craig testified that this arrangement was due to the strained relationship between Erin and the oldest two children. He agreed that it was in the children's best interest that the relationship with Erin be repaired. Craig stated that his average gross income was $90,000 per year and that he paid all expenses for the children.

Erin testified that after vacating the marital residence, she initially lived in a friend's condominium, but later moved to a rented apartment. She testified that she has a bachelor's degree in Christian care and counseling but had not used that degree in any professional capacity. Until January of 2016, Erin had stayed at home with the children and homeschooled them. Erin testified that she was now working part-time as a secretary at a church where she makes $14 per hour. She stated that she had tried to apply for other jobs but had been unsuccessful. Erin testified that Craig had only provided her with $580 since their separation and that she had been unable to collect any items from the marital

residence. She testified that she had inherited a matured IRA from her grandmother from which she was required to take yearly withdrawals. Erin believed that the parties had about $140,000 in equity in the marital home, which they would divide evenly when it was sold. The parties' oldest child testified about the issues between him and Erin and his desire that he and his siblings move to Texas. The parties stipulated that the second oldest child wished to move to Texas with Craig.

The next day, the trial court entered findings of fact and conclusions of law and a temporary order addressing the move to Texas, custody of the children, and temporary child support. The trial court found that it was in the best interest of the children for the parties to share joint legal custody and for Craig to be named the primary residential parent and move with the children to Texas. Until the move to Texas, the parties were ordered to have equal parenting time with the youngest two children. The trial court found that Craig had a gross monthly income of $7,660 and, after imputing income to Erin in the amount of $14 per hour for a forty-hour week, found that Erin had a gross monthly income of $2,427. The trial court concluded that it should deviate from the standard child support guidelines until Craig and the children moved to Texas, as Craig had the oldest two children 100% of the time. Accordingly, Craig was ordered to pay Erin $399.08 per month in child support, effective November 10, 2016. Once Craig

moved to Texas, Erin was ordered to pay him $402.32 per month in child support. It was additionally ordered that any documented daycare expenses and uncovered medical, dental, optical, copay, or prescription expenses be split between the parties, with Erin paying 24% of those expenses and Craig paying 76%.

On April 5, 2017, an agreed order was entered concerning the equity in the parties' marital residence. Therein, it was agreed that Erin would cooperate with Craig's election to take a $70,000 equity advance from the marital residence. In return, it was agreed that the first $70,000 in profit from the sale of the marital residence would go to Erin with the parties to divide evenly any remaining profit. The parties also agreed to divide the costs of any repairs needed to prepare the marital residence for sale.

Erin moved to Texas in late April of 2017, with Craig and the children following at the end of May. On August 10, 2017, the parties entered into a partial settlement agreement, which dealt only with custody and parenting time. In that agreement, the parties agreed to continue with joint custody of the children and set forth specific terms as to medical, educational, and extracurricular decision making. As to parenting time, the parties agreed to continue with an equal parenting time schedule with the youngest two children. The oldest two children were to work closely with a counselor to resolve their issues with Erin. Erin and Craig agreed to a "phase in" process with respect to the oldest two children

whereby the parties agreed that Erin was to eventually receive equal timesharing, and that this process would be guided by the recommendations of the children's counselor.

In August of 2017, Erin filed a motion with the trial court requesting it determine whether it continued to have jurisdiction to order child support in light of the fact that she, Craig, and the children were no longer residents of Kentucky. In that motion, Erin noted that under KRS[1] 407.5205(1), the trial court would no longer have jurisdiction to modify any child support orders. However, she contended that it was unclear as to whether the trial court had jurisdiction to make a permanent child support order, incorporated into a decree, when none of the interested parties resided in Kentucky. In the event that the trial court determined it did have jurisdiction to order child support, Erin requested that it take judicial notice of the Texas child support guidelines. Erin additionally filed a motion for the trial court to establish permanent maintenance of $1,000 per month.

In his response to Erin's motion concerning jurisdiction, Craig argued that KRS 407.5205 was inapplicable as the trial court's entry of a permanent child support order would not constitute a modification of the temporary child support order. Craig contended that the trial court retained jurisdiction until a final decree was entered. He argued that, under Erin's interpretation of the law, no court would

[1] Kentucky Revised Statutes.

have jurisdiction over child support issues as the children had not yet lived in Texas long enough for it to be considered their "home state" under the Uniform Interstate Family Support Act. Finally, Craig contended that it would be inappropriate for the trial court to apply the Texas child support guidelines. As to Erin's motion for spousal maintenance, Craig contended that it had not been timely filed and was not in compliance with the local rules.

The trial court heard testimony on the issues of marital property, child support, and maintenance over the course of three days: August 21, 2017; December 1, 2017; and April 12, 2018. Erin and Craig were the only testifying witnesses. On the first day of the hearing the trial court concluded that it did have jurisdiction to enter a permanent child support order and that it was not appropriate to follow the Texas child support guidelines. In February of 2018, the parties agreed to bifurcate the issues pending before the trial court; the court entered a decree dissolving the parties' marriage, but reserving all other issues, on February 28, 2018.

On June 11, 2018, the trial court entered supplemental findings of fact and conclusions of law and a supplemental decree of dissolution. Therein, the trial court found that the partial settlement agreement executed by the parties was not unconscionable and incorporated it into the supplemental decree. Concerning maintenance, the trial court found that Erin had a bone tumor in her arm that

required medical care and physical therapy but was otherwise in good mental and physical health. The trial court found that Erin had a college degree but had stayed at home caring for and homeschooling the children until January of 2016. Erin currently had a full-time job as a youth pastor earning $45,000 per year.

The trial court noted that each party received $70,000 from the sale of the marital residence and that the parties were evenly dividing Craig's Toyota retirement, which would amount to Erin receiving approximately $215,000. The trial court found that Craig had worked at Toyota for 19 years, had a base salary of $91,717 per year, and had received bonuses of $10,000 so far in 2018. The trial court found that Craig had been able to advance his career during the parties' marriage, due in part to Erin's contributions to their family.

Erin listed monthly expenses of $5,869 and Craig listed monthly expenses of $7,826.66; the trial court concluded that these expenses were supported by the testimony and exhibits presented at the hearing. The trial court additionally found that, while Craig's lifestyle had not changed since the parties moved to Texas, Erin's standard of living had drastically changed. Based on these findings, the trial court ordered Craig to pay spousal maintenance of $1,000 per month for the next four years.

The trial court next considered child support and the children's expenses. At the outset of that discussion, the trial court determined that it was in

the best interest of the children to modify the parenting time schedule so that all children would have equal parenting time with both parents effective July 1, 2018. This determination was based on the fact that the parties had entered into the "phase in" agreement almost one year ago, with no improvement. The trial court then determined that, based on its findings concerning Erin's and Craig's respective monthly salaries and the change in parenting time, Craig would owe Erin child support in the sum of $521.84 per month effective July 1, 2016. Expenses for the children's agreed-on extracurricular activity expenses and uncovered medical, dental, optical, prescription, and copay expenses were to be divided with Craig paying 61% and Erin paying 39% of the expenses. Additionally, Erin was to be responsible for 39% of the $138 per month Craig spent on the children's insurance coverage. The trial court concluded that Erin was under no requirement to reimburse Craig for any past expenses for the children related to clothing, childcare, food, or activities that he had incurred since the parties' separation.

The trial court next addressed the issue of marital property. The main point of contention between the parties was how to categorize the multiple bonuses Craig had received from Toyota as a result of his relocation. Craig testified that these bonuses had been deposited into a bank account to which Erin did not have access, and that he had not given her any portion of what he received. The trial

court categorized a $27,227 net relocation bonus that Craig had received in December of 2016 as marital property; however, because Craig had used $15,000 of that bonus to pay off marital debt, the trial court concluded that only the remaining $12,227 should be divided equally between the parties. A $40,000 gross relocation bonus that Craig is scheduled to receive in August of 2019 was categorized as Craig's nonmarital property. All other bonuses that Craig had received were classified as marital property and the trial court ordered Craig to pay half of all amounts to Erin within ninety days. The trial court ordered that Craig would receive the 2007 Cadillac Escalade and that Erin would retain the 2007 Ford Escape that she had purchased after moving to Texas. Erin's IRA was deemed to be her nonmarital property. The trial court found that Craig had a retirement account with Toyota with a balance of $435,923.15, of which Craig had a nonmarital interest of $3,101.50. Finally, the trial court denied Craig's request that Erin be ordered to reimburse him for certain expenses that he had made on her behalf after the parties had separated. The trial court found that, due to the disparity in the parties' income, Craig should pay $4,000 of Erin's attorney fees.

This appeal followed.

II. ANALYSIS

On appeal, Craig contends that the trial court erred: (1) in hearing the case after he, Erin, and the children moved to Texas as it no longer had

jurisdiction; (2) in the way it divided his and Erin's property; (3) in awarding Erin spousal maintenance; (4) in modifying the parties' partial separation agreement; (5) in awarding Erin attorney fees; and (6) in refusing to allow him to testify as to interest earned on his nonmarital retirement funds. We consider each argument in turn.

A. Trial Court's Jurisdiction

Craig first contends that the trial court lost subject matter jurisdiction over child support, custody, and parenting time issues once the parties ceased to reside in Kentucky. These contentions are based on Craig's interpretation of the Uniform Interstate Family Support Act ("UIFSA")[2] and the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA").[3] Craig additionally argues that the trial court could not have made reliable determinations as to related issues—such as maintenance and marital property—as all issues considered in the dissolution proceeding are intricately intertwined. Craig contends that all orders entered after May of 2017 must be vacated due to the trial court's lack of subject matter jurisdiction. As the jurisdiction of the trial court in this instance is resolved by interpreting statutory provisions, we review it *de novo*. *Wahlke v. Pierce*, 392 S.W.3d 426, 429-30 (Ky. App. 2013) (citing *City of Worthington Hills v.*

[2] Codified in KRS 407.5101-5903.

[3] Codified in KRS 403.800-880.

Worthington Fire Prot. Dist., 140 S.W.3d 584 (Ky. App. 2004)). "When interpreting a statute, the intent of the legislature is paramount and controls. And, words are afforded their ordinary meaning unless a contrary intent is apparent." *Id.* at 430 (citing *Old Lewis Hunter Distillery Co. v. Ky. Tax Comm'n*, 302 Ky. 68, 193 S.W.2d 464 (1945)).

Before delving into interpretation of the relevant statutes, some additional background information concerning the jurisdictional question is required. Craig filed his notice of appeal on June 28, 2018. In early August of 2018, Erin moved the trial court to compel Craig to pay her the moneys due to her under the supplemental decree and to hold Craig in contempt of court. On September 14, 2018, as part of a standard briefing schedule order, this Court, on its own motion, ordered the parties to include in their briefs the issue of Kentucky's jurisdiction.[4]

Apparently inspired by this Court's briefing order, Craig filed a CR[5] 60.02 motion with the trial court on October 4, 2018. In that motion, Craig sought to set aside all portions of any order entered after May 26, 2017, relating to child and spousal support, parenting time, or custody of the parties' children. Craig additionally contended that the supplemental findings of fact and decree—from

[4] This order was entered prior to assignment to the current panel.

[5] Kentucky Rules of Civil Procedure.

which he brings the present appeal—should be vacated. As grounds, Craig argued that the trial court was without subject matter jurisdiction to enter those orders. Craig contended that the trial court lost subject matter jurisdiction over any child support, custody, or visitation issues when all parties were no longer residing in the Commonwealth of Kentucky. Additionally, he argued that because the remaining issues addressed in the supplemental decree—*i.e.*, maintenance and marital property—were intertwined with the child support issue, the trial court could not sever them and decide only those issues.

On October 25, 2018, Craig filed with this Court a petition for a writ of mandamus staying further enforcement proceedings in the trial court until this Court ruled on the present appeal. As grounds for the grant of the writ, Craig argued that the trial court lacked subject matter jurisdiction. A panel of this Court denied Craig's writ by order entered December 11, 2018. That order explained as follows:

> [Craig's] argument is two-fold. One, the circuit court lost subject matter jurisdiction when the parties and the children left the state after commencement of the proceedings but prior to the entry of the decree, and two, the circuit court does not have jurisdiction over the pending motions. [Craig's] claims fail as he has failed to demonstrate that the circuit court is without subject matter jurisdiction.
>
> Subject matter jurisdiction is the court's authority, either by statute or constitutional provision, to hear and decide *the type* of case presented to it. *Daughtery v. Terek*, 366

> S.W.3d 463, 466 (Ky. 2012). A court is to review the pleadings and determine if, when taken at face value, the pleadings reveal a type of action that is assigned to the court by statute or constitutional provision. *Id.* "Once a court has acquired subject matter and personal jurisdiction, challenges to its subsequent rulings and judgment are questions incident to the exercise of jurisdiction rather than to the *existence* of jurisdiction." *Hisle v. Lexington-Fayette Urban Cty. Gov't*, 258 S.W.3d 422, 429-30 (Ky. App. 2008).
>
> The fact that both parties and the children were residents of Kentucky at the time the dissolution proceedings commenced and at least six months prior is determinative in resolving the issue of whether the circuit court had subject matter jurisdiction to render the decree. Dissolution actions, including therein child custody and support, between two individuals who, with their children, were residents of the Commonwealth for at least six months prior to commencing the action is the type of case the circuit court is vested with the authority to hear and decide. KRS 403.140; 403.211; 403.822. Therefore, the circuit court had jurisdiction to enter the decree.

Order Denying Extraordinary Writ at 3-5, *Roper v. Bramlage*, No. 2018-CA-001557-OA (Ky. App. Dec. 11, 2018).

Erin contends that this Court's order denying Craig's writ petition is dispositive of the question of the trial court's jurisdiction, thereby obviating the need for any further analysis on the issue. Erin's contention appears to be based on the law of the case doctrine, which is "an iron rule, universally recognized, that an opinion or decision of an appellate court in the same cause is the law of the case for a subsequent trial or appeal however erroneous the opinion or decision may

have been." *Union Light, Heat & Power Co. v. Blackwell's Adm'r*, 291 S.W.2d 539, 542 (Ky. 1956). We disagree. The law of the case "doctrine is predicated upon the principle of finality." *Brooks v. Lexington-Fayette Urban Cty. Housing Authority*, 244 S.W.3d 747, 751 (Ky. App. 2007). Indeed, the doctrine has been described as follows: "A *final decision of this Court*, whether right or wrong, is the law of the case and is conclusive of the questions therein resolved." *Martin v. Frasure*, 352 S.W.2d 817, 818 (Ky. 1961) (emphasis added).

Even though a writ petition is an original action, it comes out of the lower court proceeding, and any orders issued directly impact that action. Therefore, we do not disagree with Erin that the law of the case doctrine is potentially relevant. The problem for Erin, however, is that our decision in the writ action never achieved finality because Craig timely appealed to the Kentucky Supreme Court.[6]

While the Kentucky Supreme Court affirmed our decision to deny the writ, it did so on different grounds. Its opinion provides:

> In order to obtain a writ of prohibition based on lack of subject matter jurisdiction, there must be no remedy through an intermediate court.[7] The direct appeal of the dissolution action is still an active case at the Kentucky Court of Appeals. Consequently, Craig has failed to

[6] We informally held this appeal in abeyance pending the outcome of the writ appeal.

[7] *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004) (footnote in original).

> show that there is no potential remedy through an intermediate court.

Roper v. Bramlage, No. 2018-SC-000688-MR, 2019 WL 4073845, at *1 (Ky. Aug. 29, 2019).

The Kentucky Supreme Court's opinion implicitly holds that this Court should not have reached the substance of Craig's subject matter jurisdiction argument because the pending appeal demonstrated that there was an avenue for relief available to him at the Court of Appeals, an avenue that was already being pursued by the parties. In other words, while our result, dismissal of the writ, was affirmed, our reasoning for doing so was not. Our prior decision, which never obtained finality, cannot be considered the law of the case with respect to the issues raised in this appeal. Accordingly, the law of the case doctrine does not preclude this panel from reaching a different result on the jurisdictional issue than the result reached by the writ panel of this Court.

i. Jurisdiction Under the UIFSA

In support of his argument that the trial court lacked jurisdiction to make orders on child support in the supplemental decree, Craig directs our attention to KRS 407.5205(1), which states as follows:

> (1) A tribunal of this state that has issued a child support order consistent with the law of this state has and shall exercise continuing, exclusive jurisdiction to modify its child support order if the order is the controlling order and:

> (a) At the time of the filing of a request for modification this state is the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued; or
>
> (b) Even if this state is not the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued, the parties consent in a record or in open court that the tribunal of this state may continue to exercise jurisdiction to modify its order.

Notably, KRS 407.5205 applies to the *modification* of a child support order, not an initial order of child support. Thus, whether KRS 407.5205(1) applies depends on whether a final order on child support, following a court's temporary order on child support, is considered a modification of a child support order under the UIFSA. In response to Craig's arguments that KRS 407.5205 works to deprive the trial court of jurisdiction, Erin contends that the final order on child support, entered in June of 2018, constitutes an original order, not a modification of a child support order.

The UIFSA defines "[c]hild support order" as "a support order for a child, including a child who has attained the age of majority under the law of the issuing state or foreign country[.]" KRS 407.5101(2). A "[s]upport order" is defined as "a judgment, decree, decision, directive, or order, *whether temporary*, final, or subject to modification . . . which provides for monetary support . . . ."

KRS 407.5101(28) (emphasis added). Based on these definitions, the "child support order" referred to in KRS 407.5205(1) would include a temporary support order. To modify is "[t]o make somewhat different; to make small changes to (something) by way of improvement, suitability, or effectiveness[.]" *Modify*, BLACK'S LAW DICTIONARY (11th Ed. 2019). There is no question that the decree entered June 11, 2018, changed child support as it was ordered in the temporary child support order. Thus, it would appear that the trial court's entry of the supplemental decree on June 11, 2018, was a modification of a child support order.

There is no dispute that none of the interested parties resided in the Commonwealth of Kentucky at the time the June 11, 2018, decree was entered, implicating KRS 407.5205(1)(a). However, KRS 407.5205(1)(b) allows a court to continue exercising jurisdiction if the "parties consent in a record or in open court that the tribunal of this state may continue to exercise jurisdiction to modify its order."

In August of 2017, after the parties moved to Texas, Erin filed a motion with the trial court requesting it determine whether it still had jurisdiction over child support and child custody issues. Without specifically addressing why it believed it retained jurisdiction, the trial court ruled from the bench that it did, and the issue was not raised again until Craig filed his petition for a writ with this Court in October of 2018. In the interim, the parties proceeded to litigate issues

and specifically agreed during a February 28, 2018, motion hour that outstanding issues—which included child support issues—were reserved by the trial court. The findings of fact and conclusions of law accompanying the initial decree of dissolution, entered February 28, 2018, specifically indicate that "[t]he parties agree that the issues of property, spousal support, and child support are outstanding and shall be reserved upon by this court." R. 248. Thus, the parties *did* consent, though perhaps as a result of being misguided, to the trial court's retaining jurisdiction to modify child support. Accordingly, the trial court had continuing, exclusive jurisdiction to modify the child support order under KRS 407.5205(1)(b).

ii. Jurisdiction Under the UCCJEA

Child custody and visitation matters are governed by the UCCJEA; accordingly, whether the trial court retained jurisdiction to modify child custody requires a separate analysis from its initial determination of jurisdiction to decide those matters. *Adams-Smyrichinsky v. Smyrichinsky*, 467 S.W.3d 767 (Ky. 2015). KRS 403.824 governs a court's exclusive, continuing jurisdiction under the UCCJEA. It states as follows:

> (1) Except as otherwise provided in KRS 403.828, a court of this state which has made a child custody determination consistent with KRS 403.822 or 403.826 has exclusive, continuing jurisdiction over the determination until:
>
> > (a) A court of this state determines that neither the child, nor the child and one (1)

> parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; **or**
>
> (b) A court of this state or a court of another state determines that the child, the child's parents, and any other person acting as a parent do not presently reside in this state.
>
> (2) A court of this state which has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under KRS 403.822.

KRS 403.824 (emphasis added).

As with her arguments concerning the UIFSA, Erin contends that KRS 403.824 is inapplicable because the supplemental decree does not constitute a modification of an existing custody or parenting time order, but rather is the initial child custody determination. The UCCJEA does address jurisdiction to make initial custody determinations in KRS 403.822, and we agree with Erin that the trial court clearly had jurisdiction to make an initial custody determination as Kentucky was the home state[8] of the children on the date of the commencement of the dissolution proceeding. KRS 403.822(1)(a). The trial court first issued orders

[8] "Home state" is defined as "the state in which a child lived with a parent or a person acting as a parent for at least six (6) consecutive months immediately before the commencement of a child custody proceeding." KRS 403.800(7).

on joint custody and parenting time, however, on March 10, 2017, via the temporary order.

Under the UCCJEA an "[i]nitial determination" is "the first child custody determination concerning a particular child[.]" KRS 403.800(8). "Child custody determination" is defined as "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes permanent, *temporary*, initial, and modification orders." KRS 403.800(3) (emphasis added). Under that definition, the March 10, 2017, order—while labeled "temporary"—was the initial child custody determination. Any subsequent child custody determination would be a modification of the initial determination. KRS 403.800(11).

After the temporary order was entered, the parties agreed to a parenting time schedule in their partial settlement agreement, which the trial court incorporated into the supplemental decree. However, the trial court determined in its supplemental decree that it was in the best interest of the children to modify the parenting time schedule and did so. Thus, the supplemental decree worked as a modification of the previous parenting time schedule. Accordingly, KRS 403.824 governs the trial court's jurisdiction in this instance.

A trial "court's jurisdiction to modify custody is determined at the time the motion to modify is filed." *Wahlke*, 392 S.W.3d at 429. Interestingly,

however, the record is devoid of any motion to modify parenting time. It is clear there was no intention that the visitation schedule as set out in the temporary order would be permanent. At the time that the temporary order was entered, it was still unclear whether Erin would relocate to Texas with Craig and the children. Therefore, the temporary order was meant to govern parenting time until Craig and the children relocated. After Erin, Craig, and the children had all moved to Texas, however, the parties executed the partial settlement agreement. This agreement governed child custody and timesharing. The issue of parenting time was not reserved for the trial court.[9] It was not addressed in Erin's proposed findings of fact, conclusions of law, and supplemental decree.[10] Based on the record, it seems that the trial court *sua sponte* decided to modify parenting time in the supplemental decree. As such, we conclude it is appropriate to determine continuing jurisdiction to modify child custody and timesharing at the time the supplemental decree was entered.

A trial court's jurisdiction to modify custody and parenting time continues until it determines that the conditions described by *either* (a) or (b) of KRS 403.824(1) exist. *Wahlke*, 392 S.W.3d at 430. At the time the supplemental

[9] In fact, during the April 12, 2018, hearing when Craig attempted to call the parties' oldest child to testify, Erin objected based on the fact that there was no motion to modify the parenting time plan.

[10] Both parties were ordered to submit proposed findings of fact and conclusions of law at the close of the April 12, 2018, hearing. If Craig did so, that document is not part of the record.

decree was entered, no interested party was residing in Kentucky; KRS 403.824(1)(b) applies. KRS 403.824(2) would not apply. At the time the trial court entered the supplemental decree and *sua sponte* addressed the timesharing issue, the children and their parents had been living in Texas for approximately one year. Accordingly, the trial court lacked jurisdiction to modify custody or parenting time. *Wahlke*, 392 S.W.3d at 430-31.

Craig has additionally argued that we should conclude the trial court lacked jurisdiction to consider issues of spousal maintenance and marital property. He has offered no authority in support of this position. While specific statutory provisions govern jurisdictional issues related to child support and child custody when parties relocate outside of this home state, the same is not true for other issues incidental to a dissolution proceeding.

B. Division of Property

Next, Craig contends that the trial court erred in the division of his and Erin's property. Craig takes specific issue with the trial court's classifying his Relocation Incentive Payment from Toyota as marital property, failing to award him reimbursement of expenses he had incurred on behalf of the parties' children, awarding him the 2007 Cadillac Escalade, and refusing to allow him to testify as to interest earned on the nonmarital portion of his retirement account. When property distribution is at issue in a dissolution proceeding, the trial court must undertake

three steps: (1) the trial court must categorize each piece of disputed property as marital or nonmarital; (2) the trial court must assign each party's nonmarital property to that party; (3) the trial court must equitably divide the parties' marital property in just proportions. *Smith v. Smith*, 235 S.W.3d 1, 5 (Ky. App. 2006).

"[A] trial court has wide discretion in dividing marital property; and we may not disturb the trial court's rulings on property-division issues unless the trial court has abused its discretion." *Id.* at 6 (citing *Davis v. Davis*, 777 S.W.2d 230, 233 (Ky. 1989)). "The question of whether an item is marital or nonmarital is reviewed under a two-tiered scrutiny in which the factual findings made by the court are reviewed under the clearly erroneous standard and the ultimate legal conclusion denominating the item as marital or nonmarital is reviewed de novo." *Id.* (citations omitted). Marital property is defined in KRS 403.190(2) as "all property acquired by either spouse subsequent to the marriage[.]"[11]

i. Relocation Incentive

Craig contends that the trial court erred in failing to classify the Relocation Incentive as his future income, which he contends would have required the trial court to classify it as nonmarital property. In concluding that the Relocation Incentive was marital property, the trial court found that Craig had

[11] Exceptions to the general rule are set out in KRS 403.190(2)(a)-(e). None of the exceptions is applicable in this case.

received it on August 1, 2017, which was before the decree of dissolution was entered. This finding was supported by Craig's testimony at the hearing. However, while Craig acknowledges that he has already received all funds at issue under the Relocation Incentive, he contends that he is not yet fully entitled to those funds as an event may occur which would require him to pay a portion of those funds back to Toyota. The Toyota Group Move Relocation Agreement, which governs the bonuses received by Craig as a result of his relocation, was admitted into evidence at the hearing. Provisions pertinent to the Relocation Incentive state as follows:

> 1.2 Toyota will pay Team Member [Craig] a $80,000 [sic] Relocation Incentive Payment ("Incentive") to acknowledge and support Team Member's future services to be rendered after arrival in the New Work Location area because of Team Member's willingness to accept this new assignment to promote and achieve a One Toyota culture. The amount is not tax protected. This amount will be paid in two installments, each installment constituting 50% of the incentive.
>
> > 1.2.1. **The initial fifty percent payment of the Incentive will be paid because of Team Member's willingness to relocate at the request of Toyota** in order to perform services in the new location that will help support the corporate structure of Toyota in the United States. This payment is not made because of any services performed by Team Member, or activities in, the location that Team Member is leaving. The initial fifty percent of the Incentive will be paid no earlier than sixty days following the Effective Date in the New Work Location. Team Member must have

relocated to the New Work Location and be employed by Company on the date of payment to be eligible to receive the initial payment.

. . . .

2.1. If a "Triggering Event" occurs, Team Member's Relocation Benefits and Incentive payments shall cease and Team Member shall no longer be entitled to receive such benefits and payments. Any one or more of the following is a Triggering Event:

2.1.1. Team Member's separation from Toyota for any reason, voluntarily or involuntarily (excluding total disability or death), within twenty-four (24) months of Team Member's Effective Date in the New Work Location;

2.1.2. Team Member's failure to relocate and start work in the New Work Location by the Effective Date in the New Work Location;

2.1.3. The discovery, prior to, during or after Team Member's employment with Toyota, that Team Member has provided false or fraudulent information to Toyota in connection with Team Member's application for Relocation Benefits; and

2.1.4. Team Member's transfer to a different location within Toyota, when not company-initiated, within twenty-four (24) months following Team Member's Effective Date in the New Work Location, specified in Section C above.

. . . .

If a Triggering Event occurs, Team Member agrees to reimburse Toyota for a pro-rata share of all Relocation Benefits paid by Toyota, including all direct payments made to Team Member, expense and

> reimbursements made to Team Member and payments to third parties for the benefit of Team Member and Team Member's eligible family members (including any gross-up amounts).[12] Team Member agrees to reimburse Toyota for the costs of the Relocation Benefits within thirty (30) days of any Triggering Event.

Resp't Ex. 17 at pp. 1-3 (emphases added).

Craig's "Effective Date in the New Work Location" was May 30, 2017. As he is still subject to having to pay back a portion of the Relocation Incentive if a triggering event occurs within twenty-four months of that date—*i.e.* before May 30, 2019—Craig contends he will not have actually earned the entirety of the Relocation Incentive until June of 2019, well after the dissolution of his and Erin's marriage.[13]

"In the case of an employee benefit, the operative factor in determining whether benefits are marital or non-marital property is not whether vesting has occurred." *Cobane v. Cobane*, 544 S.W.3d 672, 677 (Ky. App. 2018) (citing *McGinnis v. McGinnis*, 920 S.W.2d 68, 70 (Ky. App. 1995)). "Rather, the

[12] The Relocation Agreement includes a schedule setting forth the percentage of relocation benefits Craig would be required to pay back to Toyota should a triggering event occur. As of the date of the divorce decree, Craig had completed eight months of service at the Texas location. At that time, he would have been required to reimburse Toyota for 66.4% of the Relocation Incentive if a triggering event occurred.

[13] In his brief to this Court, Craig states he would have to reimburse Toyota for the Relocation Incentive if he left his employment for any reason before August of 2019. However, the Relocation Agreement clearly states that the relevant time is twenty-four months following Craig's Effective Date in the New Location, not following Craig's receipt of the Relocation Incentive.

test is whether the spouse's *right to participate in the plan* was earned during the marriage." *Id.* (emphasis added) (citing *McGinnis*, 920 S.W.2d at 70). Benefits that are only a "mere expectancy" should be classified as nonmarital. *Id.* However, "if the employee's right to future participation in the plan accrued during the marriage, then it is a marital asset even though the employee's right to receive those benefits does not arise until after the marriage." *Id.* (citing *McGinnis*, 920 S.W.2d at 71).

The evidence clearly indicates that Craig earned the right to receive the Relocation Incentive during his and Erin's marriage. The Relocation Agreement indicates that the Relocation Incentive was being paid as a result of Craig's willingness to relocate to Texas. Craig both made the decision to relocate and actually relocated to Texas during the parties' marriage. The benefits are more than a "mere expectancy"; Craig received all of the funds due to him under the Relocation Incentive during his and Erin's marriage. In contrast, the possibility that a triggering event will occur, requiring Craig to pay back a portion of those funds, is slim. Craig testified that he had not committed fraud when submitting his relocation application and had no intention of either ceasing to work for Toyota or seeking a transfer to a different location. While there is a chance that Craig could be terminated from his position, Craig acknowledged that it is unlikely.

Accordingly, we find no error in the trial court's conclusion that the Relocation Incentive is marital property.

ii. Reimbursement of Expenses

Craig next contends that the trial court erred in failing to reimburse him for all of the expenses he incurred on the children's behalf during the period following his and Erin's separation and before their divorce. Craig testified that because Erin claimed to be too financially strained to contribute, he alone paid for the children's childcare, school lunches, haircuts, school supplies, clothing, and medical expenses. The supplemental decree did order that Craig and Erin calculate the expenses each had incurred post-separation on the children's extracurricular activities and uninsured medical, dental, optical, prescription, and copay expenses and use those expenses to offset the amount of child support each owed the other. Craig contends, however, that Erin should reimburse him for "each and every" expense incurred on the children's behalf. We disagree.

As Craig and Erin were not divorced until February of 2018, the bulk of the expenses for which Craig requests reimbursement were paid out of marital funds. The only expenses that Craig and Erin were ordered to share were those incurred on behalf of the children's uncovered medical, dental, optical, prescription or copay expenses. While it would be ideal for both parties to proportionately contribute to the children's expenses, there is no requirement that they do so. We

discern no abuse of discretion in the trial court's decision not to have Erin reimburse Craig for all expenses he incurred on the children's behalf.

iii. Cadillac Escalade

Craig next argues that the trial court erred in awarding him the parties' Escalade, when both he and Erin had requested that she receive the vehicle. As an initial point, Craig's statement that both he and Erin wished that she keep the Escalade is incorrect. This vehicle has been the subject of much contention throughout this proceeding. The parties' testimony established that Erin was the primary driver of the Escalade, but that only Craig's name was listed on the vehicle's title. In November of 2016, Erin did request that the court order Craig to transfer title of the Escalade to her so that she could sell it, as she could no longer afford the maintenance it required. The court entered no such order, and the Escalade remained in Erin's possession. At the hearing, Erin testified that she had repeatedly requested that Craig either transfer title of the Escalade to her so that she could sell it or that he sell it himself. He refused. Erin testified that Craig had refused to register the Escalade in Texas after the parties moved there; accordingly, she could no longer drive it without running the risk of being ticketed. Erin additionally presented exhibits showing that her apartment complex had towed the Escalade from the complex because it lacked valid registration. When Erin informed Craig that the Escalade had been towed, he told her to either move it or

fix the issue—things that she did not have the ability to do. Erin testified that because she could not drive the Escalade, she had purchased another vehicle.

In determining that Craig should take the Escalade and be responsible for any liability attached to it, the trial court found that Craig's actions were in bad faith. That finding is supported by the testimony given at the hearing. As such, we cannot conclude that the trial court abused its discretion in awarding the Escalade to Craig.

iv. Interest Earned on Nonmarital Retirement

Craig additionally contends that the trial court erred in not allowing him to testify about interest earned on the nonmarital portion of his retirement account. On the second day of the hearing, Craig introduced a statement demonstrating that he had $3,101.50 in his retirement accounts immediately prior to the parties' marriage. Craig's counsel explained to the trial court that, over the years, the accounts had been managed by Fidelity, Mercer, TransAmerica, and then Fidelity again. At some point, Craig's pension and 401(k) accounts were merged into one account. Craig had statements for these accounts; however, he acknowledged that he was missing statements covering approximately six years. Nonetheless, Craig sought to give testimony tracing his nonmarital portion of the funds. On Erin's objection, the trial court ruled that Craig could not testify as to the interest attributable to the nonmarital portion of his retirement funds.

When a particular item of property consists of both marital and nonmarital components, a trial court is required to "determine the parties' separate nonmarital and marital shares or interests in the property on the basis of the evidence before the court." *Sexton v. Sexton*, 125 S.W.3d 258, 265 (Ky. 2004) (quoting *Travis v. Travis*, 59 S.W.3d 904, 909 (Ky. 2001)). "The court must apply the 'source of funds' rule in order to characterize the property or the parties' interests in it as marital or non-marital." *McVicker v. McVicker*, 461 S.W.3d 404, 417 (Ky. App. 2015) (citing *Sexton*, 125 S.W.3d at 265). It was acknowledged by both Craig and Erin that the $3,101.50 in Craig's retirement account at the time of their marriage was Craig's nonmarital property. What was unclear, however, was how much of the account's current balance was attributable to interest earned on the nonmarital portion.

"Tracing" is "[t]he process of tracking property's ownership or characteristics from the time of its origin to the present[.]" *Tracing*, BLACK'S LAW DICTIONARY (11th ed. 2019). "The concept of tracing is judicially created and arises from KRS 403.190(3)'s presumption that all property acquired after the marriage is marital property unless shown to come within one of KRS 403.190(2)'s exceptions." *Sexton*, 125 S.W.3d at 266 (citations omitted). "A party claiming that property, or an interest therein, acquired during the marriage is nonmarital bears the burden of proof." *Id.* (citation omitted) To meet this burden, the party

claiming that a portion of the disputed property is nonmarital must provide clear and convincing evidence demonstrating that contention. *Smith v. Smith*, 450 S.W.3d 729, 733 (Ky. App. 2014) (citing *Brosick v. Brosick*, 974 S.W.2d 498, 502 (Ky. App. 1998)).

In this instance, Craig all but outright admitted that he could not meet this burden. As he was missing six years' worth of statements from his retirement account, there is no way he could have accurately traced the interest attributable to his nonmarital portion of the account. Because it was clear that Craig could not meet his burden, there was no error on the trial court's part in refusing to allow him to testify on the issue.

C. Maintenance

Next, Craig contends that the trial court erred in ordering him to pay any maintenance to Erin. Pursuant to KRS 403.200(1), a trial court may only award a spouse maintenance in a dissolution proceedings if it finds that two requirements are met. First, "there must first be a finding that the spouse seeking maintenance lacks sufficient property, including marital property, to provide for his reasonable needs." *Drake v. Drake*, 721 S.W.2d 728, 730 (Ky. App. 1986). "Secondly, that spouse must be unable to support himself through appropriate employment according to the standard of living established during the marriage." *Id.* (citing *Lovett v. Lovett*, 688 S.W.2d 329, 332 (Ky. 1985)). If a trial court

determines that a spouse is entitled to receive maintenance, it looks to the factors listed in KRS 403.200(2) to determine the amount and duration of maintenance payments. When reviewing awards of maintenance, this Court will not set aside the findings of the trial court unless they are clearly erroneous. *Age v. Age*, 340 S.W.3d 88, 94-95 (Ky. App. 2011) (citing CR 52.01). "Further, the trial court is afforded a wide range of discretion, which is reviewed under an abuse-of-discretion standard." *Id.* at 95 (citations omitted).

In considering Erin's request for maintenance, the trial court found that Erin earned a gross of $45,000 per year but had expenses of $5,869 per month. The trial court found that Erin's standard of living post-separation had changed significantly—she was residing in a small apartment with a roommate, was unable to take vacations with the children or purchase new clothing for herself, and was unable to make ends meet without liquidating assets to pay bills. Erin had received approximately $70,000 from the sale of the marital residence and would receive approximately $215,000 after dividing the marital portion of Craig's retirement account. However, the trial court found that Erin had been forced to use a portion of the proceeds from the sale of the marital residence to cover her attorney fees and living expenses.

As to the amount and duration of maintenance, the trial court ordered that Erin receive $1,000 per month for the next four years. In so determining, the

trial court found the parties had enjoyed a comfortable standard of living during their eighteen-year marriage, which Craig continued to enjoy post-separation. The trial court found that Craig had been able to substantially advance his career during the parties' marriage, due, in large part, to Erin's contributions as a full-time homemaker and as the main provider of care for the parties' children. The trial court noted that while Craig had the ability to continue to grow his retirement through his employment, Erin had a job that did not offer retirement benefits. The trial court concluded that Craig had the ability to meet his needs while paying Erin maintenance, based on his income of approximately $101,717 gross per year and monthly expenses of $7,826.66.

Much of Craig's argument against the amount of maintenance awarded to Erin concerns his contention that Erin is to blame for the breakdown of the parties' marriage. In support of his contention that the trial court should have taken Erin's fault into consideration when determining whether she should be awarded maintenance, Craig directs our attention to *Chapman v. Chapman*, 498 S.W.2d 134 (Ky. 1973). The court in *Chapman* did hold that it was appropriate to introduce proof of a spouse's fault when arguing the amount of maintenance he or she will receive; this is despite the fact that KRS 403.200(2) does not include fault in the factors to be considered by a court. *Chapman*, 498 S.W.2d at 135. While *Chapman* has been heavily criticized, *see e.g., Tenner v. Tenner*, 906 S.W.2d 322,

325-26 (Ky. 1995) (Stephens, C.J., concurring); *Platt v. Platt*, 728 S.W.2d 542 (Ky. App. 1987), it has not been overruled and its holding prevails. The trial court did not discuss fault when considering the amount and duration of maintenance Erin should be awarded. Nonetheless, we cannot find that this constitutes an abuse of discretion. *Chapman* does not mandate that a trial court consider fault. Further, while Craig and the parties' oldest child did testify to facts that suggest that Erin was engaged in an extramarital affair shortly before the parties' separation, Erin also testified to facts suggesting that it was Craig's behavior that caused her to file the petition for dissolution.

Craig additionally contends that the maintenance award was erroneous because the trial court failed to consider the fact that, in addition to her salary and the marital assets apportioned to her, Erin had a nonmarital IRA with an approximate balance of $118,000. He also argues that Erin presented no proof that she had been forced to use her proceeds from the marital residence for any expense. Craig notes that the most recent bank statement provided by Erin showed that she had a savings account balance of $71,624.47. Craig is correct that the trial court failed to consider the income Erin received from her IRA in its analysis. It additionally appears that the trial court failed to consider the total sum of marital

property Erin was receiving by virtue of its order.[14] We further note that the trial court found that Craig had a gross income of $101,717 per year, including bonuses, which amounts to $8,476 gross per month. It additionally found that Craig had monthly expenses of $7,826.66, which were appropriate. These findings are supported by this evidence. Based on these findings, however, it is unclear how the trial court concluded that Craig has the ability to pay Erin $1,000 per month—not including child support payments—while retaining the ability to support himself. Because the trial court's order on maintenance fails to consider all of Erin's financial resources and erroneously concludes, based on its own findings, that Craig has the ability to support himself while paying Erin $1,000 per month in maintenance, we vacate and remand for further consideration.

D. Attorney Fees

Craig contends that the trial court erred in ordering him to pay a portion of Erin's attorney fees under KRS 403.220. KRS 403.220 permits a trial court to order a party to pay a reasonable amount of the other party's legal fees after considering the financial resources of both parties. The amount of attorney fees awarded to a party is within the sound discretion of the trial court. *Gentry v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990).

[14] In addition to the $285,000 Erin received from the sale of the marital residence and Craig's retirement account considered by the court, Erin was allocated $30,925.44 in marital assets.

In ordering Craig to pay $4,000 of Erin's attorney fees, the trial court noted the inequity of the parties' incomes. Craig contends that this was erroneous, as he believes Erin is in possession of greater financial resources than he if her inherited IRA is taken into consideration. Indeed, KRS 403.220 directs a court to consider the parties' total financial resources, not just their incomes. Disparity between the parties' incomes is, however, "a viable factor for trial courts to consider in following the statute and looking at the parties' total financial picture." *Smith v. McGill*, 556 S.W.3d 552, 556 (Ky. 2018). It is undisputed that Craig grosses more than two times as much as Erin per year. Thus, despite the fact that Craig does not have supplemental income from an IRA account like Erin does, he is still in a better financial position than she is. Accordingly, we cannot find that the trial court abused its discretion in ordering Craig to pay a portion of Erin's attorney fees.

III. CONCLUSION

. In light of the foregoing, we affirm in part, reverse in part, vacate in part, and remand for further proceedings. Specifically, we affirm the trial court's orders with respect to child support, division of marital property, and attorney fees. We reverse the trial court's *sua sponte* order modifying timesharing because the trial court lacked jurisdiction under the UCCJEA to modify timesharing where the parties did not live in Kentucky and had lived in Texas for over a year. We vacate

the trial court's spousal maintenance award and remand for consideration of Craig's ability to pay the ordered maintenance while meeting his own reasonable and necessary expenses.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Tasha K. Schaffner Crestview Hills, Kentucky	Melissa Thompson Millard Cincinnati, Ohio