

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001557-MR

HENRY K. JARRETT, III

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE PAULA SHERLOCK, JUDGE
ACTION NO. 03-CI-503843

CYNTHIA M. JARRETT; HON. DENNIS
SIMS

APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** * ** * ** *

BEFORE: ABRAMSON, ACREE AND WINE, JUDGES.

WINE, JUDGE: Henry K. Jarrett, III, appeals from findings of fact, conclusions of law and a judgment dissolving his marriage to Cynthia M. Jarrett. Henry argues that the trial court was unfairly biased against him, failed to properly restore certain nonmarital property to him, improperly valued certain marital property, failed to make sufficient findings of fact supporting the maintenance award to Cynthia, and awarded excessive fees to Cynthia's attorney. We agree with Henry that he was entitled to restoration of his

original nonmarital contribution to the marital residence, that the court's findings concerning the amount and duration of maintenance were insufficient, and that the court's award of attorney fees was arbitrary. We find no error on his other claimed grounds. Hence, we affirm in part, reverse in part, and remand for additional factual findings and entry of a new judgment.

FACTUAL SUMMARY

Henry and Cynthia Jarrett were married on July 9, 1983, in Jefferson County, Kentucky. One child who was born of the marriage is now emancipated. Throughout the marriage, Henry was employed as an attorney. For much of the marriage, Cynthia was employed as a legal secretary. In recent years, she has reduced her outside employment to part-time and has attempted to establish a home-based sewing business.

The parties separated on September 29, 2003, and Cynthia filed a petition for dissolution of the marriage on October 16, 2003. After extensive discovery, the trial court conducted a bench trial on all contested issues on August 16-17, 2005. The court entered a dissolution decree on December 29, 2005. On March 15, 2006, the court entered separate findings of fact, conclusions of law and a judgment on the contested issues of property division, maintenance, and attorney fees. Thereafter, Henry filed a motion to alter, amend or vacate, CR 59.05, or in the alternative a motion for additional findings, CR 52.02. For the most part, the trial court denied the motions, but it did make additional findings on Henry's claim of a nonmarital contribution to the residence and

concerning attorney fees. Following additional post-judgment motions, mostly involving attorney fees, Henry appealed to this Court.

ALLEGED BIAS OF TRIAL JUDGE

We will first address Henry's claim that the trial court exhibited personal bias and prejudgment against him through its comments from the bench during proceedings, its evidentiary rulings, its judgment and postjudgment rulings. Consequently, he asserts that the trial judge should have recused itself. However, the record does not support Henry's assertions that the trial judge was personally biased against him.

In *Stopher v. Commonwealth*, 57 S.W.3d 787 (Ky. 2001), the Supreme Court of Kentucky reiterated the burden placed upon a party seeking disqualification of a judge:

KRS 26A.015(2) requires recusal when a judge has "personal bias or prejudice concerning a party . . . [,]" or "has knowledge of any other circumstances in which his impartiality might reasonably be questioned." KRS 26A.015(2)(a) and (e); *see* SCR 4.300, Canon 3C(1). The burden of proof required for recusal of a trial judge is an onerous one. There must be a showing of facts "of a character calculated seriously to impair the judge's impartiality and sway his judgment." *Foster v. Commonwealth*, Ky., 348 S.W.2d 759, 760 (1961), *cert. denied*, 368 U.S. 993, 82 S.Ct. 613, 7 L.Ed.2d 530 (1962); *see also Johnson v. Ducobu*, Ky., 258 S.W.2d 509 (1953). The mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds for recusal. *Webb v. Commonwealth*, Ky., 904 S.W.2d 226 (1995).

Id. at 794-95.

Likewise, the fact that the judge may have formed an opinion about a party based upon the evidence is not grounds for recusal. Rather, the focus of our inquiry must be on whether the judge's attitude towards a party was based upon any extra-judicial or improper factors. *Marlowe v. Commonwealth*, 709 S.W.2d 424, 428 (Ky. 1986). See also *Liteky v. United States*, 510 U.S. 540, 550-51, 114 S. Ct. 1147, 1155, 127 L. Ed. 2d 474 (1994). While we question certain aspects of how the trial court handled this case and the appropriateness of certain comments, we cannot find that these actions categorically demonstrate unfair bias on the part of the trial judge.

Henry first contends that the trial court's pretrial and postjudgment rulings demonstrate that the trial judge was biased against him. We agree that Henry's motions to alter, amend or vacate and for additional findings operated to stay the execution of the judgment. CR 62.01. Consequently, the court's order enforcing maintenance during the pendency of these motions was erroneous. But the trial court's adverse rulings, even if erroneous, do not provide a basis for finding bias absent some showing that they were based on improper factors.

Henry next contends that the trial court strictly enforced pretrial discovery orders against him, but allowed Cynthia to file late or incomplete responses to his discovery requests. However, such decisions are clearly within the discretion of the trial court. *Berrier v. Bizer*, 57 S.W.3d 271, 278 (Ky. 2001), citing CR 36.02. We find no evidence that the trial court's discretion was influenced by bias or any improper factors.

Furthermore, much of Henry's argument on this point is based on his contention that Cynthia was required to specifically identify the amounts of each of her claims, relying on *Fratzke v. Murphy*, 12 S.W.3d 269 (Ky. 1999). He asserts that the trial court exhibited bias in favor of Cynthia by failing to enforce this requirement. But the notice requirements of CR 8.01 only apply to claims for unliquidated damages. CR 8.01(2). Cynthia's claims for maintenance and division of marital property were not "unliquidated damages" within the meaning of the terms used in CR 8.01. Hence, the trial court's refusal to require Cynthia to identify the amounts of her claims was not erroneous, much less an indication of bias.

Henry next complains that the court's allocation of time at the bench trial showed favoritism toward Cynthia. But upon reviewing the trial tape, we find no evidence of any hostility shown by the trial judge toward Henry. Furthermore, Henry does not indicate when or whether he objected to the trial court's request to hear from witnesses out of order. And he does not suggest that the court's conduct of the trial interfered with his ability to present evidence. The trial court has discretion to control the presentation of evidence. Thus, we can find no unfair prejudice to Henry from the court's conduct of the trial. *Pendleton v. Pendleton*, 685 S.W.2d 549 (Ky. 1985); *Estes v. Estes*, 464 S.W.2d 813 (Ky. 1971).

Henry's strongest argument concerns a statement by the trial judge during a pretrial hearing to the effect that the court believed Henry was underreporting his income. In addressing Henry's subsequent motion to recuse based on this statement, the trial

judge admitted that this comment was inappropriate because this issue had been reserved for trial. While we would agree that this statement was ill-advised at the time, we find no indication that the trial judge could not impartially consider the evidence presented at trial. In fact, the trial court ultimately found no evidence that Henry had failed to report any income. Rather, the only issue which the court considered was the reasonableness of Henry's claimed business deductions, which we will address separately. After reviewing the record as a whole, we cannot find that Henry met his burden of proving unfair bias sufficient to warrant recusal of the trial judge.

TRACING OF NONMARITAL FUNDS

Turning now to the substantive issues in this case, Henry first argues that the trial court failed to restore two of his nonmarital contributions to marital property. Specifically, he claims that he was entitled to an interest in the equity in the marital residence based upon a contribution of nonmarital funds in 1987, and to restoration of Cynthia's attorney fees which he paid with nonmarital funds during the pendency of this action. The trial court found that Henry had failed to meet his burden of tracing the nonmarital funds into the marital residence. The trial court also denied Henry's request for restoration of the attorney fees without explanation. While we find that Henry was entitled to restoration of his original contribution to the marital residence, we conclude that Henry was not entitled to the additional nonmarital interest which he claimed in the residence or to restoration of the funds used to pay Cynthia's attorney fees.

The concept of “tracing” is not expressly created by statute, but it is strongly implied by the presumptions created in KRS 403.190. Essentially, the tracing requirement simply means that “[w]hen the original property claimed to be nonmarital is no longer owned, the nonmarital claimant must trace the previously owned property into a presently owned specific asset.” 15 Graham & Keller, *Kentucky Practice, Domestic Relations Law*, § 15.10 at 512 (2nd ed. 2000). If the claimant does so, then the trial court assigns the specific property, or an interest in the specific property, to the claimant as his or her nonmarital property. On the other hand, a claimant cannot meet the tracing requirement simply by showing that he or she brought nonmarital property into the marriage without also showing that he or she has spent his or her nonmarital assets in a traceable manner during the marriage. Under such circumstances, the trial court will not assign the property to the claimant as nonmarital property, but it may consider nonmarital contribution as a factor when it makes a just division of the parties’ marital property. *See Chenault v. Chenault*, 799 S.W.2d 575, 578-79 (Ky. 1990). *See also Brunson v. Brunson*, 569 S.W.2d 173, 176 (Ky.App. 1978); *Angel v. Angel*, 562 S.W.2d 661, 664-65 (Ky.App. 1978).

In 1987, the marital residence was threatened with foreclosure. Henry states that he sold a nonmarital gold coin and applied \$1,362.72 of the proceeds toward the past-due mortgage payment. In its supplemental findings of fact, the trial court found that Henry had traced his nonmarital contribution into the marital residence. But the court declined to restore the nonmarital contribution because “the proceeds from the

liquidation of [Henry's] gold coin were used to keep the marital residence from going into foreclosure after a period when [Henry], the primary wage earner of the family, failed to make mortgage payments.” Thereafter, the court indicates that Henry failed to prove that this payment should be applied as an equity contribution rather than toward interest and fees.

We agree with Henry that the trial court erred by finding that he had failed to satisfy the tracing requirements with respect to the original \$1,367.72 contribution. As the trial court noted, Henry clearly established that he sold the nonmarital coin and then shortly thereafter made the mortgage payment with a portion of the proceeds. The parties agree that this payment stopped the pending foreclosure of the marital residence. The fact that Henry may have been responsible for the original default does not negate his nonmarital contribution. Furthermore, there is no requirement that Henry prove that this nonmarital contribution was applied toward equity. Consequently, we agree that Henry was entitled to restoration of this nonmarital contribution.

However, Henry further argues that the payment should be considered a nonmarital contribution to the equity in the marital residence. Thus, he asserts that he is entitled to the restoration of his \$1,367.72 contribution, plus the increase in value of the marital residence attributable to that contribution. See *Newman v. Newman*, 597 S.W.2d 137 (Ky. 1980); *Brandenburg v. Brandenburg*, 617 S.W.2d 871 (Ky.App. 1981). In *Travis v. Travis*, 59 S.W.3d 904 (Ky. 2001), the Kentucky Supreme Court explained that the *Brandenburg* formula is not automatically applicable to situations such as this.

Where property consists of both marital and nonmarital components, the trial court must determine the parties' separate nonmarital and marital shares or interests in the property. *Travis*, 59 S.W.3d at 909. But when the property acquired during the marriage includes an increase in the value of an asset containing both marital and nonmarital components, the trial court must determine from the evidence why the increase in value occurred. If the increase in value was due to general economic conditions, then the increase is deemed to be nonmarital. But if the increase is due to the joint efforts of the parties, then the increase in value is marital. Moreover, KRS 403.190(3) creates a presumption that any such increase in value is marital property. Therefore, a party asserting that he or she should receive appreciation upon a nonmarital contribution as nonmarital property carries the burden of proving the portion of the increase in value attributable to the nonmarital contribution. Otherwise, the increase will be characterized as marital property. *Travis*, 59 S.W.3d at 910-11.

In this case, Henry did not establish that the increase in value of the marital residence was due to general economic circumstances or his sole efforts. Therefore, the appreciation in value of the residence must be deemed to be marital property. Thus, Henry is only entitled to restoration of his original \$1,367.72 contribution.

Henry next claims that he was entitled to restoration of fees which he paid with nonmarital funds to Cynthia's attorney. Prior to trial, the court ordered Henry to advance \$7,500.00 to Cynthia's attorney. Henry cashed out \$4,000.00 from a nonmarital trust/annuity to apply toward that obligation. However, the tracing rule applies to

nonmarital contributions to marital *assets*. A party is not entitled to restoration of a contribution of nonmarital funds unless that contribution can be traced to a specific asset owned at the time of dissolution. *Chenault*, 799 S.W.2d at 579. In this case, Cynthia's attorney fees were not a marital asset, but an obligation which the trial court assigned to Henry. Furthermore, the court did not order Henry to apply any particular assets toward this obligation. While this contribution should be taken into consideration in the court's division of marital property, Henry was not entitled to a restoration of those funds.

DIVISION AND VALUATION OF MARITAL PROPERTY

Henry's second series of arguments concerns the trial court's valuation of certain marital property. He specifically claims that the trial court over-valued the two automobiles (which were awarded to him), under-valued Cynthia's business (which was awarded to her), and failed to charge Cynthia for withdrawals she made from her retirement account during the parties' separation. In reviewing the trial court's valuation of marital property, we must defer to the considerable discretion of the trial court unless it has committed clear error or has abused that discretion. The trial court's findings of fact will "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. Substantial evidence has been defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). "Mere doubt as to the correctness of the finding [will] not

justify [its] reversal.” *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003), *citing* 7 Philips, *Kentucky Practice, Rules of Civil Procedure Annotated*, § 52.01 at 279 (6th ed. 2005).

We cannot find that the trial court clearly erred in determining the divisible values of any of these items of marital property.

With respect to the valuation of the automobiles, neither party testified entirely from their personal knowledge. Both parties introduced computer appraisals based upon standard values and adjusted for mileage and condition of the vehicles.¹

Henry argues, however, that Cynthia’s appraisal does not accurately reflect the mileage and condition of either vehicle. Consequently, he asserts that the trial court clearly erred by accepting Cynthia’s appraisals of the vehicles rather than his.

While Henry’s position is reasonable, we note that he did not introduce any independent evidence supporting his description of the mileage and condition of the vehicles. Consequently, the sole issue before the trial court concerned the credibility of Henry’s and Cynthia’s separate appraisals. Such determinations are squarely within the discretion of the trial court. Therefore, we cannot find that the trial court clearly erred by accepting Cynthia’s appraisals over Henry’s.

Henry next argues that the trial court erred by finding that Cynthia’s home sewing business had no value which could be divided. He notes that the business had assets of a \$2,000.00 sewing machine, copyright, materials, supplies and inventory.

¹ Both parties obtained their appraisal information from <http://www.nadaguides.com> - the website of the National Automobile Dealers Association. The printed and electronic versions of the NADA Guides are recognized to be authoritative sources as to the values of new and used vehicles.

Consequently, he argues that the court should have assigned some marital value to these assets.

However, Henry concedes that Cynthia had not actively operated the business for two years prior to trial, the business has an outstanding debt of \$6,000.00, and the business had never operated at a profit. Furthermore, while the court found the business debt to be marital, it assigned the debt entirely to Cynthia. Under the circumstances, the court could reasonably find that the sewing business had no value above its liabilities.

DISSIPATION OF ASSETS

Henry argues that the trial court should have charged Cynthia for withdrawals she made from her retirement account during separation. Between the parties' separation and the trial, Cynthia withdrew approximately \$11,000.00 from her individual retirement account. The parties agree that the IRA is a marital asset. The trial court noted that Cynthia did not receive maintenance during the separation, but she continued to live in the marital residence and Henry continued to pay the mortgage and other necessary expenses.

Nevertheless, the trial court found that Cynthia's withdrawals from the IRA were for her reasonable and necessary expenses during the period of separation. Since there was no showing that Cynthia dissipated these assets, the court concluded that the withdrawals should not be charged against Cynthia's share of the marital property. Again, we cannot find this conclusion to be clearly erroneous.

MAINTENANCE

Henry's primary argument concerns the trial court's award of lifetime maintenance to Cynthia in the amount of \$1,350.00 per month. An award of maintenance is within the sound discretion of the court and will not be disturbed on appeal absent an abuse of discretion. *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990); *Perrine v. Christine*, 833 S.W.2d 825 (Ky. 1992). When determining whether an award of maintenance is appropriate, KRS 403.200(1) requires the trial court to find that the spouse seeking maintenance: (1) lacks sufficient property, including marital property apportioned to her, to provide for her reasonable needs; and (2) is unable to support herself through appropriate employment. While Henry takes issue with the trial court's findings concerning Cynthia's earning capacity and expenses, he does not seriously contend that Cynthia is currently able to meet her reasonable needs even with the marital property apportioned to her and the earning capacity which he would impute to her. Therefore, we cannot find that the trial court erred by finding that Cynthia is entitled to maintenance.

Rather, Henry takes issue with the trial court's findings concerning the amount and duration of maintenance. He argues that the trial court failed to make sufficient findings supporting its award. In particular, Henry contends that the award is based upon erroneous findings concerning his income and Cynthia's earning capacity. He further argues that the trial court considered improper factors, disregarded Cynthia's admissions that she was voluntarily underemployed, and improperly considered Cynthia's unsupported testimony about her medical conditions. Henry argues that the

trial court failed to consider changes in Cynthia's expenses which occurred after the trial but prior to the judgment. Based on these erroneous findings, Henry contends that the award of maintenance is excessive as to both amount and duration.

KRS 403.200(2) provides that once it is established that maintenance is appropriate:

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

(a) The financial resources of the party seeking maintenance, including marital property apportioned to [her], and [her] ability to meet [her] needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

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

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

(d) The duration of the marriage;

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

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

In determining the amount of a maintenance award, KRS 403.200(2) clearly directs the trial court to consider "all relevant factors." The statute does not, however,

require the court to make specific findings of fact as to each relevant factor. *Drake v. Drake*, 721 S.W.2d 728 (Ky.App. 1986).

Furthermore, the amount and duration of maintenance are within the sound discretion of the trial court. *Gentry*, 798 S.W.2d at 937; *Combs v. Combs*, 622 S.W.2d 679, 680 (Ky. App. 1981), *citing* KRS 403.200(2); *Browning v. Browning*, 551 S.W.2d 823 (Ky.App. 1977); and *Russell v. Russell*, 878 S.W.2d 24, 26 (Ky.App. 1994). “As an appellate court, . . . this Court is [not] authorized to substitute its own judgment for that of the trial court on the weight of the evidence, where the trial court’s decision is supported by substantial evidence.” *Leveridge v. Leveridge*, 997 S.W.2d 1, 2 (Ky. 1999), *citing Combs*, 787 S.W.2d at 262.

Nevertheless, the trial court’s exercise of its discretion regarding maintenance must be based upon sufficient findings of fact which are supported by the evidence. Following entry of the judgment, Henry filed a motion pursuant to CR 52.02 for additional factual findings on specific issues involving the amount and duration of maintenance. The trial court denied his motion for additional findings. Based upon the lack of necessary findings supporting the maintenance award, Henry argues that this Court must set aside the maintenance award for additional findings. Under the circumstances presented in this case, we agree.

It is well-established that a final judgment shall not be set aside because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless the failure is brought to the attention of the trial court by a written motion pursuant

to CR 52.02. CR 52.04. In the absence of such a motion, this Court must presume that the evidence presented at trial supports the trial court's conclusions. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). But conversely, CR 52.02 does not require a trial court to make additional findings in response to a motion. The rule simply states that the court "may amend its findings or make additional findings" in response to a motion. By its own terms, the rule permits the trial court to determine the sufficiency of its factual findings.

But where a party preserved the issue through a proper motion, the question on appeal is whether the omitted finding involves a matter which was essential to the trial court's judgment. As this involves a question of law, we need not defer to the trial court's conclusion that its findings were sufficient. Furthermore, since the issue is preserved for review, this Court is not required to presume that the evidence supports the trial court's conclusions. With this standard in mind, we agree that Henry was entitled to specific factual findings on several issues which he raised relating to the maintenance award.

First, we agree with Henry that the trial court failed to adequately explain its findings concerning Henry's income and earning capacity. At trial, Cynthia claimed that Henry was under-reporting his income and that his deductions for business expenses were excessive. The trial court found no evidence that Henry had failed to report any income. The court then suggested that some of Henry's deductions of personal expenses, while appropriate for tax purposes, were not appropriate to determine his income for

maintenance purposes. The court also stated that Henry has been able to meet his reasonable needs and to pay private school tuition for their adult daughter “from his personal resources.” However, the trial court did not determine Henry’s actual income. Rather, the court summarily found “the sum of \$60,000.00 a year as a reasonable amount to impute as income to [Henry].”

The trial court’s finding “imputing” income to Henry was a poor choice of words. For purposes of determining child support and maintenance, a court may impute income to a party it finds to be voluntarily unemployed or underemployed. However, the trial court never explained its reasons for imputing income to Henry and evidence presented at trial does not support a conclusion that Henry is underemployed.

The trial court noted that Henry has been a practicing attorney for twenty-five years and “bills at the rate of \$175.00 per hour.” But the court also states that the gross receipts for Henry’s law practice in 2003 and 2004 were \$54,495.00 and \$76,621.00, respectively. While it could be implied that the court implicitly disallowed some of Henry’s business deductions, we note that the gross receipts from Henry’s legal practice exceeded the sum of \$60,000.00 only in 2004 – the year immediately preceding the bench trial. And while the trial court suggested that Henry has income from his nonmarital property, the trial court did not make any findings concerning the amount of income which that property could be expected to produce for Henry. Given Henry’s prior income history, there was no evidence to suggest that Henry is underemployed.

In determining the amount of maintenance, KRS 403.200(2)(f) requires the trial court to consider “[t]he ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.” As part of this determination, the trial court must consider the obligor spouse’s income and his reasonable expenses. Without adequate factual findings supporting its decision, we are unable to review the trial court’s conclusions imputing income to Henry and finding that he can meet his reasonable needs while paying maintenance to Cynthia. We conclude, therefore, that the trial court erred by denying his motion for additional factual findings on this issue. Consequently, this matter must be remanded for additional findings. *Greathouse v. American National Bank and Trust Co.*, 796 S.W.2d 868, 878 (Ky.App. 1990).

Second, we also agree with Henry that he was entitled to additional findings concerning Cynthia’s income. Henry contends that the trial court erred by finding that Cynthia is unable to earn more than her current income. He first argues that the trial court erred by accepting Cynthia’s testimony about her health problems without any supporting expert medical testimony or documentation. Such evidence is necessary in personal injury cases, where a plaintiff must prove damages with reasonable certainty. *See Rogers v. Sullivan*, 410 S.W.2d 624, 628 (Ky. 1966). But as previously noted, maintenance is not an item of damages. It is a statutorily-created right based upon consideration of enumerated factors. We find no authority for Henry’s contention that a spouse cannot testify generally about her health or physical ailments which limit her

working capacity. Rather, the absence of supporting medical evidence merely goes to the weight of Cynthia's testimony.

Having said this, however, we caution that trial courts should consider such evidence carefully. While a spouse may testify about her health and symptoms, she may not offer a medical diagnosis outside of her knowledge or experience. Likewise, such testimony may not include hearsay from medical providers. Finally, due process and fundamental fairness require a trial court to apply the same evidentiary standards to opposing parties. Thus, unless the trial court adequately explained the disparate treatment, we would consider it an abuse of discretion to require one party to present medical evidence of a work restriction while accepting the other party's unsupported statements regarding a limited ability to work.

But in this case, Henry does not argue that Cynthia's testimony included any improper evidence. She testified that she is unable to sit for long periods due to bouts of dizziness, a racing heart, and pain in her lower back and hip. Cynthia introduced her prescription records, and she discussed her absences from work due to medical appointments. She did not attempt to testify regarding any medical diagnosis or work restrictions imposed by her physicians. Although the trial court was not required to accept Cynthia's testimony without supporting medical testimony or documentation, we cannot find that the trial court clearly erred in doing so. Furthermore, we find no indication that the trial court applied disparate evidentiary standards to the parties.

The more difficult question concerns how Cynthia's testimony should be viewed in light of her pretrial admissions. In response to a request for admission, Cynthia admitted that her medical conditions did not prevent her from maintaining full-time employment during the marriage. She admitted that no physician has placed any restrictions on her work activity. And she further stated that her "decision not to seek other employment is based on personalty [*sic*] preference, my side business, and the enormous amount of time I have committed to this dissolution action."

Henry contends that these admissions should have precluded Cynthia from testifying about any limitations on her ability to work. Since Cynthia never withdrew the admissions, he argues that they conclusively establish that Cynthia is voluntarily underemployed. CR 36.02. *See also Berrier*, 57 S.W.3d at 278-80. But while Cynthia admitted that she reduced her employment to part-time for personal reasons, her other admissions also addressed her health problems. And when viewed as a whole, the admissions would not necessarily negate the trial court's finding that Cynthia "is unlikely to be able to increase her income at her age with her present education and skills and physical limitations," since this finding relates only to Cynthia's future earning capacity.

But we agree with Henry that the trial court failed to adequately address the effect of these admissions upon the determination of her current income and earning capacity. Even if Cynthia's admissions did not amount to a categorical admission of underemployment, they strongly suggest that the recent reduction in her income was due to a temporary, rather than permanent, loss of earning capacity. Since maintenance must

be based on Cynthia's reasonable needs in excess of her income and other resources, the trial court's failure to make findings on this question necessarily implicates its conclusions concerning the amount of maintenance. *See Sayre v. Sayre*, 675 S.W.2d 647, 648 (Ky.App. 1984). Therefore, the trial court must make additional findings on this issue.

Third, we agree with Henry that he was entitled to additional findings concerning Cynthia's reasonable expenses. In determining maintenance, the trial court found that Cynthia's monthly expenses would be approximately \$2,742.00 per month after she moved from the marital residence. These expenses included projected housing-related expenses of \$1,100.00 per month. Prior to entry of the judgment, the marital residence was sold and Cynthia purchased a new residence. In his CR 59.05 motion, Henry stated that Cynthia's housing expenses had been reduced to \$500.00 per month, and he argued that her maintenance should be adjusted accordingly. The trial court denied Henry's motion without addressing this issue.

In *Rayborn v. Rayborn*, 185 S.W.3d 641 (Ky. 2006), the Kentucky Supreme Court found that a change in circumstances occurring after the entry of the decree but before entry of the judgment cannot serve as a basis for a subsequent modification of maintenance pursuant to KRS 403.250. *Id.* at 643-44. Since these changes in Cynthia's expenses cannot be raised at a later date, Henry properly raised the issue in his motion to alter, amend, or vacate the judgment. Consequently, he was entitled to additional findings on the merits of the issue.

Henry's fourth argument is that the trial court's award of maintenance was influenced by an improper factor – evidence of his infidelity during the marriage. However, a trial court may consider such misconduct as a factor in determining the amount of maintenance. *See Tenner v. Tenner*, 906 S.W.2d 322 (Ky. 1995); *Chapman v. Chapman*, 498 S.W.2d 134 (Ky. 1973). Moreover, Henry does not identify anywhere in the record where the trial court indicated that it considered his misconduct during the marriage as a factor in determining maintenance. In the absence of any evidence in the record supporting this speculation, we can find no error or abuse of discretion.

Henry's last argument with regard to maintenance is that the trial court improperly considered the marital debt assigned to Cynthia. The trial court found all of the debt to be marital and divided it equally between the parties. The court then assigned the debt to the party in whose name the debt was incurred, and ordered Henry to pay Cynthia \$6,000.00 to equalize the division of debt. While Henry does not contest the trial court's allocation of debt, he argues that the court should not have considered Cynthia's share of the debt in determining her reasonable needs for maintenance purposes.

In essence, Henry contends that the inclusion of Cynthia's debt payments in her monthly expenses appears to negate the assignment of debt to her. However, we find no authority to support his position that these expenses must be excluded in determining Cynthia's reasonable needs. Likewise, the trial court must consider Henry's debt payments in determining whether he can meet his reasonable needs while paying maintenance to Cynthia.

Because we are remanding this case for additional findings, we will also address Henry's broader argument concerning the duration of the maintenance award. Henry correctly notes that KRS 403.200 seeks to enable the unemployable spouse to acquire the skills necessary to support himself or herself in the current workforce so that he or she does not rely upon the maintenance of the working spouse indefinitely. *Clark v. Clark*, 782 S.W.2d 56, 61 (Ky.App. 1990). But "in situations where the marriage was long term, the dependent spouse is near retirement age, the discrepancy in incomes is great, or the prospects for self-sufficiency appears dismal[,]” our courts have declined to follow that policy and have instead awarded maintenance for a longer period or in greater amounts. *Id.* Further, KRS 403.200 specifically states that the trial court should consider the standard of living to which the parties are accustomed in determining the amount and duration of the award. "It is especially acceptable for the trial court to consider the impact of the divorce on the nonprofessional's standard of living and award an appropriate amount that the professional spouse can afford." *Id.* See also *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003).

In this case, we have a long-term marriage of twenty-three years. While there is some dispute concerning the parties' respective incomes, the evidence clearly shows a significant disparity between their incomes and earning capacities. Even if Cynthia is underemployed, her highest annual income during the marriage was \$17,533.40, and she has limited skills sufficient to earn more than that amount. Furthermore, she no longer has any significant retirement savings. And Henry concedes

that there was very little marital property to be divided. Finally, there is no dispute that the parties maintained a comfortable standard of living during the marriage.

Thus, it seems apparent to this Court that Cynthia is entitled to maintenance, perhaps even lifetime maintenance. And given the proper findings, the trial court's original award may well be justified. For this reason, we cannot reach the merits of Henry's argument that the amount and duration of maintenance was excessive. This matter can only be reviewed once the trial court makes sufficient findings.

ATTORNEY FEES

Henry argues that the trial court abused its discretion in its award of attorney fees. "KRS 403.220 authorizes a trial court to order one party to a divorce action to pay a "reasonable amount" for the attorney's fees of the other party, but only if there exists a disparity in the relative financial resources of the parties in favor of the [obligor]. . . ." But even if a disparity exists, the amount of fees is within the sound discretion of the trial judge. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 519 (Ky. 2001). The court may also consider conduct or tactics by either party during the litigation. *Gentry*, 798 S.W.2d at 938; *Connelly v. Degott*, 132 S.W.3d 871, 873 (Ky.App. 2003).

Nevertheless, even the broadest discretion must not be exercised arbitrarily. In this case, we are troubled by the manner in which the court exercised its discretion. Prior to trial, the court ordered Henry to advance the sum of \$7,500.00 to Cynthia's attorney for her fees. At trial, Cynthia sought a total of \$22,500.00 in attorney fees. In its first judgment, the trial court awarded Cynthia an additional \$10,000.00 in attorney

fees, bringing the total to \$17,500.00. But in its order denying Henry's CR 52.02 and CR 59.05 motions, the court, on its own initiative, awarded an additional \$5,000.00 in fees to Cynthia's attorney. In explaining this decision, the court stated that it had been "somewhat conservative" in its initial award. The court added that it now believed the award was too low and that all of Cynthia's attorney fees were reasonable "due to the protracted and contentious nature of the litigation, attributable in most part to [Henry], and the disparity in income between the parties."

Based solely on the disparity of incomes and resources, the trial court could have properly exercised its discretion to award attorney fees of either \$17,500.00 or \$22,500.00. But the court's late decision to increase the lower award by \$5,000.00 was arbitrary. We recognize that the trial court is in the best position to judge the conduct or tactics which waste the court's and attorneys' time, and this Court must give the trial court wide latitude to sanction or discourage such conduct. *Gentry*, 798 S.W.2d at 938. However, the record does not support the trial court's stated reasons for increasing the award.

At trial, Cynthia primarily argued that Henry was underreporting income and that he had dissipated assets. She also challenged his nonmarital claim to an inheritance and a trust. The trial court found for Henry on the first two issues, and Cynthia dropped her marital claim to the other property. Since he prevailed on these issues, Henry contends Cynthia's claimed attorney fees were not reasonable and that the award was excessive.

Simply because Henry prevailed on these issues does not mean that Cynthia did not reasonably incur attorney fees in raising them. But likewise, the result indicates that Henry had a reasonable basis to litigate these issues. However, the trial court seemed to take great issue with Henry's unwillingness to settle the disputed issues in this litigation. But while "[a] judge should encourage and seek to facilitate settlement, . . . parties should not feel coerced into surrendering the right to have their controversy resolved by the courts." SCR 4.300, Code of Judicial Conduct, Commentary to Canon 3B(8). Similarly, the court should not use its discretion to impose attorney fees under KRS 403.220 as a punitive sanction against a party who reasonably decided to litigate disputed issues.

Furthermore, the record does not support the trial court's opinion that Henry was primarily responsible for the contentious nature of the litigation. Rather, the record indicates that both parties engaged in conduct which caused protracted litigation. For example, early in the litigation, Cynthia entered Henry's law offices without permission and improperly removed client files. Furthermore, Cynthia sought discovery of Henry's client escrow account, which required the trial court to conduct an *in camera* review to address Henry's claim that this information was privileged. On the other hand, Henry raised a number of issues of questionable merit, most notably his argument concerning the application of CR 8.01(2).

Finally, Cynthia's attorney argues that the additional award was appropriate based upon Henry's actions in filing his postjudgment motions and an original action in

this Court against the trial judge. But as this Court found above, Henry was entitled to additional findings on several of the issues he raised in his postjudgment motions. Thus, we cannot say that his motions were unreasonable or brought in bad faith. Likewise, we agree with Henry that the trial court's order directing enforcement of the maintenance award while the postjudgment motions were pending appears to violate the clear language of CR 36.02. The trial court's subsequent denial of this motion rendered the issue moot. Further, this Court denied Henry's petition for a writ of prohibition, finding that he had failed to show irreparable harm as a result of the order. Nonetheless, we conclude that Henry had a reasonable basis for bringing the postjudgment motions and the original action. Therefore, that conduct could not serve as a basis for awarding additional attorney fees to Cynthia.

In most cases, such factors would not be sufficient to overturn a trial court's discretion in awarding attorney fees. But in this case, the trial court initially made a lesser award of fees and then subsequently increased the award on its own motion. Under such circumstances, the increase must be supported by more than the trial court's mere reconsideration of the original award. In the absence of sufficient evidence or findings, we conclude that the trial court abused its discretion by awarding Cynthia's attorney an additional \$5,000.00 in fees. Therefore, we reinstate the original award of \$17,500.00.

CONCLUSION

In conclusion, the record does not support Henry's argument that the trial court was unfairly biased against him. We find that Henry was entitled to a \$1,362.72

credit for a nonmarital contribution to the marital residence, but he failed to prove an entitlement to restoration of any other nonmarital property. The trial court's findings concerning the valuation of the marital property were supported by substantial evidence. Likewise, the trial court's finding that Cynthia is entitled to maintenance was also supported by substantial evidence. However, the trial court failed to make essential findings on certain issues relating to the amount and duration of the maintenance award. Therefore, we must remand this matter for additional factual findings. Finally, the trial court abused its discretion by awarding Cynthia's attorney an additional \$5,000.00 in fees after entry of the initial judgment. Consequently, we must set aside that award and we direct the trial court to reinstate its original award of \$17,500.00.

Accordingly, the judgment of the Jefferson Family Court is affirmed in part, reversed in part, and remanded for additional factual findings and entry of a new judgment as set forth in this opinion.

ALL CONCUR.

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