

RENDERED: JULY 24, 2009; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-002283-MR  
AND  
NO. 2008-CA-000938-MR

MARK WALLER

APPELLANT

v. APPEALS FROM BOONE CIRCUIT COURT  
HONORABLE LINDA R. BRAMLAGE, JUDGE  
ACTION NO. 03-CI-00162

ANGELA J. WALLER

APPELLEE

### OPINION AFFIRMING

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BEFORE: CAPERTON, CLAYTON AND DIXON, JUDGES.

DIXON, JUDGE: In this consolidated action, Mark Waller appeals from the Boone Circuit Court's findings of fact, conclusions of law, and decree dissolving his marriage to Angela J. Waller, rendered October 17, 2007. Mark also appeals from an order rendered April 18, 2008, setting maintenance and finding him in

contempt for failing to comply with the prior decree. After thorough review, we affirm.

Mark and Angela married in October 1986. Mark worked in the manufacturing and heavy equipment industries, in addition to raising tobacco and tending livestock on the parties' farm. Angela worked as a waitress at Gold Star Chili until the parties' only child was born in 1995, and she returned to that job a few years later. In 1999, however, Angela was diagnosed with multiple sclerosis. As a result, once she returned to work, her schedule alternated 32-hour and 40-hour workweeks to accommodate her symptoms.

Mark filed for divorce in January 2003. After lengthy litigation, a trial was held in September 2007. On October 17, 2007, the court rendered a decree of dissolution, along with extensive findings of fact and conclusions of law dividing the parties' property. Thereafter, following an April 16, 2008, hearing, the court rendered an order awarding maintenance to Angela and finding Mark in contempt of the court's prior order.

On appeal, Mark disputes the court's division of property, imputation of income to him, and award of attorney's fees. He also contends the court improperly used its contempt powers because he is unable to pay the amount necessary to purge the contempt.

## **I. Motion to Strike and Request for Attorney's Fees**

We first address Angela's pending motion to strike Mark's appellate brief and request for attorney's fees.<sup>1</sup> The format and content of Mark's brief falls short of the requirements set forth in CR 76.12(4). Mark failed to cite whether his claims are preserved for appellate review, and he failed to cite the video record, or any other evidence, to support his claims. CR 76.12(4)(c)(v). Additionally, Mark failed to file a designation of record pursuant to CR 75.01 and CR 98(3).

Although we have the authority to strike an appellate brief for non-compliance with the civil rules, CR 76.12(8)(a), we decline to do so in this instance. Instead, we will "give little credence to the arguments . . . that are not supported by a conforming citation to the record." *Smith v. Smith*, 235 S.W.3d 1, 5 (Ky. App. 2006).

As to Angela's request for attorney's fees of \$5,037.76, along with other fines and sanctions against Mark pursuant to CR 73.02(2), we likewise deny her motion.

## **II. Division of Property**

Mark's arguments relate to the sufficiency of the evidence supporting the court's classification of certain acreage as marital property, and the court's allocation of a marital savings plan account to Angela.

Although Mark cites the relevant paragraphs of the court's October 2007 findings of fact, he cites no other evidence from the record or hearing to

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<sup>1</sup> Angela's motion also requested dismissal of the instant appeal. In an order rendered December 22, 2008, a panel of this Court denied dismissal and passed the remainder of Angela's motion for this panel to consider with the merits of the case.

substantiate his arguments. Further, he did not designate the video of the September 10, 2007, hearing to be included in the certified record for our review. Consequently, Mark cannot now attack the sufficiency of the evidence where he has neither cited any evidence supporting his position, nor included the hearing in the record on appeal. *Commonwealth, Dep't of Highways v. Richardson*, 424 S.W.2d 601, 603 (Ky. 1967). Nevertheless, based on the court's detailed findings of fact, we conclude Mark's assertions are meritless.

#### A. Acreage

Mark argues the court erred in designating land of approximately 2.8 acres as marital property. Mark asserts he inherited the land during the marriage, making it his separate property.

The court's findings reflect that Angela and Mark received the property as a gift from Mark's family in May 2000. Further, the court noted, "There is no evidence offered by [Mark] to prove that he has a non-marital interest in this property."

Pursuant to KRS 403.190(3), all property acquired during the marriage is presumed marital, and the burden of proving otherwise rests with the spouse claiming a non-marital property interest. *Travis v. Travis*, 59 S.W.3d 904, 912 (Ky. 2001). As Mark offered no evidence to sustain his burden of proof, we find no error in the court's decision.

#### B. Savings Plan Account

Mark disputes the court's allocation of a marital savings plan account valued at approximately \$165,000.00, to Angela. The court set forth its reasoning, specifically noting Angela was solely responsible for substantial marital debt after Mark filed for bankruptcy and his liability for the marital debt was discharged. Mark deems the allocation of the savings plan unfair, asserting that Angela could also file bankruptcy to eliminate the marital debt.

“[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.” *Smith*, 235 S.W.3d at 6 (citation omitted). Furthermore, we are mindful that “a trial court is not obligated to divide the marital property equally. Rather, a trial court need only divide the marital property ‘in just proportions.’” *Id.* (citations omitted). After reviewing the trial court's detailed findings, we find no abuse of discretion.

### **III. Imputed Income**

Mark next challenges the finding of the court in its April 2008 order determining he had an “earning capacity of \$3,268.00 per month.” Mark argues his actual wage was \$12.32 per hour, and he earned \$2,135.47 per month. The court utilized its finding of Mark's “earning capacity” to calculate maintenance and child support.<sup>2</sup> Mark opines the court erroneously imputed income to him without

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<sup>2</sup> Mark's child support obligation was calculated based on income of \$3,268.00 per month and a wage assignment was entered with the October 2007 decree. Child support was not addressed in the April 2008 order.

making a finding he was voluntarily underemployed. Mark does not set forth whether (or how) this issue was preserved, nor does he cite any evidence from the record or hearing to substantiate his argument regarding income. CR 76.12(4)(c)(v). Furthermore, even if the court failed to make a specific finding of underemployment, Mark did not bring this issue to the court's attention by filing a post-judgment motion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). Pursuant to CR 52.04, "A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02." *See also id.* Accordingly, we decline to address this issue.

#### **IV. Contempt**

In its order of April 18, 2008, the court found Mark in contempt of the court's prior order of October 17, 2007, which required Mark to distribute certain assets to Angela. The court concluded Mark could purge himself of contempt by paying his full obligation under the October 2007 order, \$53,536.44. Mark contends the court's finding of contempt was unconscionable because it is impossible for him to pay the purge amount.

Again, Mark does not set forth whether (or how) this issue was preserved for our review, nor does he cite any evidence to support his argument. CR 76.12(4)(c)(v). Furthermore, even if the court had considered Mark's

argument, but failed to make a finding of fact, Mark did not bring the issue to the court's attention in a post-judgment motion. *Cherry*, 634 S.W.2d at 425; CR 52.04.

The inability of a party to pay an obligation is a question of fact for the trial court, and Mark bore the burden of proving he was unable to pay.

*Blakeman v. Schneider*, 864 S.W.2d 903, 906 (Ky. 1993).

A party is not to be punished for contempt for failure to perform an act which is impossible. An inability to comply must be shown clearly and categorically by the defendant, and the defendant must prove that he took all reasonable steps within his power to insure compliance with the order.

*Id.* (citations omitted).

There is no indication in the record that Mark attempted to overcome his burden of proof, and “[a] contemnor cannot voluntarily produce his own inability to pay.” *Id.* It is clear that a trial court has broad discretion in exercising its contempt powers. *Meyers v. Petrie*, 233 S.W.3d 212, 215 (Ky. App. 2007). Based on the record before us, we find no abuse of discretion.

#### **V. Attorney's Fees**

Finally, Mark asserts the court erred in determining a disparity in income existed between the parties and ordering him to pay \$24,000.00 in Angela's legal 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 payor.” *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 519 (Ky. 2001). In light of KRS 403.220, the trial court enjoys broad discretion in determining whether to award attorney’s fees. *Id.*

Although Mark disputes the court’s finding of disparity in the parties’ financial resources, yet again, he cites no evidence to support his position. The trial court clearly has broad discretion in awarding attorney’s fees, and we are not convinced the court’s finding of disparity “was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004) (citation and quotation marks omitted). The court made detailed findings of fact, and specifically concluded that a disparity in financial resources existed, warranting an award of attorney’s fees to Angela. Based on the record before us, we conclude the court did not abuse its broad discretion in awarding attorney’s fees.

For the reasons stated herein, the October 17, 2007, judgment, and the April 18, 2008, order of the Boone Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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