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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000180-MR

MELISSA MARGARET FARRAR — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DONNA DELAHANTY, JUDGE
ACTION NO. 10-CI-502682

BRADLEY WALTER FARRAR — APPELLEE

AND

NO. 2013-CA-000253-MR

BRADLEY WALTER FARRAR — CROSS-APPELLANT

v.

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DONNA DELAHANTY, JUDGE
ACTION NO. 10-CI-502682

MELISSA MARGARET FARRAR
AND MARY JANICE LINTNER — CROSS-APPELEES

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: JONES, LAMBERT, STUMBO, JUDGES.

JONES, JUDGE: This appeal and cross-appeal arise out of a marital dissolution proceeding wherein the Jefferson Circuit Court entered an order directing Appellant/Cross-Appellee, Melissa Margaret Farrar (hereinafter referred to as "Melissa") to transfer her interest in the parties' former marital residence (hereinafter referred to as "the residence") to Appellee/Cross-Appellant, Bradley Walter Farrar (hereinafter referred to as "Brad") in exchange for half of the fair market value of the residence less hypothetical closing costs, taxes and realtor fees. Brad also contests the trial court's award of attorney's fees to Melissa based on his alleged failure to timely comply with various other aspects of the dissolution decree and the trial court's denial of his motion for CR[1] 11 sanctions.

For the reasons more fully explained below, we affirm in part, reverse in part and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

Brad and Melissa were married on November 19, 1988, and formally separated on June 1, 2010. Prior to their separation, the parties lived in the residence, which is located in Anchorage, Kentucky. The residence was not encumbered by any mortgages or liens. When the parties separated, Melissa moved out of the residence leaving Brad in sole possession. During the pendency of the parties' marital dissolution action, Melissa moved the trial court to direct that the residence be placed on the market for sale. Melissa also proposed that Brad's brother, realtor Mike Farrar (hereinafter referred to as "Mike") be appointed realtor

[1] Kentucky Rules of Civil Procedure

and that she and Brad each contribute $5,000.00, as Mike suggested, to ready the residence for sale.

Brad objected to Melissa's motion stating to the trial court that he would like to maintain ownership of the residence. He suggested that the trial court allow him to "buy out" Melissa's interest in the residence. The trial court appeared amenable to this course of action and ordered an appraisal of the residence to determine its fair market value.

As directed, the parties had the residence appraised. The appraisal valued the residence at $440,000.00. Sometime thereafter, Brad changed his mind and informed the trial court that he no longer wanted to maintain ownership of the property. The parties then mutually agreed that the residence would be placed on the market for sale.

On March 2, 2011, the parties executed the Settlement Agreement, which codified their agreement concerning the sale of the residence. The relevant portion of the Settlement Agreement provides:

> The marital residence will be listed with Mike Farrar. The parties will follow all reasonable recommendations that the realtor may make. [Brad] will be responsible for the maintenance and upkeep of the property until it is sold. Any major improvements necessary for the house will be paid for equally by the parties. Once the home has been sold, they will each receive 50% of the net sale proceeds. Until the house is sold, [Brad] will pay [Melissa] $500.00 per month so long as he resides in the house. These payments will be made to [Melissa] out of [Brad's] share of the proceeds from the sale of the house.

The Settlement Agreement was incorporated into the final dissolution decree entered by the trial court.

As set forth in the Settlement Agreement, Brad continued residing in the residence. The parties agreed to make some repairs and maintenance to the residence before it was listed. To this end, they each contributed $4,829.74 to prepare the residence for sale, which included replacing kitchen countertops, replacing carpet, and painting. The residence was set to be listed on June 1, 2011.

Initially, Brad refused to sign the listing contact unless a clause was inserted into it that forbade the acceptance of any offers under $490,000.00. Melissa moved the trial court to order Brad to sign the listing contract without the minimum sale price clause. The trial court sustained Melissa's motion and directed Brad to sign the listing contract without inclusion of the contested provision.

Mike, acting as realtor, listed the residence for sale at $539,000.00 on or about June 30, 2011. On October 11, 2011, Melissa moved the trial court to allow the parties to reduce their asking price. In support of her motion, Melissa stated that the parties had not received a single offer to purchase the residence since having listed it and that no one had requested a showing in several weeks. Melissa also moved the trial court to appoint a new realtor on the ground that Mike was no longer responding to her inquires and had not been able to generate any offer. Conversely, Brad moved to extend Mike’s listing contract, which was set to expire on December 31, 2011, for a two-year term. Following a hearing, the trial court ordered that the residence be co-listed with Mike and a realtor of Melissa’s

choosing. The trial court also ordered that the listing price be reduced to $500,000.00.

On July 18, 2012, Melissa moved the trial court to order that the residence be sold at public auction stating that the parties had yet to receive a single offer for the residence. Before the trial court could take up Melissa's motion, a prospective buyer offered to purchase the residence for $447,000.00. When Brad refused to accept the offer, Melissa moved the trial court to order him to accept it.

Brad responded to the motion by offering to purchase Melissa's interest. He offered to do so for $207,243.00, the amount he asserted she would receive if they accepted the third-party buyer's offer.[2] Melissa replied that she would not agree to sell her interest to Brad for the offered amount.

The trial court held a hearing on the parties' motions. Melissa explained that she had already spent $4,829.74 on improvements for the residence in order to prepare it for sale. Melissa testified at the hearing that she would never have agreed to spend money for improvements to the residence if she knew Brad would continue living there. Melissa also testified that she was a licensed realtor and that the changes to the residence were only “cosmetic” to get the residence to sell and did not actually increase the fair market value of the residence. Second, Melissa objected to Brad buying out her interest in the residence at his calculation,

[2] Brad arrived at this number by dividing the purchase price in half and by subtracting $32,846.95 for closing costs (realtors' commission, realtors' administrative fee, deed preparation, sellers' closing fee, state taxes, city taxes, county taxes, school taxes, and a home warranty). Mike supposedly prepared a mock HUD Settlement Statement to arrive at this sum.

which reduced her interest by half of the closing costs that would not actually be incurred if Brad purchased her interest. Brad testified during the same hearing that he may in the future put the residence back on the market, but had no immediate plans to do so. Brad also testified that he would buy out Melissa's interest in the residence with cash and other assets, not from a sale of the residence.

The trial court ultimately granted Brad's motion. It ordered Brad to pay Melissa $207,200.00, calculated as one half of the $447,000.00 sales price of the residence minus closing costs, "including real estate taxes and realtor commissions but not the home warranty." The trial court then ordered Melissa to execute a quitclaim deed in Brad's favor upon receipt of the $207,200.00.

Thereafter, Melissa filed a motion under CR 59 to alter, amend, or vacate the court's order. In her motion, Melissa argued that the court's order should be amended to reflect the money that she paid to improve the residence and the lack of closing costs actually incurred for a resulting payment of $226,085.00, plus the $4,829.74 for improvements. The court overruled her motion, finding that Melissa had not suffered any manifest injustice due to the execution of the "sale" of the residence to Brad. Brad also moved the trial court to impose sanctions on Melissa, claiming that she filed the CR 59 motion in bad faith. The trial court denied Brad's motion.

This appeal followed.

II. Jurisdiction

A dissolution decree is considered a final judgment. Pursuant to KRS[3] 403.250(1): "[t]he provisions [of a decree] as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state."

Melissa asserts that the trial court did not make the required findings necessary under CR 60.02 to support reopening, and therefore, acted outside its authority by modifying the dissolution decree, which incorporated the Settlement Agreement, to permit Brad to purchase her interest in the residence. Apparently recognizing that this issue was not put before the trial court, Melissa couches it in terms of subject-matter jurisdiction, which can be raised at anytime, even for the first time on appeal.

The interplay between our procedural rules and subject-matter jurisdiction has been a source of great confusion. In *Commonwealth v. Steadman*, 411 S.W.3d 717 (Ky. 2013), the Kentucky Supreme Court went to great lengths to clarify the important distinction between case-specific jurisdiction, which is waived if not timely asserted, and subject-matter jurisdiction, which can never be waived. *Steadman* concerned a trial court's restitution order, which was entered more than ten days after final judgment. *Steadman* did not raise the "jurisdictional" issue before the trial court. On appeal, the Kentucky Supreme Court determined that because the circuit court has jurisdiction over felony criminal matters, it did not act outside its general subject-matter jurisdiction, but

[3] Kentucky Revised Statutes

only outside its case-specific jurisdiction. Since *Steadman* did not raise the alleged error before the trial court, the Supreme Court ruled that it was waived.

The *Steadman* court explained this very fundamental and important distinction with such clarity that we quote its explanation at length:

> Admittedly, this Court has said repeatedly in the past that a trial court *loses jurisdiction* of a case ten days after entry of a final order or judgment. *See, e.g., Commonwealth v. Marcum*, 873 S.W.2d 207, 211 (Ky. 1994) ("[J]udgment became final once ten days had elapsed with no action taken to alter, amend or vacate it; and ... the court had *lost jurisdiction* over the case." (citation omitted)); *Silverburg v. Commonwealth*, 587 S.W.2d 241, 244 (Ky. 1979) ("The court had lost jurisdiction of the case...."). We have also stated that the filing of a notice of appeal divests the trial court of jurisdiction and "transfers jurisdiction of the case from the circuit court to the appellate court." *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky.1990).
>
> But these decisions repeatedly refer to jurisdiction of or over "the case." They do not say the court loses jurisdiction over the subject matter of the case, or a category or class of cases.
>
> . . . .
>
> There is a significant difference between general subject-matter jurisdiction and jurisdiction over a particular case. General subject-matter jurisdiction "refers to a court's authority to determine 'this kind of case' (as opposed to 'this case')." *Commonwealth v. Griffin*, 942 S.W.2d 289, 290 (Ky.1997). This differs from "another type of jurisdiction, jurisdiction over a particular case, ... [which] refers to a court's authority to determine a specific case (as opposed to the class of cases of which the court has subject matter jurisdiction)." *Id.; see also Milby v. Wright*, 952 S.W.2d 202, 205 (Ky.1997) ("Finally there is jurisdiction over the particular case at issue, which refers to the authority and

power of the court to decide a specific case, rather than the class of cases over which the court has subject-matter jurisdiction.")

. . . .

A court's power to affect its own judgment within ten days of entry or after the filing of a notice of appeal is this latter category: jurisdiction over a particular case. Such questions go more accurately to the propriety of the exercise of jurisdiction rather than to the *existence* of jurisdiction. As noted above, the decisions describing a lack of jurisdiction under such circumstances limit it to "this case." That alone shows that we are talking not about limits on the court's power over an entire category of cases, but whether the court has exceeded its power with respect to *this* case.

. . . .

That these procedural rules are concerned with particular-case jurisdiction is also shown by the fact that they turn on particular facts, rather than whether the case fits within a statutorily or constitutionally defined category. "This kind of jurisdiction often turns solely on proof of certain compliance with statutory requirements and so-called jurisdictional facts, such as that an action was begun before a limitations period expired." *Nordike*, 231 S.W.3d at 738. The jurisdictional facts that would decide a particular-case jurisdictional question here are whether the trial court acted within ten days of entering its judgment, or whether Steadman had filed a notice of appeal.

Under the facts of this case, once they are accurately laid out, the trial court had lost jurisdiction of this case, but not subject-matter jurisdiction, when it entered the restitution order more than ten days after entering the final judgment imposing the sentence. But that does not mean that Steadman wins the jurisdictional fight in this particular case.

> ***As noted above, Steadman complained about this issue for the first time on appeal. He never raised this issue with the trial court, and in fact all but consented to having the restitution hearing after his final sentencing.*** Moreover, he had ample opportunity to raise any jurisdictional issue, and even addressed some issues related to his appeal at the restitution hearing. Yet he and his counsel acted as though the trial court still had jurisdiction. Not only did his counsel indicate that the first notice of appeal may have been ineffective, but Steadman himself had ready and filed a notice of appeal at the end of the hearing.
>
> Almost all issues are subject to waiver, whether from inaction or consent, even in a criminal case, and "[a] new theory of error cannot be raised for the first time on appeal." [Citations omitted].
>
> The lone exception to this rule, of course, is when the question is whether the trial court had general *subject-matter* jurisdiction. As we have concluded, however, the questions Steadman has raised do not go to subject-matter jurisdiction and instead concern only whether the trial court had particular-case jurisdiction. Or, more precisely, as "challenges to [the trial court's] subsequent rulings and judgment," they "are questions incident to the exercise of jurisdiction rather than to the *existence* of jurisdiction." *Hisle*, 258 S.W.3d at 429–30 (quoting *Buckalew v. Buckalew*, 754 N.E.2d 896, 898 (Ind.2001)). In other words, they are allegations of pure legal error and not of a failure of the court's power to act at all. And *particular-case* jurisdiction is subject to waiver. *Griffin*, 942 S.W.2d at 291 ("[A] lack of jurisdiction of the particular case, as dependent upon the existence of particular facts, may be waived.") (quoting *Collins v. Duff*, 283 S.W.2d 179 (Ky.1955)). It is clear that Steadman waived particular-case jurisdiction here.

Steadman, 411 S.W.3d at 721 -25 (emphasis in bold added).

Applying *Steadman* to the case at hand, it is clear that Melissa's jurisdictional argument concerns case-specific jurisdiction not subject-matter

jurisdiction. The circuit court has subject-matter jurisdiction over dissolution proceedings, including the division of marital property. While the trial court may have acted outside its case-specific jurisdiction in modifying the Settlement Agreement without making any findings under CR 60.02, it did not act outside its subject-matter jurisdiction in doing so. Melissa did not raise the case-specific jurisdictional issue before the trial court. As such, we are precluded from considering that issue as part of her current appeal.

III. Estoppel by Deed

Brad raises a threshold issue regarding Melissa's ability to pursue this appeal that we must consider before reaching the merits of this appeal. Brad argues that Melissa is estopped from prosecuting this appeal because she accepted his $207,200.00 payment and executed the quitclaim deed.

The doctrine of estoppel by deed "precludes a party to the deed and also those in privity with him from asserting against the other party thereto and his privies any right or title in derogation of the deed or from denying the truth of any material fact asserted in it." *Hunts Branch Coal Co. v. Canada*, 599 S.W.2d 154,156 (Ky. 1980) (citing *Kentucky River Coal Corp. v. Jones*, 441 S.W.2d 409, 411 (Ky. 1969); *Meyer v. Jefferson County*, 305 S.W.2d 536 (Ky. 1957)).

Brad argues that because Melissa executed the quitclaim deed prior to filing her CR 59 motion, she is estopped from asserting that she did not transfer title to him. Brad also claims that since the quitclaim deed referred to the specific amount of consideration, $207,200.00, which Melissa acknowledged receiving as

part of the transfer, she is estopped from now claiming that he owes her any additional sums.

With respect to the transfer of title, we do not believe that the doctrine of estoppel by deed is applicable because there is no evidence in the record that Melissa is contesting that Brad owns the residence as a result of the transfer. Melissa's sole argument on appeal is that the trial court abused its discretion in awarding her less than half of the equity in the residence.

Additionally, Brad's argument overlooks a crucial factor regarding the doctrine of estoppel – that "[o]ne who knows or should know of a situation or a material fact is precluded from denying it or asserting the contrary where by his words or conduct he has *mislead or prejudiced another person or induced him to change his position to his detriment.*" *Hunts Branch Coal Company* 599 S.W.2d at 155 (quoting *Old Republic Insurance Co. v. Begley*, 314 S.W.2d 552, 556 (Ky. 1958) (emphasis added)); s*ee also Illinois Cent. R. Co. v. Ward*, 35 S.W.2d 863, 866 (Ky.App. 1931) (*partially overruled on other grounds by Department of Highways v. Jackson*, 302 S.W.2d 373 (Ky. 1957)) ("In order to constitute an estoppel, action must have been induced that would result in prejudice to the actor if the person inducing the action should be permitted to change his position, or to pursue an inconsistent course of conduct.")

Melissa's execution and delivery of the deed was in accordance with a direct order from the court. In general, compliance with a court order does not estop a litigant from subsequently appealing the decision with which he or she

complied. "Where judgment is rendered against a party for money, he may pay the judgment and still prosecute the appeal[.]" *Mercer v. Federal Land Bank of Louisville*, 188 S.W.2d 489, 491 (Ky. 1945)(quoting *Madden v. Madden*, 183 S.W. 931 (Ky.App. 1916)). We believe it is appropriate to extend that logic to these circumstances where Melissa executed the quitclaim deed in response to the trial court's order directing her to do so. It would be inequitable to hold that Melissa has waived her right to appeal because she executed the deed in compliance with the trial court's order, especially where we fail see how Melissa induced Brad to act to his detriment in doing so.

Brad also argues that Melissa is estopped from appealing the trial court's order by her acceptance of the $207,200.00 from Brad. In support of this argument, Brad cites, *Complete Auto Transit v. Louisville & N. R. Co.*, 273 S.W.2d 385, 386 (Ky. 1954). Therein, it was held that one who accepts payment on a judgment is estopped from pursuing an appeal to reverse the judgment:

> It is our opinion that the general rule now recognized in so many other jurisdictions, as well as our own at an earlier date, is a sound one. As pointed out in the Paine case, from which we have quoted above, a party takes as indefensibly inconsistent position when he accepts the satisfaction of a money judgment and then appears before this Court asking that such judgment be reversed. The governing principle is one of waiver of the right of appeal, although in certain cases there may be also elements of estoppel. It does not seem material whether the payment of the judgment is coerced by execution or simply accepted by the successful party, nor is it material whether the satisfaction of the judgment is accepted prior to or after the appeal is taken. Upon such

> acceptance the appealing party relinquishes his right to attack in this Court the correctness of the judgment.

Id. at 387.

Other jurisdictions have recognized an exception to this rule:

> [I]f, for any reason, the benefit accepted by a party under a judgment or decree will not legally be put in jeopardy by his prosecuting an appeal or writ of error, his right to do so is not to be considered waived. If a plaintiff, for example, recovers a judgment for part of his claim, and the circumstances are such that his right to that part is incontrovertible upon the review or retrial which he seeks, he may accept payment, or even enforce execution, as to this lesser judgment without waiving his right to pursue his claim for the balance.

J. E. Macy, Annotation, *Right of appeal from judgment or decree as affected by acceptance of benefit thereunder*, 169 A.L.R. 985 (1957); *see also In Re Marriage of Abild*, 243 N.W.2d 541, 543 (Iowa 1976) ("When an appellant accepts only that which the appellee concedes, or is bound to concede, to be due him under the judgment or decree, he is not barred from prosecution of an appeal which involves only his right to a further recovery.")

Kentucky previously had a statute that codified this exception. *See* *Combs v. Bates*, 145 S.W. 759 (Ky. 1912) ("Section 757 of the Civil Code, among other things, provides: 'But when a party recovers judgment for only a part of the demand or property he sues for, the enforcement of such judgment shall not prevent him from prosecuting an appeal therefrom as to so much of the demand or property sued for that he did not recover.'") The statute was repealed in 1953 and not replaced. *See Complete Auto Transit,* 273 S.W.2d at 387. Since that time, the

cases in this jurisdiction have primarily followed the rule as set forth in *Complete Auto* disallowing appeal following acceptance of money.

However, our review shows no case law affirmatively rejecting an exception to the *Complete Auto Transit* rule in cases where the claimant accepted payment in exchange for executing a deed as part of dissolution proceedings and the appeal relates only to the appropriate amount of equity awarded to the parties. More importantly, our courts have questioned whether *Complete Auto Transit* is applicable to domestic relations cases as they are distinct from tort cases in many fundamental and important respects. "The *Complete Auto Transit* case deals with a tort judgment. It would be contrary to judicial conscience to hold that a wife and children must be without means of obtaining sustenance pending an appeal." *Walden v. Walden*, 486 S.W.2d 57, 60 (Ky. 1972).

Courts in other jurisdictions have carved out similar exceptions to acceptance of partial payment pending appeal in domestic relations cases where there is no argument that the accepting party was entitled to at *least* the amount awarded by the trial court and is seeking only additional money. *See Esposito v. Esposito*, 385 A.2d 1266, 1274 (N.J. Super.A.D.1978) ("Her appellate position was limited to an effort to modify upwards the monetary awards of equitable distribution and alimony; and our determination vindicates that position. Her acceptance of the partial benefits in her financial position cannot serve as a legal bar to her right to appeal. Defendant's argument is without merit."); *In re Marriage of Abild*, 243 N.W.2d at 543 ("Her acceptance of part of the cash award

was not inconsistent with her claim she was entitled to a greater award. In these circumstances, we hold she did not acquiesce in the property award by accepting part of it while her appeal was pending."); *Royster v. Hammel*, 366 N.E.2d 535, 537 (Ill. App. 1977) ("[O]n the facts before us there is no merit to defendant's contention that plaintiff accepted financial benefits under the decree. Title to the marital home was in joint tenancy, and the plaintiff surrendered her interest therein by quitclaim deed to the defendant in exchange for a cash payment to her of one-half of its appraised value.").

We believe these authorities are in accord with our Supreme Court's recent pronouncements favoring appeals and strictly curtailing the actions by which a party is deemed to have waived her right to appeal. Indeed, the Kentucky Supreme Court recently reaffirmed that "the right of appeal is favored by the law, and it certainly should not, and will not, be held to have been waived except upon clear and decisive grounds." *Dreamers, LLC v. Don's Lumber & Hardware, Inc.*, 366 S.W.3d 381, 385 (Ky. 2011) (quoting *Mercer v. Federal Land Bank of Louisville*, 300 Ky. 311, 188 S.W.2d 489, 491 (1945)); *see also* *Hundley v. Hundley*, 291 S.W.2d 544, 546 (Ky. 1956).

Accordingly, we hold that *Complete Auto Transit* does not apply to acceptance of monetary payments in dissolution proceedings where *there is no disagreement or dispute concerning whether the accepting party was entitled to at least the amount accepted and the only issue on appeal concerns whether the accepting party is entitled to additional money*.

No one, not even Brad, disputes that Melissa is entitled to at least the $207,200.00 she accepted for her equity in the residence. Melissa does not challenge the actual transfer of her interest in the residence to Brad. Her only challenge relates to the amount of equity due her. Moreover, when Melissa accepted payment, Brad was living in the residence and no rent was due until after sale. Melissa owned the residence jointly with Brad, requiring her to transfer title to him and then wait until after an appeal to accept *any* equity, even the amount Brad admitted she was due, while he continued living in the residence with no rent currently due, would be patently unfair. Under these facts, we do not believe that Melissa's acceptance of the equity payment from Brad precludes her ability to prosecute the instant appeal.

IV. Determination of Equity

We now turn to Melissa's primary assignment of substantive error: that the trial court abused its discretion in imputing closing costs, taxes, and realtors' fees before determining her one-half interest in the residence. As discussed above, when the trial court allowed Brad to purchase Melissa's interest in the residence, the court deducted "assumed" closing costs, including real estate taxes and realtor commissions, from the cost of the residence prior to determining Melissa's one-half interest.[4] Melissa argues that the trial court abused its discretion

[4] It is unclear what additional items were considered as closing costs by the trial court but we note that the number appears to include all items listed in Brad's settlement charges sheet minus the home warranty.

by deducting the closing costs from the total value of the residence when no costs were actually incurred or set to be incurred in the imminent future. We agree.

This is an issue of first impression in Kentucky. However, the issue has been addressed in several other jurisdictions. It has been most thoroughly discussed and summarized in *Kohler v. Kohler*, 211 Ariz. 106, 118 P.3d 621 (Ariz. Ct. App. 2005). In that case, the court granted the husband the marital residence and refused to include a deduction for future sales costs when determining the wife's equitable interest in the residence when the husband had no current, imminent plans to sell the property. The *Kohler* court held that: "In the absence of evidence that a sale is likely to occur in the near future, it is speculative to allow a deduction of the costs of a hypothetical sale from the share of the equity awarded to the spouse not receiving the property." *Id.* at 622. The *Kohler* court also relied upon a Washington case that determined that to justify deduction of costs of the sale, there must be evidence in the record: (1) showing that the party receiving full ownership of the residence intends an imminent sale; and (2) supporting the estimated costs of sale. *Id.* (citing *In re Marriage of Berg*, 47 Wash.App.754, 737 P.2d 680, 683 (1987)); *see also Dowden v. Allman*, 696 N.E.2d 456, 458 (Ind. Ct. App. 1998) ("Although it may be appropriate for a trial court to include the costs of sale that are a direct result of the disposition of property, where such costs are speculative in nature, we hold that including such costs in the valuation of property constitutes an abuse of discretion.")[5]

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[5] Courts have developed similar rules in: Alaska (*Virgin v. Virgin*, 990 P.2d 1040, 1049 (Alaska 1999)); California (*In re Marriage of Stratton*, 46 Cal.App.3d 173, 176 (Cal.Ct.App.1975));

We believe that *Kohler* is consistent with Kentucky's principle of distributing marital property in just proportions. *See* KRS 403.190; *see also* *Gaskill v. Robbins*, 282 S.W.3d 306, 316 (Ky. 2009) ("How the trial court ends up splitting the property must be based on record evidence, with an eye toward equity.")

It is reasonable and just that neither party should benefit or be harmed by including phantom or hypothetical costs as associated with the division of marital property. We adopt the rule as set forth in *Kohler* and hold that a trial court should not impute hypothetical closing costs to the transferring party where the property is being transferred to the other spouse without first finding based on the evidence of record that: (1) the receiving spouse plans or intends an imminent sale of the property without delay; and (2) credible and reliable evidence supports the estimated costs of sale. A trial court that imputes hypothetical closing costs in absence of either one of these threshold findings abuses its discretion.

Turing to the matter at hand, we do not believe that the first *Kohler* factor was satisfied in this matter. There was a private seller that was ready to purchase the property, but Brad indicated to the trial court that he wished to retain

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Colorado (*In re Marriage of Finer*, 920 P.2d 325, 332 (Colo.App.1996)); Florida (*Taber v. Taber*, 626 So.2d 1089, 1089–90 (Fla.Dist.Ct.App.1993)); Illinois (*In re Marriage of Benkendorf*, 624 N.E.2d 1241, 1245–46 (Ill. App. 1993)); Maryland (*Coviello v. Coviello*, 91 Md.App. 638, *5 (Md.Ct.Spec.App.1992)); Minnesota (*Aaron v. Aaron*, 281 N.W.2d 150, 154 (Minn.1979)); Missouri (*M.A.Z. v. F.J.Z.* 943 S.W.2d 781, 787 (Mo.Ct.App.1997)); Nebraska (*Matter of Adoption of G-,* 618 S.W.2d 462, 470 (Neb. Ct.App. 2000)); North Carolina (*Carlson v. Carlson*, 127 N.C.App. 87, 487 S.E.2d 784, 786–87 (1997)); Oregon (*In re Marriage of Kopplin*, 74 Or.App. 368, 703 P.2d 251, 253 (1985)); and South Carolina (*Pruitt v. Pruitt*, 389 S.C. 250, 268 (S.C.Ct.App.2010)).

the property for himself. While he testified that he might sell it at some point in the future, the record is clear that Brad did not intend to immediately re-list the property for sale. Rather, his intent was to live in the residence. Therefore, there was no evidence of record that Brad was going to have to pay out any closing costs associated with the residence at anytime in the near future.

The trial court, however, imputed the closing costs that would have been due to Melissa based on the offer from the third party that Brad rejected. At first blush, this might seem equitable. However, in reality, upon further review, it is anything but equitable and resulted in a windfall for Brad. There was no private third-party sale. Brad remained living in the residence. Neither party had to pay any closing costs. While the parties' Settlement Agreement called for a division of "net proceeds" after the sale, the trial court's order effectively modified this provision because there was no private third-party sale as contemplated by the Settlement Agreement provision. There were no "net proceeds" to divide. The trial court modified the Settlement Agreement by ordering Melissa to execute a quitclaim deed to Brad for a set amount in lieu of a private third-party sale.

However, the clear intent of the Settlement Agreement was that each party would receive fifty percent of the equity in the residence. The trial court's orders essentially awarded Brad fifty-four percent of the residence's equity, leaving Melissa with only forty-six percent in equity. The evidence of record does not support awarding Brad more equity than Melissa, particularly in light of the parties' prior agreement to share equally in any proceeds from a sale. It is our view that

Melissa was entitled to one half of the fair market value of the residence (apparently valued by the trial court at $447,000.00 as based on the private offer to purchase) minus any *actual costs* incurred by Brad as related to recording the quitclaim deed and effectuating the transfer.[6]

Melissa also argues that the trial court abused its discretion in failing to order Brad to reimburse her for the improvement costs she shared in prior to listing the residence for sale. We do not agree. While Melissa contends that the "improvements" did not actually increase the value of the residence, we find no evidence to support this contention. Additionally, we observe that the appraisal conducted prior to the improvements valued the residence at $440,000.00 and the third-party offer to purchase, upon which the trial court ultimately valued the residence, was $447,000.00. The difference between the two figures is roughly the amount the parties spent on improvements. Therefore, we do not believe that the trial court erred in refusing to order Brad to refund Melissa's half of the improvement costs to her. We believe evidence in the record supports the conclusion that improvements increased the overall value of the residence and resulted in a higher fair market value.

V. Cross-Appeal

We now turn to Brad's cross-appeal. The parties' original Settlement

[6] The record is unclear if Brad did actually incur any costs as a result of the transfer of Melissa's interest, such as the cost of preparing the quitclaim deed, etc. However, it is obvious that he did not incur any costs for realtor commissions, taxes, etc.

Agreement provided that: "[Brad] will assume responsibility for any taxes and penalties arising out of the 2008 [joint tax] returns." No deadline was given for Brad to assume this liability. On October 24, 2011, after the IRS sent an intent to levy letter to the parties, Melissa filed a motion to order Brad to pay the 2008 income taxes and to show cause why he should not be held in contempt for failing to do so. During a hearing on this motion, Brad testified that he was in the process of appealing his tax underpayment. Brad further testified that he was working with his accountant on this issue and that he had provided the IRS with the appropriate documentation.

At the conclusion of the hearing, the court verbally indicated that it would order Brad to pay the taxes, but did not submit a written order assigning a deadline for payment. Subsequent to the hearing, Melissa's counsel submitted a fee affidavit in regards to this issue in the amount of $707.51. The court then issued an order on January 30, 2012, indicating that the motions related to the tax obligation were under submission. Melissa renewed her motion on April 2, 2012. Prior to the hearing in this matter, Brad produced copies of the checks sent to the IRS in full satisfaction of this tax obligation by May 16, 2012. Melissa later filed another motion for contempt seeking attorney's fees in regards to the tax issue in the total amount of $2,050.00.

The trial court entered an order on June 25, 2012, requiring Brad to pay attorney's fees to Melissa's counsel in the amount of $707.51.[7] Brad did not

[7] This order reduced to writing the court's prior verbal order that Brad would pay the attorney's fees incurred by Melissa in bringing the first motion for contempt.

appeal this decision. The continued issue of the later attorney's fees was not decided until the court's January 4, 2013, order. Therein, the trial court found that Brad's failure to pay the taxes as set forth in the Settlement Agreement was both "willful and deliberate." As such, the court ordered him to pay $2,500 in attorney's fees to Melissa.[8] It is from that order that Brad appeals.

We review a trial court's order for attorney's fees for abuse of discretion. *Smith v. City of Loyall*, 702 S.W.2d 838, 839 (Ky.App. 1986). *See also Gentry v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990) ("The amount of an award of attorney's fees is committed to the sound discretion of the trial court with good reason. That court is in the best position to observe conduct and tactics which waste the court's and attorneys' time and must be given wide latitude to sanction or discourage such conduct.").

The circumstances under which attorney's fees may be granted in a dissolution matter are governed by KRS 403.220:

> The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

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[8] A portion of this $2,500.00 is in regards to fees incurred in order to compel Brad to pay expenses for the parties' minor child. This issue is discussed below.

Additionally, obstructive tactics and conduct are proper considerations justifying both the fact and the amount of the award. *Sexton v. Sexton*, 125 S.W.3d 258, 272–73 (Ky. 2004) (internal citations omitted).

"[I]n proper circumstances a reasonable attorney's fee may be allowed to the prevailing plaintiff in a civil contempt proceeding." 43 A.L.R.3d *Civil Contempt Action—Attorney's Fees,* § 3 (1972) at 797. "However, Kentucky courts have been consistently reluctant to uphold awards of attorney's fees except in those particular instances when such fees are authorized by a statute or a contract expressly providing therefor." *White v. Sullivan*, 667 S.W.2d 385, 389 (Ky. App. 1983) (internal citations omitted); *see also Rearden v. Rearden*, 296 S.W.3d 438, 444 (Ky. App. 2009).

In the present case, while the court made findings regarding Brad's conduct, it failed to make a finding regarding whether an award of attorney's fees was appropriate considering the financial resources of the parties in violation of KRS 403.220. Therefore, we remand the issue of the $2,500.00 payment of attorney's fees back to the trial court with instructions to make findings regarding the financial resources of the parties.[9]

In the parties' Memorandum of Understanding, the parties agreed to divide certain medical and educational costs associated with their minor son. On March 13, 2012, Melissa filed a motion for contempt regarding Brad's failure to pay such expenses and for attorney's fees in bringing the motion. Brad eventually

[9] We note that our order does not concern the trial court's award of $770.51 in attorney's fees from June 25, 2012, as Brad did not properly appeal that order.

reimbursed Melissa for these fees, but again the payment was significantly delayed and not made until several hearings were conducted. In the trial court's January 4, 2013, order, it found that: "[Melissa] further requests attorney's fees for her efforts in procuring Respondent's share of expenses related to the parties' minor child as [Melissa] filed a motion for a finding of contempt against [Brad] for his failure to pay these expenses which were incurred in 2011. [Brad] did not pay such expenses prior to the scheduled hearing, but once again delayed payment…the Court finds that it is appropriate to assign a portion of the reasonable attorney's fees relating to [Melissa's] attempt to collect the child's expenses." The Court thereafter ordered Brad to pay $2,500.00 in attorney's fees.[10]

As with the attorney's fees ordered for Melissa's contempt motion against Brad for the taxes, the court failed to make a finding in regards to the parties' financial circumstances for this award of attorney's fees. Therefore, we likewise remand this issue back to the trial court with instructions to make a finding regarding the financial resources of the parties.

Finally, we address the trial court's denial of Brad's motion for sanctions pursuant to CR 11. After Melissa filed her CR 59 Motion to Alter, Amend, or Vacate, Brad filed a response wherein he asked for sanctions pursuant to CR 11. Brad's argument effectively mirrors his estoppel by deed argument with the additional emphasis on the conduct of Melissa and her attorney at the times in

[10] This order for $2,500.00 in attorney's fees is the same order described above. It is unclear from the court's order what portion of the $2,500.00 was attributable to the child care contempt issue.

question. The trial court denied Brad's motions for sanctions in its January 4, 2013, order, finding that "[Melissa's] motion to alter, amend, or vacate contains a more complete argument regarding the amount received by [Brad]."[11] It is from that order that Brad appeals.

CR 11 states in relevant part:

> The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation….If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

CR 11 does not provide substantive rights to litigants but is a procedural rule designed to curb abusive conduct in the litigation process. *Clark Equip. Co., Inc. v. Bowman*, 762 S.W.2d 417, 420 (Ky.App. 1988). It is intended only for exceptional circumstances. *Id.* Where a trial court denies a motion for sanctions under CR 11, this Court's review is limited to a determination of whether

[11] The order actually refers to Brad's motion as just for attorney's fees. However, it is our view from the record that the court's order denied Brad's request for sanctions contained within that same motion.

the trial court abused its discretion. *Id.*; *see also Lexington Inv. Co. v. Willeroy*, 396 S.W.3d 309, 312-313 (Ky.App. 2013). The test for abuse of discretion is whether the trial court's ruling was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

After reviewing the record in this contentious case, we cannot say that the trial court abused its discretion in failing to award sanctions regarding Melissa's CR 59 motion. Melissa's arguments in her CR 59 motion were well grounded in law. Even though the trial court did not ultimately agree with Melissa's arguments, it still noted that her motion contained a more complete argument regarding the issues. Additionally, considering our reversal of the trial court's order regarding one of the issues raised in Melissa's CR 59 motion, we fail to see how her argument was not supported by law. We are therefore not persuaded that the trial court abused its discretion in failing to award sanctions pursuant to CR 11.

VI. Conclusion

Having reviewed each assignment of error, we reverse in part as related to the trial court's award of the amount of equity due Melissa and the trial court's award of attorney's fees, we affirm in part as related to the remainder of the trial court's order, and we remand this claim to the Jefferson Circuit Court for further proceedings consistent with this opinion.

ALL CONCUR.

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