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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000891-MR

THOMAS FRANCIS LAMBE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 11-CI-503339

JUDE MARIE WEBER (FORMERLY LAMBE); AND ALLEN MCKEE DODD — APPELLEES

AND NO. 2013-CA-000930-MR

JUDE MARIE WEBER (FORMERLY LAMBE) — CROSS-APPELLANT

v.

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 11-CI-503339

THOMAS FRANCIS LAMBE — CROSS-APPELLEE

AND NO. 2013-CA-001642-MR

THOMAS FRANCIS LAMBE APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 11-CI-503339

JUDE MARIE WEBER
(FORMERLY LAMBE) APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: DIXON, MOORE AND NICKELL, JUDGES.

DIXON, JUDGE: Appellant/Cross-Appellee, Thomas Lambe, appeals from the Jefferson Family Court's Findings of Fact, Conclusions of Law, Judgment and Decree of Dissolution of Marriage, as well as the Family Court's denial of his motion to alter, amend or vacate. Appellee/Cross-Appellant, Jude Marie Weber (formally Lambe) also appeals from the family court's orders. In addition, in a separate action filed in this Court and addressed herein, Thomas appeals from an order of the family court denying his motion to reduce maintenance and child support.

Thomas and Jude were married on October 10, 1992. Two children were born during the marriage, Margaret born in December 1996, and Kevin born in September 1999. Thomas has been employed at General Electric for the past twenty-six years and is currently an Operations Manager. Jude is a stay-at-home mother who has not worked outside of the home in over sixteen years. On September 26, 2011, Thomas filed a petition for dissolution in the Jefferson Family Court. A trial was subsequently conducted on November 14 and 15, 2012, and the family court entered its Findings of Fact, Conclusions of Law, and Decree of Dissolution on February 26, 2013.

In the decree, the family court restored each party's nonmarital assets and then divided the marital assets, including significant real property as well as numerous investment and brokerage accounts. Further, the family court awarded the parties joint custody of the two children and determined that their monthly expenses (excluding education costs) totaled $3,697.[1] As such, the family court ordered Thomas to pay child support in the amount of $2,150.09 per month in addition to the $108 per month that he pays in health insurance for the children. The family court also determined that because of Margaret's health issues, Jude is currently unable to obtain full-time employment. The family court estimated that Jude's reasonable monthly living expenses are $5,800 (including 30%, or $1,440, of the children's living expenses) which requires taxable income of about $7,300

[1] The family court calculated the children's expenses, including their share of household bills, food, clothing, personal items, entertainment and travel to be $3,589. In addition, the children's ratable share of the family health insurance was $108 per month.

per month. Accordingly, Thomas was ordered to pay maintenance in the amount of $7,300 per month for a period of nine years. Finally, the family court found that Jude used $50,000 in marital assets to pay her attorney fees, and credited Thomas with having contributed $25,000 of that amount. Due to the disparity in the parties' financial resources, Thomas was ordered to pay an additional $15,000 of Jude's attorney fees.

Following the entry of the decree, both parties filed Kentucky Rules of Civil Procedure (CR) 52 motions to alter, amend or vacate. On April 30, 2013, the family court ruled on the motions, making a few minor changes to its original judgment but otherwise denying the parties' requests. This appeal and cross-appeal ensued. Additional facts are set forth as necessary.

We review the findings of fact in a dissolution action only to determine if they are clearly erroneous. CR 52.01; *Sexton v. Sexton*, 125 S.W.3d 258 (Ky. 2004); *Ghali v. Ghali*, 596 S.W.2d 31 (Ky. App. 1980). CR 52.01 states, in part, "Findings of fact shall not be set aside unless clearly erroneous, and due respect shall be given to the opportunity of the trial court to judge the credibility of the witnesses." The trial court's conclusions of law are reviewed *de novo*. *Gosney v. Glenn*, 163 S.W.3d 894, 898–99 (Ky. App. 2005). With that standard of review in mind, we now turn to the parties' arguments on appeal.

Maintenance

Thomas argues that the trial court erred by (1) finding that Jude meets the statutory criteria for an award of maintenance; (2) failing to find that Jude is

voluntarily unemployed and imputing income to her; (3) improperly calculating her monthly expenses; (4) using Thomas's gross income rather than net income to establish a monthly amount of maintenance; and (5) ordering the maintenance obligation to continue for a period of nine years. In her cross-appeal, Jude challenges the family court's calculation of her monthly expenses, arguing that the amount and duration of the maintenance award is inadequate.

The amount and duration of a maintenance award are matters within the sound discretion of the trial court. *Gentry v. Gentry*, 798 S.W.2d 928, 937 (Ky. 1990). "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) (citation omitted). This Court may disturb the family court's order only if it abused its discretion or based its decision on findings of fact that are clearly erroneous. *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003).

Under Kentucky Revised Statutes (KRS) 403.200(1), a family court may award maintenance to either party to a dissolution proceeding if the party requesting such "lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs" and said party "[i]s unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home." KRS 403.200(2) sets forth the relevant

factors to be considered in determining the amount and duration of a maintenance award:

> (2) 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 him, and his ability to meet his 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 finding that Jude met the criteria for maintenance, the family court herein noted,

> Having considered the [KRS 403.200(2)] factors set forth above, the Court concludes that Ms. Lambe is currently unable to provide for her reasonable monthly living expenses through adequate employment or property awarded to her. Specifically, the Court believes that Ms. Lambe cannot maintain full-time employment until Margaret's medical condition has stabilized, but that she can draw a modest income from assets apportioned to her in this judgment. Ms. Lambe's current monthly living

> expenses are $5,800, which requires taxable income of about $7,300 per month. Mr. Lambe earns $18,756 per month and has reasonable monthly living expenses of about $4,500, plus a child support obligation of $2,150 per month. Therefore, he has sufficient income to meet his needs with money to spare. Effective with the entry of this Order, he shall pay Ms. Lambe maintenance of $7,300 per month for a period of nine (9) years. This award shall be modifiable under KRS 403.250 and shall terminate when either party dies or when Ms. Lambe remarries or cohabitates with an unrelated male. Furthermore, it shall be specifically modifiable in June of 2014, when Kevin completes 8th grade, or upon a change in Margaret's medical condition.

While Jude was, in fact, awarded a significant amount of property there is no evidence in the record regarding the income to be generated from such. Moreover, even though Jude will receive one-half of the equity in the marital residence once it is sold, there is no way to know when that will occur. We cannot conclude that the family court erred in finding that Jude was not awarded sufficient property to provide for her reasonable needs.

Nor do we find any merit in Thomas's argument that the family court erred in finding that Jude is currently unable to support herself through appropriate employment. Thomas points out that Jude has a Bachelor's Degree in Communications and was earning $26,000 to $28,000 at Vencor prior to becoming pregnant with their first child. Further, Thomas argues that his expert, Robert Tiell, performed a vocational assessment of Jude and concluded that she is currently employable and could earn approximately $30,000 to $35,000 per year at her current skill level. Jude's own expert, Linda Jones, also found her to be

employable, albeit with only an earning potential of $25, 461 to $31,456. In addition, Thomas argues that the evidence does not support the family court's finding that Jude cannot work at the present time due to Margaret's health and believes that, at a minimum, she is capable of obtaining part-time employment. Accordingly, Thomas argues that the trial court erred by refusing to impute income to Jude. We disagree.

KRS 403.212(2)(d) permits the family court to base child support on a parent's potential income if it determines that the parent is voluntarily unemployed or underemployed. Further, with respect to maintenance, a panel of this Court in *McGregor v. McGregor*, 334 S.W.3d 113, 117 (Ky. App. 2011), observed:

> [T]he maintenance statute, KRS 403.200, does not explicitly include a similar provision permitting a court to impute income to a voluntarily unemployed or underemployed spouse. In determining if a spouse is entitled to maintenance, a trial court must find, among other things, that the spouse seeking maintenance "[i]s unable to support [herself] through appropriate employment...." KRS 403.200(1)(b). To set the appropriate amount and duration of maintenance under KRS 403.200(2), the court must consider several factors, including a spouse's financial resources, ability to find appropriate employment, and the standard of living enjoyed during the marriage. While a case of first impression, it is implicit in this statutory language that a court may impute income to a voluntarily unemployed or underemployed spouse to determine both the spouse's entitlement to maintenance and the amount and duration of maintenance.

In its judgment, the family court thoroughly addressed Jude's ability to work, finding that she was absent from the workforce for more than sixteen years

at the agreement of the parties. The family court noted that Jude began looking for work immediately after the parties separated, but was forced to suspend her search when Margaret's health deteriorated. Further, once she is again able to begin looking for work, the family court concluded that it would take her at least nine months to a year to find suitable employment. The most significant factor, however, is that both parties' experts agreed that Margaret's condition must be stabilized before Jude can consider returning to the workforce. Because substantial evidence in the record supported a finding that Jude was not voluntarily unemployed, we conclude that the family court did not err by refusing to impute income to her for the purpose of maintenance.

Next, Thomas argues that the family court erred in calculating Jude's living expenses. Specifically, the trial court first found that Jude had significantly overstated her living expenses and had also included all of the costs attributable to the children in her estimate. After adjusting Jude's figures, the family court determined that her own reasonable monthly living expenses were $4,400. It then allocated about 39%, or $1,400 of the children's expenses,[2] to that amount for a total of $5,840 per month. Thomas contends that because his child support payment represents approximately 61% of the children's expenses, the family court's inclusion of Jude's proportional share of the children's expenses to her own expenses in calculating the maintenance amount essentially requires him to pay 100% of Jude's and the children's expenses for nine years. We must agree.

[2] The family court calculated the children's living expenses at $3,697 per month and allocated 61%, or $2,258.09, to Thomas, and 39%, or $1,440, to Jude.

There can be no question that awards of spousal maintenance and awards of child support are two distinctly separate concepts. Maintenance is for the needs of the recipient spouse, as the policies behind our maintenance statutes are of rehabilitation and relative stability. "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." *Powell,* 107 S.W.3d at 224; *see also Clark v. Clark*, 782 S.W.2d 56, 61 (Ky. App. 1990). The purpose of the statutes and the guidelines relating to child support, on the other hand, is to secure the support needed by the children commensurate with the ability of the parents to meet those needs. *Gossett v. Gossett*, 32 S.W.3d 109, 112 (Ky. App. 2000). "Both our statutory scheme and our case law demand that whenever possible the children of a marriage should be supported in such a way as to maintain the standard of living they would have enjoyed had the marriage not been dissolved." *Stewart v. Madera*, 744 S.W.2d 437, 439 (Ky. App. 1988).

The issue of whether expenses related to dependent children can or should be considered in determining a spouse's "reasonable needs" with respect to an award of maintenance under KRS 403.200 appears to be an issue of first impression in Kentucky. Although the term "reasonable needs" has not been specifically defined, it is clear that KRS 403.200(1) speaks in terms of whether the party seeking maintenance lacks sufficient property to provide for "his" reasonable

needs and whether that party is unable to support "himself" through appropriate employment.

In *Cohen v. Cohen*, 73 S.W.3d 39 (Mo. App. W.D. 2002), the husband argued that the trial court erred in finding that the wife's reasonable expenses included expenses for the minor child in her custody because those expenses had already been included in the court's child support calculation. In construing statutes virtually identical to ours, the Missouri Appellate Court agreed:

> It is well settled that maintenance awards, . . . are limited to the needs of the spouse requesting support. *Nichols v. Nichols*, 14 S.W.3d 630, 637 (Mo. App. 2000). Section 452.335 speaks "solely in terms of whether the requesting party lacks sufficient property to meet 'his' reasonable needs, and whether that party is able to support 'himself' through appropriate employment." *Id.* Thus, in determining the need for maintenance, the trial court is not to consider any amounts expended for the direct care and support of a dependent child. *Id.*

Cohen, 73 S.W.3d at 51. The *Cohen* Court cited to the decision in *Nichols v. Nichols*, 14 S.W.3d 630 (Mo. App. E.D. 2000), wherein the court explained the difference between the purposes of maintenance and child support:

> First, maintenance is for the needs of the recipient spouse; maintenance is not for child support. Although a few states have features in their statutes which occasionally blur the distinction between the two, *Fink v. Fink*, 120 N.C.App. 412, 462 S.E.2d 844, 851 (1995), the general rule is that awards of spousal maintenance and child support are two distinctly separate concepts, and the former does not include the latter. 27B C.J.S. *Divorce*, Sec. 309(a), p. 108 (1986). Missouri follows the general rule. Maintenance payments must be limited to the needs of the party requesting support. *Gerecke v. Gerecke*, 954 S.W.2d 665, 669 (Mo.App. S.D.1997). Maintenance

> awards proceed solely from "the need for reasonable support by one spouse from the other after the dissolution of the marriage." *Cates v. Cates*, 819 S.W.2d 731, 734 (Mo. banc 1991).
>
> Second, the relevant statutes do not authorize awards of maintenance to include anything more than the reasonable needs of the recipient spouse. . . . Section 452.335 is the statute governing support obligations of spousal maintenance. It does not provide that amounts expended for the direct care and support of a dependent child who resides with the spouse seeking maintenance may be included in determining the need for maintenance. Rather, the statute speaks solely in terms of whether the requesting party lacks sufficient property to meet "his" reasonable needs, and whether that party is able to support "himself" through appropriate employment.
> . . . .
>
> Wife's attempt to bootstrap child support into the maintenance statute by calling it part of the previous "standard of living" amounts to a strained interpretation of the statute, and one that would render a meaningless nullity the well-settled principle that maintenance is only for the needs of the recipient spouse. We hold that "standard of living," as properly construed in the context of the *maintenance* statute, refers solely to the standard of living previously enjoyed by the married parties themselves, and does not also refer to the standard of living enjoyed by any dependent [ ]children who resided with them during the marriage --- just as, by the very same token, the "standard of living" referred to in the *child support* statute refers solely to the standard of living enjoyed by the children prior to dissolution. [Emphasis in original].

Id. 637-638; s*ee also Ruffino v. Ruffino,* 400 S.W.3d 851 (Mo. App. E.D. 2013).

We agree with the rational of the Missouri courts in the above decisions.

Thomas was ordered to pay child support in the amount of $2,258.09 per month,

which represented approximately 61% of the children's expenses. The family court's inclusion of the other 39% of the children's expenses into Jude's reasonable monthly expenses resulted in Thomas essentially paying 100% of the children's expenses. Admittedly, we perceive some validity in Jude's argument that her costs related to the children should necessarily fall within her reasonable expenses. Such argument is all the more persuasive in circumstances herein where Jude's primary income is her maintenance award. Nevertheless, we believe including the children's expenses within the purview of the "reasonable expenses" of the party seeking maintenance is a slippery slope with far-reaching implications.

We conclude that in calculating the amount and duration of maintenance, the family court is not to consider any amounts expended by the party seeking maintenance for the care and support of a dependent child. Accordingly, we agree with Thomas that the family court's calculation of Jude's reasonable monthly expenses was erroneous and the matter must be remanded for further proceedings consistent with this opinion.

Thomas next argues that the family court's decision to award maintenance for a period of nine years is excessive and an abuse of discretion. Jude, on the other hand, argues that the maintenance award should be permanent given the length of the marriage (twenty years) and her uncertainty of future employment.

Generally, "[t]he duration of maintenance must have a direct relationship to two factors: (1) the period over which the need exists, and (2) the ability to pay." *Combs v. Combs*, 622 S.W.2d 679, 680 (Ky. App. 1981). The goal

of a maintenance award is to "facilitate one's transition from dependence upon her former spouse to independence. This is consistent with another goal of the dissolution process which is to sever all ties as much as possible as soon as possible." *Daunhauer v. Daunhauer*, 295 S.W.3d 154, 156 (Ky. App. 2009); *see also Light v. Light*, 599 S.W.2d 476, 479 (Ky. App. 1980)("Since ongoing maintenance ties the parties together, it should be avoided except as circumstances of need and fairness demand.")

In support of her claim for permanent maintenance, Jude relies on our Supreme Court's decision in *Gripshover v. Gripshover*, 246 S.W.3d 460 (Ky. 2008), wherein the Court observed,

> We have recognized, however, that the statutory goal of rehabilitation will not always be attainable: "[I]n 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 appear dismal, our courts have declined to follow that policy [rehabilitation] and have instead awarded maintenance for a longer period or in greater amounts."

Id. at 470. (Quoting *Powell,* 107 S.W.3d at 224). Thus, while it is true that maintenance awards sometimes last indefinitely, we do not believe the case before us is such a case. Thomas and Jude's marriage of twenty years may be considered one of long duration by today's standards. Nevertheless, Jude is only 48 years of age and possesses a bachelor's degree in communications. The trial court's finding that she was currently unable to seek employment was based primarily on Margaret's health, a condition that will not continue indefinitely. Both parties'

experts agreed that Jude will be employable once Margaret has stabilized. We do not believe that, like the spouse in *Gripshover*, "the prospects for [Jude's] self-sufficiency appear dismal[.]" Given Jude's age, education, and property settlement, she is not entitled to an award of permanent maintenance.

We do conclude, however, that the family court failed to make findings to justify its award of maintenance for a period of nine years. The family court neither found that Jude's need for maintenance will terminate in nine years because of an increased ability to meet her needs through property or employment income, nor found that Thomas will retain his ability to pay maintenance for nine years. The family court did rule that the maintenance award "shall be specifically modifiable in June of 2014, when Kevin completes 8th grade, or upon a change in Margaret's medical condition." However, because we are remanding this matter for a recalculation of Thomas's maintenance obligation, the trial court must also make additional findings pertaining to the duration of maintenance.

Next, Thomas argues that the family court erred in considering his gross income rather than net income in calculating maintenance. Thomas relies upon the *Powell* decision, wherein the Court noted,

> We think that common sense dictates that a court consider the parties' net income when determining whether or not the spouse seeking maintenance will be able to meet his or her own needs, as well as the payor spouse's ability to continue meeting his or her own needs. Indeed, our courts do consider tax implications to parties in the valuation and division of the marital property, and in determining the appropriate time to require a party to liquidate or transfer capital assets.

> Accordingly, we do not consider it a great leap to also hold that the trial court should consider the after-tax income of both parties in determining the proper amount and duration of maintenance to be awarded.

Powell, 107 S.W.3d at 226 (citations omitted). Thomas contends that by considering his gross income in determining maintenance and child support, the family court imposed upon him financial obligations that are both unconscionable and impossible for him to fulfill.

Contrary to Thomas's argument, we believe the family court did consider his net income. In its order ruling on the parties' motions to alter, amend or vacate, the family court specifically addressed this issue, finding that Thomas has "an average net monthly income of $10,799; however, he makes significant contributions to various retirement accounts and charities, which are entirely discretionary and do not negate or reduce his obligation to provide for his family." As such, we conclude that the family court did follow the dictates of *Powell* and did not abuse its discretion with respect to the consideration of Thomas's income.

Child Support

For many of the same reasons as discussed in the issues concerning maintenance, Thomas argues that the family court erred in its calculation of child support. As we have previously noted, we find no merit in Thomas's argument that the family court should have found that Jude was voluntarily unemployed and

imputed income to her. Nor do we find that the family court abused its discretion in establishing the children's monthly expenses, as such was supported by evidence of record. Finally, contrary to Thomas's argument, Kentucky employs the gross income method of calculating child support. KRS 403.212 states,

> (2) For the purposes of the child support guidelines:
>
> (a)"Income" means actual gross income of the parent if employed to full capacity or potential income if unemployed or underemployed.
>
> (b)"Gross income" includes income from any source, except as excluded in this subsection, and includes but is not limited to income from salaries, wages, retirement and pension funds, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, Social Security benefits, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, Supplemental Security Income (SSI), gifts, prizes, and alimony or maintenance received. Specifically excluded are benefits received from means-tested public assistance programs, including but not limited to public assistance as defined under Title IV-A of the Federal Social Security Act, and food stamps.

Accordingly, the trial court did not err in using Thomas's gross income in calculating his child support obligation.

Vanguard Mutual Funds Account and GE Stock Options

Thomas next argues that the family court abused its discretion in determining that Thomas liquidated Vanguard mutual funds subsequent to trial for his own use and crediting him with having received that amount as part of his share

of the property division. Jude, on the other hand, argues that she is entitled to all of the Vanguard funds because Thomas intentionally tried to hide the asset.

The record establishes that at the time of trial, Thomas asserted that the Vanguard stock was included in the parties' ARGI Portfolio. In fact, it was a separate account worth approximately $48,500. Following the trial herein, Thomas liquidated $13,030.40 in mutual funds from the account while Jude liquidated the balance of $35,456.79. In the decree, the family court credited Thomas with having received the $13,030.40 as marital property. Further, the family court determined that Jude used the remaining $35,456.79 to pay her attorney fees and ordered that the funds were a partial satisfaction of her request for such fees.

Thomas contends that although the family court rejected Jude's claim that he attempted to hide the account and amended its final judgment to reflect that he "removed" rather than "liquidated" the funds, the family court nevertheless ignored evidence that the $13,030.40 was used to pay marital expenses. Finally, Thomas argues that the family court should have found that Jude's act of removing the remaining funds was a dissipation of marital assets. We disagree.

Decisions concerning the division of marital property are within the sound discretion of the trial court, and will not be disturbed except for an abuse of that discretion. *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001). While it appears that the Vanguard funds removed by Thomas were deposited into a joint account, Thomas failed to provide any accounting demonstrating that those funds were used for marital living expenses. Further, we cannot agree that Jude's

removal of the balance of the funds constituted dissipation of marital assets. Jude openly disclosed her actions and informed Thomas that the monies were being used to pay her attorney fees. Accordingly, the trial court properly credited that amount against Jude's request for fees from Thomas. Based on the record before us, we cannot conclude that the trial court erred in its division of the Vanguard mutual funds.

Similarly, Thomas argues that the family court erred in its valuation of his exercisable General Electric stock options. Specifically, the family court found that Thomas's exercisable GE stock option awards had a net value of $46,796 as of December 31, 2012. The family court further noted that it would not penalize Thomas for the options he exercised in July and November 2012 because those proceeds were applied to marital expenses and Jude's attorney fees. However, in his motion to alter, amend or vacate the judgment, Thomas pointed out that both parties had provided the family court with a statement dated October 24, 2012, valuing the options at $10,712.

The record indicates that the parties' joint financial expert, Helen Cohen, calculated that the net value of the GE stock options was $74,492 as of December 31, 2012. However, in reaching such figure, Ms. Cohen was unaware that Thomas had exercised $27,696.00 in stock options four days prior to trial. Accordingly, the family court subtracted the value of the exercised options from Ms. Cohen's figure to reach its valuation figure of $46,794.

A family court's valuation of property is subject to review for clear error. *Gaskill v. Robbins*, 361 S.W.3d 337, 339 (Ky. App. 2012). We conclude that substantial evidence in the record including testimony from the parties' *joint expert* supports the family court's valuation of the GE stock options and thus no error occurred.

Attorney Fees

Thomas argues that the family court erred in ordering him to pay $40,000 towards Jude's attorney fees. Specifically, after the trial herein, Jude requested over $79,000 in attorney fees and costs. As previously noted herein, Thomas made a $15,000 payment to Jude's attorney after exercising some of his GE stock options and Jude subsequently paid an additional $35,456.79 from the Vanguard funds. In its judgment, the family court noted,

> After her recent liquidation of the parties' Vanguard account, Ms. Lambe has used $50,000 in marital assets to pay her attorney fees. Therefore, Mr. Lambe will be credited with having contributed $25,000. The Court orders him to pay an additional $15,000 in light of the disparity in the parties' financial resources.

Thomas contends that Jude was not entitled to any attorney fees and, even if she were, the amount awarded by the family court was excessive. Conversely, Jude claims she was entitled to payment of all of her attorney fees.

KRS 403.220 authorizes a family court to order one party to a divorce action to pay a "reasonable amount" for the attorney fees of the other party if there exists a disparity in the relative financial resources of the parties in favor of the

payor. Even if a disparity exists however, the family court retains broad discretion to determine the appropriate amount of attorney fees. *Neidlinger,* 52 S.W.3d at 519; *see also Gentry,* 798 S.W.2d at 938. "If the record on appeal supports the trial court's determination of an imbalance in the parties' financial resources, an award of attorney fees will not be disturbed on appeal." *Jones v. Jones*, 245 S.W.3d 815, 821 (Ky. App. 2008).

In *Atkisson v. Atkisson*, 298 S.W.3d 858 (Ky. App. 2009), the husband argued, as does Thomas herein, that the award of attorney fees to the wife was erroneous based upon the nonmarital and marital property she was awarded. In affirming the lower court, a panel of this Court observed that although the wife was awarded "a substantial amount of liquid marital property[,]" the husband had also been awarded significant property and enjoyed "a substantially higher earning capacity." *Id.* at 865. Similarly, the family court herein awarded both Thomas and Jude a substantial amount of marital property. Nevertheless, Thomas has a significantly higher earning capacity and Jude is currently unable to seek full-time employment. In addition, we would observe that the family court awarded Jude only about half of her claimed attorney fees. Under the circumstances, we cannot find that the trial court's award of attorney fees amounted to an abuse of its discretion.

Jude's Cross-Appeal

In addition to the issues already discussed, Jude also argues that the trial court erred in (1) calculating Thomas's income, (2) allocating expenses for the

marital residence, (3) failing to divide Thomas's health savings account and 2012 incentive bonus, (4) failing to grant her sole custody of the children; and (5) permitting Thomas's experts to testify after he failed to comply with the discovery deadlines.

Jude first argues that the trial court erred in finding that Thomas's income was $222,496.51 annually or $18,756.00 per month. Jude points out that Thomas's 2012 tax return introduced into evidence after the trial showed that his 2012 gross income not including his various pre-tax deductions was $283,092.00, and including the deductions was $315,928.00.

In calculating Thomas's income, the family court found:

> At the inception of this case, Mr. Lambe held an executive position with G.E. Supply Chain Solutions, where he earned a base salary of $194,376 per year, plus an annual incentive bonus. His 2012 bonus was $30,700, bringing his total income to $225,076. The Court notes that Mr. Lambe's year-to-date income, as reflected on his November 11, 2012 pay statement is $256,615.32. However, that number is artificially inflated because it includes significant taxable income from his exercise of stock options. . . .
>
> In the fall of 2012, G.E. underwent a management restructure that resulted in the elimination of Mr. Lambe's position. Mr. Lambe wished to remain with the company, so he considered several internal options. He ultimately accepted a position as Business Leader for G.E.'s Dishwasher Plastics Operations, which did not require him to relocate and had no effect on his base salary. However, his new job is not an executive-level position, so he is no longer eligible for an incentive bonus. Mr. Lambe will receive a bonus in February of 2013 for work performed in 2012. He may receive an

> additional bonus in 2014 as a type of severance, but that payment is not guaranteed.
>
> Based on the foregoing, the Court finds that Mr. Lambe's current income is $225,076, which yields a gross monthly income of $18,756. The Court understands that Mr. Lambe's income may substantially decrease after 2013 or 2014, when his incentive pay has definitively ended.

Jude cites no authority, and we find none, for the proposition that the family court is required to look at only the most recent tax return in calculating a party's income. In fact, "[e]vidence regarding current or reasonably projected income and also of recent years' past income" may assist the court in calculating income for the purposes of maintenance and child support. *Snow v. Snow*, 24 S.W.3d 668, 673 (Ky. App. 2000). We are of the opinion that the trial court thoroughly considered all of the evidence concerning Thomas's income. Further, Jude's claim that the family court improperly discounted the likelihood of Thomas receiving future bonuses is without merit. The evidence established that Thomas's base salary was approximately $195,000. As the family court calculated Thomas's annual income to be $225,076, it clearly accounted for bonuses.

Next, Jude takes issue with the family court's allocation of expenses relating to the marital residence. The parties agreed that she would remain in the residence until Kevin completes the eighth grade, at which time the home was to be listed for sale and any proceeds from such sale divided equally between the parties. In the decree, the family court ruled that Jude was responsible for the monthly mortgage payment, utility bills, taxes, insurance and related fees, as well as any repairs not to

exceed $500. Jude argues that it is an unfair financial hardship for her to bear sole responsibility for all of the expenses and that such should have been equally split between the parties. We disagree. The expenses related to the residence were specifically included in the family court's calculation of Jude's monthly expenses when it set the maintenance award. Accordingly, Thomas is, in fact, bearing much of the cost pertaining to the marital residence since Jude is unable to work and her primary source of income is Thomas's maintenance obligation.

Jude also argues that the family court should have equally divided the balance of Thomas's Health Savings Account (HSA), as well as his 2012 incentive bonus. With respect to the HSA, Jude has failed to provide a citation to the record, and we do not find one, indicating that this issue was raised or preserved for appellate review. Notwithstanding, it is clear that the HSA is a tax-deferred account that is only to be used for medical expenditures. As Thomas was ordered to continue providing health insurance for the children and to pay 61% of any remaining uninsured medical expenses, we cannot conclude that the family court abused its discretion in the division, or lack thereof, of Thomas's HSA. *See Neidlinger*, 52 S.W.3d at 523.

We likewise find no merit in Jude's argument that the family court failed to divide Thomas's 2012 bonus. In its order ruling on the parties' motions to alter, amend or vacate, the family court specifically noted, "The Court included Mr. Lambe's bonus earnings in his income when awarding maintenance. Further

division would provide a double benefit to Ms. Lambe, to which she is not entitled." Again, no error occurred.

Next, Jude contends that the family court should have awarded her sole custody of both children. Specifically, Jude concludes that "given Tom's antagonism towards Jude, his inconsistent involvement in the children's lives, and his refusal to co-parent with Jude" it is in the children's best interest that she have the sole decision-making power.

As the family court herein noted, KRS 403.270(2) directs the court to determine custody in accordance with the best interests of the child, giving equal consideration to each parent and considering all relevant factors, including the wishes of the child, the wishes of the parents, the interaction and interrelationship of the child with his parents, siblings and any other person who may significantly affect the child's best interests. While cooperation between the parents is a relevant factor, our Supreme Court in *Squires v. Squires*, 854 S.W.2d 765, 768-769 (Ky. 1993), observed:

> While we have no doubt of the greater likelihood of successful joint custody when a cooperative spirit prevails, we do not regard it as a condition precedent. To so hold would permit a party who opposes joint custody to dictate the result by his or her own belligerence and would invite contemptuous conduct. Moreover, the underlying circumstance, the parties' divorce, is attended by conflict in virtually every case. To require goodwill between the parties prior to an award of joint custody would have the effect of virtually writing it out of law.

Thomas and Jude have unquestionably had difficulty co-parenting, with the family court commenting that "[t]he dynamic is dysfunctional and both parents

share in the blame." However, the family court further observed that Thomas and Jude are both genuinely concerned with their children's well-being and have expressed their willingness to participate in family therapy.

When an appellate court reviews the decision in a child custody case, the test is whether the findings of the trial judge were clearly erroneous or that he abused his discretion. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986); *see also Eviston v. Eviston*, 507 S.W.2d 153 (Ky.1974). Our standard of review requires a great deal of deference both to the family court's findings of fact and discretionary decisions. We believe the family court herein was in the best position to resolve the conflicting evidence and make the determination that it was in the children's best interest for the parties to share joint custody. The family court's decision "adheres to the mandate of KRS 403.270, including giving due consideration to all relevant factors." *Frances v. Frances*, 266 S.W.3d 754, 759 (Ky. 2008).

Finally, Jude argues that the family court erred in permitting Thomas's experts to testify despite Thomas's failure to comply with CR 26.02 and the family court's disclosure deadlines. Specifically, the order setting the trial date required that the parties file and exchange a list of all witnesses within fifteen days prior to the November 15th trial date. Subsequently, counsel for both parties agreed to extend the deadline until Friday, November 9, 2012. Nevertheless, Thomas's counsel did not provide his disclosures until the following Monday, November 12th. In response to Thomas's noncompliance, Jude's counsel filed

motions in limine requesting that the family court exclude Thomas's lay and expert witnesses. The family court denied the motions.

We are of the opinion that the family court thoroughly and properly resolved this issue:

> Ms. Cohen was retained by both parties to trace their respective non-marital investment. Both attorneys had unrestricted access to her and both had been working with her for more than a year prior to trial. The last analysis Ms. Cohen completed was a tracing of Mr. Lambe's Savings and Security Plan. Mr. Dodd and Mr. Mulloy were aware that the SSP tracing would be delayed because Ms. Cohen had been unable to obtain an account statement from 2002. Counsel appeared in late October to advise the Court of the delay. As reflected in the Court's order of October 30, 2012, they agreed to proceed with trial, with or without the reports.
>
> On November 5, 2012, Mr. Mulloy advised Mr. Dodd that the missing document could not be produced. Ms. Cohen then proceeded to draft her report with the remaining data, which had long been available to both parties. Ms. Cohen mailed her report to counsel, and both received it on November 12, 2012. Neither counsel was disproportionately disadvantaged by the delay.
>
> Mr. Lambe's other expert witness, Robert Tiell, is a vocational psychologist who was retained to evaluate Ms. Lambe's ability to work and her earnings potential. Mr. Tiell's report was provided to Mr. Dodd on or about September 23, 2012, and so he had ample time to review it prior to trial.
>
> Finally, the Court's Trial Order specifically provided that any Motion in Limine must be placed on the Motion Hour Docket no later than the Monday prior to Trial, which would have been November 12, 2012. Counsel was before the Court at that Motion Hour, but these issues were not raised. For the reasons set forth herein, the Motion in Limine was denied on the record.

While Jude maintains that she was unfairly prejudiced by Thomas's failure to timely disclose his witnesses, she fails to explain in what way and we certainly find no basis to find such. Accordingly, the trial court did not err in denying Jude's Motion in Limine.

Appeal No. 2013-CA-1642-MR

In the companion case herein, Thomas appeals from an August 21, 2013, order of the family court denying his motion to reduce maintenance and child support. Thomas had requested a hearing to introduce evidence showing "a material change in circumstances that is so substantial and continuing" that it made the family court's original award unconscionable.

Pursuant to KRS 403.250(1), maintenance payments may be modified "upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable." Maintenance becomes unconscionable if it is "manifestly unfair or inequitable." *Combs v. Combs*, 787 S.W.2d at 261(quoting *Wilhoit v. Wilhoit*, 506 S.W.2d 511 (Ky. 1974)). "To determine whether the circumstances have changed, we compare the parties' current circumstances to those at the time the court's separation decree was entered." *Block v. Block*, 252 S.W.3d 156, 160 (Ky. App. 2008). The family court's decision to deny a modification of a maintenance award is reviewed for abuse of discretion. *Id.* at 159. We may only disturb the court's conclusion if it "abused its discretion or based its decision on findings of fact that are clearly erroneous." *Powell,* 107 S.W.3d at 224. The

family court abuses its discretion when its decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Artrip v. Noe*, 311 S.W.3d 229, 232 (Ky.2010).

In his affidavit accompanying his motion, Thomas states that his net income (which he does not claim has changed) is insufficient to cover the obligations imposed in the family court's original decree and further that, in addition to his reoccurring monthly expenses, he has paid about $8,000 for Margaret's medical treatment. We must agree with the family court's ruling that, even if accepted as true, "[t]he affidavit does not set forth any change in circumstances to warrant a hearing on this motion. If, when bonuses are regularly distributed, Mr. Lambe has incurred a significant loss of income, that may be a basis to file a motion to modify his maintenance obligation."

For the reasons set forth herein, this matter is remanded to the Jefferson Family Court for recalculation of maintenance in accordance with this opinion. All other aspects of the family court's Findings of Fact, Conclusions of Law, Judgment and Decree of Dissolution of Marriage are affirmed. The family court's denial of Thomas's motion to modify maintenance is also affirmed.

ALL CONCUR.

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