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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000392-MR

LAURA R. NORMANDIN

APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE JERRY D. CROSBY II, JUDGE
ACTION NO. 13-CI-00741

SCOTT W. NORMANDIN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: J. LAMBERT, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: Laura R. Normandin (Laura) appeals from an order entered by the Oldham Circuit Court, Family Division, on February 2, 2016, denying in part and granting in part Laura's motions regarding calculation of maintenance and child support, division of marital property, and award of attorney's fees. She also appeals from the court's subsequent denial entered March 21, 2016, of her motions to alter, amend, or vacate and for additional findings of fact. After careful

consideration, for the reasons set forth below, we affirm.

BACKGROUND

The events of this case stem from Laura's dissolution of marriage action against the appellee, Scott W. Normandin (Scott). The parties were married in Madison County, Virginia, on January 25, 2004. The marriage resulted in the birth of four minor children. Laura filed for dissolution in November 2013. After Laura filed for divorce, the parties contemplated reconciliation for several months before proceeding to two failed mediations and ultimately going to trial on January 6, 2016. The trial court issued its findings of fact and conclusions of law on February 2, 2016.

While the parties lived in Washington, D.C., Laura worked as a commercial real estate manager until 2005. Since then, Laura has primarily been a stay-at-home mother and homemaker. She had no substantial source of income outside of marital funds until she received an inheritance from the probate of her father's estate while these divorce proceedings were ongoing. She has received at least \$350,000 in assets from her father's estate so far and is expected to receive an additional \$100,000 from the estate's disposition of real property.

Throughout most of the marriage, Scott was the sole income earner. He has worked for his current employer, Humana, since 2008. At the time of the divorce trial, he earned a base salary of \$226,096 per year as Chief Security Officer. He also earned bonuses and incentive-based income, including restricted

stock units (RSUs). RSUs are earned at Humana's discretion based on prior years' performance, are subject to other restrictions, and are not available until all the restrictions lapse or occur as required under a three-year vesting schedule. For example, if Scott is no longer employed by Humana on the date of vesting, all the remaining RSUs would be forfeited.

Scott admitted he anticipated receiving proceeds worth approximately \$220,000 when more of the RSUs were expected to vest eighteen days after the conclusion of the trial. However, he testified Humana is merging with another large health insurance company, making Scott's job outlook uncertain because he may lose his position at any time due to restructuring.

In addition to Scott's other employment benefits, he also has a 401k retirement savings account. The total value of the account at the time of the trial was \$499,879. This account consists of funds derived both while working for Humana and his previous employers. Scott rolled his retirement funds from his premarital employment into his Humana account in 2009, and he claimed \$77,000 as the present nonmarital value of the account.

The parties own an unimproved piece of real property located in Dubois, Wyoming, which they purchased prior to their marriage. Laura claims she paid the initial down payment on the property when they purchased it. Scott testified he reimbursed Laura for the down payment thereafter. Neither party provided documentation to support their testimonies.

In its February 2, 2016, order,¹ the trial court found all proceeds from Scott's unvested RSUs were nonmarital property and did not include them in his income when calculating maintenance or child support. It designated the Wyoming property as marital, divided its value equally, and awarded possession to Scott. The trial court awarded Laura \$1,500 per month for forty-eight months in maintenance after considering the nonmarital inheritance she received, her portion of the marital property awarded, her ability to become employed, and her other financial resources. It also awarded \$2,199.60 per month for child support. Finally, after considering Laura's use of \$18,000 of marital funds to pay some of her attorney's fees, the trial court denied her request for additional reimbursement for them.

After the trial court's February order was issued, both parties filed motions to alter, amend, or vacate and motions for additional findings of fact. This resulted in a second order issued on March 21, 2016.² Between the two orders in this case, the trial court successfully disposed of much of the marital estate, including: distributing the ownership and debt associated with several vehicles; assigning the parties' personal property; dividing the equity in the marital home, which was put up for sale; and apportioning the parties' bank accounts, credit

¹ Judge Timothy E. Feeley signed the February 2, 2016, order and resigned from the bench soon after. Judge Doreen S. Goodwin is now the Oldham Family Court Judge.

² The order on Kentucky Rules of Civil Procedure (CR) 52 and 59 motions of both parties (March order) was signed by Judge Jerry D. Crosby, who was temporarily sitting as the Oldham Family Court Judge.

cards, and other debts. However, many of the parties' motions were denied in the March order. This appeal followed.

STANDARD OF REVIEW

The standard of review for determinations of maintenance and child support is an abuse of discretion. *Stipp v. St. Charles*, 291 S.W.3d 720, 727 (Ky. App. 2009) (reviewing maintenance); *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001) (regarding child support). The same standard applies to the award of attorney's fees because the determination is purely within the court's discretion. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 519 (Ky. 2001). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted). An appellate court will not disturb the holdings or substitute its own judgment when the evidence supports the trial court's decision and it did not abuse its discretion when deciding a case. *Combs v. Combs*, 787 S.W.2d 260, 262 (Ky. 1990).

In *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006), this Court established a two-tiered standard of review for the division of marital property. *Id.* Under the first tier of the standard, conclusions of law are reviewed *de novo*. *Id.* The trial court must apply a statutory standard when classifying property as marital or nonmarital, which is a conclusion of law. *Holman v. Holman*, 84 S.W.3d 903, 905 (Ky. 2002). When applying this standard, the rebuttable presumption under

Kentucky law is property acquired during a marriage will be classified as marital and the presumption must be rebutted by clear and convincing evidence. KRS³ 403.190(3). The clear and convincing standard requires the evidence substantially support the trial court's findings of fact. *Barber v. Bradley*, 505 S.W.3d 749, 754 (Ky. 2016). In the second tier of review, we defer to the trial court's findings of fact regarding the division of property and do not disturb those findings on appeal unless the court abuses its discretion. *Id.*

KRS 403.190(2) defines marital property as any property acquired after the marriage begins (and its increase in value outside of any efforts of the parties during the marriage), which is not affected by one of the exceptions listed in the statute. Any property acquired after the marriage begins is presumed to be marital property unless the party who claims it as nonmarital can overcome the presumption. KRS 403.190(3). The burden of proof required is clear and convincing evidence. *Barber*, 505 S.W.3d at 755. The standard method of proving an asset is nonmarital is by a method of documentation called tracing. *Sexton v. Sexton*, 125 S.W.3d 258, 266 (Ky. 2004). However, as the trial court observed, the clear and convincing standard is not so rigid as to require tracing to a degree of precise record keeping and computation. *Chenault v. Chenault*, 799 S.W.2d 575, 578-79 (Ky. 1990); *see also Maclean v. Middleton*, 419 S.W.3d 755, 767 (Ky. App. 2014).

³ Kentucky Revised Statutes.

ANALYSIS

Laura appeals from the trial court's March order denying her motions to alter, amend, or vacate and for additional findings from the February order. The primary issues on appeal are related to the trial court's classification of RSUs granted to Scott by his employer and calculation of maintenance. Laura also asserts several issues relating to the categorization of nonmarital property and the awards of child support and attorney's fees.

I. Calculation of Maintenance

Although there was some debate on the upward boundary of his income, both parties recognized there were variations based on bonuses and the liquidation of vested RSUs every year but agreed Scott's annual income exceeded \$220,000 per year or \$18,000 per month. Scott has a retirement plan valued at \$499,879. It is also undisputed Laura has been out of the work-force since 2005 to raise their four children. Laura has also recently inherited a significant amount of assets with a minimum value of \$350,000. The trial court granted Laura's request for maintenance in the amount of \$1,500 per month for forty-eight months.

Laura challenges the amount of maintenance awarded, claiming the trial court erred in failing to make adequate findings and by considering the nonmarital inheritance she received as a part of her available financial resources. The statutory standard for granting an award of maintenance is whether the spouse is unable to support her own reasonable needs through her property, including her

part of the marital estate, and is also unable to support herself through suitable employment. KRS 403.200(1). The trial court imputed employment income to Laura of \$1,733 per month. It also considered her inheritance of at least \$350,000 in assets and \$220,000 from her portion of the marital estate. Then it found her reasonable needs were \$6,000 per month. Because the trial court concluded Laura lacked sufficient property to provide for her reasonable needs and is currently unable to support herself through appropriate employment, it awarded her maintenance.

Once it grants an award of maintenance, the trial court must calculate the amount and duration after considering certain factors, as detailed by statute:

(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.

KRS 403.200(2). Applying the abuse of discretion standard, we hold the trial court's decision was not arbitrary, unreasonable, unfair, or unsupported by legal principles. The trial court considered Laura's financial resources, which are not limited to her marital property only; her education level and inability to return to work at her previous level immediately; the standard of living and duration of the marriage; Laura's physical and emotional condition; and Scott's ability to pay maintenance. The trial court is not required to delineate every factor, but only to consider the factors in its decision. *Shafizadeh v. Shafizadeh*, 444 S.W.3d 437, 446 (Ky. App. 2012) (citing *McGregor v. McGregor*, 334 S.W.3d 113, 118 (Ky. App. 2011)).

Laura cites several cases where the absence of a finding of one or more factors resulted in a reversal on appeal; however, these cases are all distinguishable from the facts here. Laura does not state which factors were not addressed by the court, but vaguely claims the court did not analyze Scott's income when it calculated her maintenance payment. However, the trial court is not required to analyze his income, only to consider his ability to provide for himself and make the payments ordered. In this case, the court found Scott can provide

some support, while observing he is also already paying all the marital bills. The trial court did not abuse its discretion when it considered all these factors and awarded maintenance of \$1,500 per month for forty-eight months.

Finally, Laura argues the trial court should not have included her inheritance in its consideration of her financial resources. This argument also fails. It is well within the court's discretion to consider nonmarital assets when calculating the amount and duration of maintenance. *Owens v. Owens*, 672 S.W.2d 67, 69 (Ky. App. 1984); *see also Roberts v. Roberts*, 744 S.W.2d 433, 436 (Ky. App. 1988) (considering husband's second wife's inheritance when recalculating first wife's claim for increased maintenance). It was proper for the trial court to consider all financial resources available to Laura when calculating her maintenance award, including all assets she inherited as well as the marital assets she will receive in this divorce. The trial court did not abuse its discretion in considering Laura's nonmarital financial resources in making its maintenance award.

II. Classification of RSUs

This Court must first review *de novo* the trial court's conclusions of law finding the unvested RSUs are nonmarital property. Once the *de novo* review is complete, then we must decide if the trial court abused its discretion in its findings of fact regarding the marital property status of the RSUs. Kentucky case law has not often addressed RSUs in terms of marital property. To get around this,

Laura cites case law of other jurisdictions. These cases have no precedential value in Kentucky and are not binding. In addition, Laura also cites several Kentucky cases involving other types of employment benefits, all of which we also conclude are inapplicable.

Laura contends Scott earned the RSUs during the marriage and the future vesting RSUs should be divided just like a retirement account would be. For example, Laura cites *Poe v. Poe*, 711 S.W.2d 849 (Ky. App. 1986), and a few other cases as standing for the proposition that both vested and non-vested pensions are marital property. However, pensions are a less speculative benefit mechanism, and the employee has a right to the benefit before it is fully vested. Laura also posits *McGinnis v. McGinnis*, 920 S.W.2d 68, 70 (Ky. App. 1995), supports her position that compensation earned during a marriage, even when not fully vested, is a marital asset. However, the *McGinnis* court also found if a benefit is a mere expectancy, it is non-marital. *Id.* at 70-71. We find this reasoning persuasive.

Finally, in support of her claim regarding the status of the RSUs, Laura relies heavily on *Penner v. Penner*, 411 S.W.3d 775 (Ky. App. 2013), which was a case involving RSUs issued by the same employer as here, Humana. The trial court in *Penner* found the unvested RSUs were marital property and divided them equally between the parties. *Id.* at 779. Then it also included the value of the RSUs in the husband's income when it calculated maintenance and child support. *Id.* at 780. This resulted in "double-dipping" from the husband's portion of the

marital estate. *Id.* A panel of this Court ruled this “double-dipping” was improper and remanded the case for the trial court to correct the error. *Id.* at 781. The *Penner* court did not direct the trial court on how to resolve the duplicative use of the RSUs in its calculations. Therefore, *Penner* is not instructive on whether the court should have classified the RSUs at issue as marital property.

Rather than rely on *Penner*, the trial court here cited *Sharber v. Sharber*, 35 S.W.3d 841 (Ky. App. 2001), finding the facts were analogous. In *Sharber*, the husband received a retirement bonus after the divorce decree was entered. *Id.* at 842. The trial court then ruled a portion of the bonus was marital property and divided it equally between the parties. *Id.* This Court reversed on appeal, reasoning because the husband had no right to the bonus during the marriage it was a mere expectancy and not earned during the marriage. *Id.* at 844.

In the present case, after considering the issues, the trial court followed this Court’s reasoning in *Sharber*, and found the unvested RSUs were nonmarital property. We agree with the trial court and conclude the Humana RSUs vest in a comparable manner to how the *Sharber* retirement bonus operated. The RSU awards deceptively appear as if Humana granted them solely in recognition of work that occurred during the parties’ marriage. However, the RSUs do not vest or fall under Scott’s control until the passing of a specified future date. Humana gives them in recognition of long-term employment, rather than as compensation earned at the time of the award. Merely because there is a specific

date known in advance for the RSUs' vesting does not make them any less of a reward for long-term service than the retirement bonus given at a time that is not determined by a regular vesting schedule.

As permitted by CR 76.28(4)(c), the trial court considered *Gallagher v. Gallagher*, 2012-CA-00671-MR, 2013 WL 5886028 (Ky. App. November 1, 2013), an unpublished case, because it directly dealt with the issue of classifying RSUs as marital property and there were no other published opinions directly on-point at the time. The trial court did not err in relying on *Gallagher*. The husband in *Gallagher* worked for UPS and received RSUs as part of his compensation package, which vested regularly every few years. *Id.* at *11-12. The trial court determined the RSUs at issue were marital property and divided them equally. *Id.* at *11. However, on appeal, this Court reversed, concluding the RSUs were too speculative to include in the marital estate. *Id.* at *11-12. The *Gallagher* RSUs were described as a "bookkeeping unit," which tracks the number of stock units that may be transferred upon vesting, into an account held by the employee. *Id.* at *12. This is similar to Scott's testimony describing the mechanism of the Humana RSUs supported by provisions in the Humana prospectus asserting the employee has no rights to the RSUs until they vest (*e.g.* he may not vote his shares or receive dividends). It would be different if the RSUs were issued to an account in Scott's name and under his control, then held until they vested. Instead, the RSUs will vest after the dissolution decree was entered and Scott does not have any rights or

access to the RSUs until their date of vesting.

Accordingly, the trial court properly concluded the RSUs are nonmarital property belonging to Scott. Therefore, the trial court properly excluded the RSUs from Scott's income in calculating maintenance and child support.

III. Classification of the Retirement Account

Laura challenges the trial court's decision awarding \$77,000 of Scott's retirement account to him as nonmarital property. The trial court accepted Scott's evidence relating to the roll-over of funds from his nonmarital retirement accounts into his Humana account. Although Scott was unable to provide complete records of his retirement accounts from the beginning of the marriage, he supported his testimony with documentation showing the roll-over deposit into his Humana account. This documentation, combined with Scott's testimony and the absence of any evidence to the contrary in the record, is enough to meet Scott's burden of proof. These findings were supported by substantial evidence and will not be disturbed.

IV. Classification of the Wyoming Property

Laura appeals the trial court's ruling she failed to meet her burden of proving her nonmarital interest in the parties' Wyoming undeveloped real property. A trial court presumes property obtained during a marriage is marital property. KRS 403.190(3). Therefore, Laura had the burden of proving her nonmarital

interest by clear and convincing evidence. Laura was unable to provide any documentation supporting her nonmarital claim to the property. Considering the conflicting testimony offered by Scott and Laura on the issue, the trial court properly found neither party was able to prove a nonmarital interest in their premarital purchase of the Wyoming property.

In its March 2016 order, the trial court reiterated its earlier finding that Laura failed to meet this burden when ruling on her motions to alter, amend, or vacate or for additional findings of fact on the previous order. Accordingly, the trial court did not err in classifying the Wyoming property as a marital asset. Once the trial court established the Wyoming property as a marital asset, it properly awarded the property to Scott and ordered him to pay Laura one-half of its fair market value.

V. Calculation of Child Support

Trial courts in Kentucky are given broad discretion over the calculation of child support. *Downing*, 45 S.W.3d at 454. KRS 403.211(3) allows, but does not require, a court to deviate from the guidelines if the resulting calculation would be “unjust or inappropriate in a particular case.” Accordingly, if “the trial court’s discretion comports with the [child support] guidelines, or any deviation is adequately justified in writing, this Court will not disturb the trial court’s ruling” *Downing*, 45 S.W.3d at 454. Child support calculations are designed to meet children’s “reasonable and realistic needs under the

circumstances[,]” rather than the highest lifestyle a parent’s income will support. *Id.* at 457.

By considering Scott’s base salary of \$18,841 per month, the parties’ income exceeded the highest level contemplated by the guidelines. The trial court properly determined the unvested RSUs would not be considered part of Scott’s income for the purpose of calculating child support. Although the trial court *may* have used its discretion to award more than the guidelines recommended, it was not required to do so. The trial court found the children all participated in one normal extra-curricular activity each, attended public school, and did not have any extraordinary medical needs. It denied Laura’s motion to recalculate the child support award, after finding the children’s needs were within the reasonable needs contemplated by the child support guidelines. We discern no abuse of discretion.

VI. Award of Attorney’s Fees

An award of attorney’s fees is purely discretionary, and the trial court is not required to award them despite a disparity in income or any other factor. *Neidlinger*, 52 S.W.3d at 519; *see also Sexton*, 125 S.W.3d at 272. The proper standard for reviewing a trial court’s ruling on attorney’s fees is abuse of discretion. *Id.* at 520. The trial court is in the best position to evaluate when an award of attorneys’ fees is proper. *See Maclean*, 419 S.W.3d at 776.

Laura argues Scott conceded the issue of attorney’s fees by admitting in his Answer to her Petition he “has the greater financial resources and should be

required to pay the cost of this action and [Laura's] attorney's fees." This argument fails because only factual statements are considered judicial admissions.⁴ Although neither party disputes the admission's factual component, their income disparity, the ultimate *legal* determination to award attorney's fees is in the sole discretion of the trial court. KRS 403.220.

Here, Laura used marital funds to pay her attorney \$18,000. Both parties' total attorneys' fees are roughly equal. Laura has already used marital assets to pay most of the fees she owes, and she has sufficient nonmarital assets to assist her in paying her fees. We conclude the trial court did not abuse its discretion in determining Laura did not need any additional reimbursement for attorney's fees.

CONCLUSION

For the foregoing reasons, we affirm the orders of the Oldham Circuit Court.

LAMBERT, J., JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND DOES NOT FILE A SEPARATE OPINION.

⁴ "A judicial admission . . . is a formal act of a party (committed during the course of a judicial proceeding) [*sic*] that has the effect of removing a fact or issue from the field of dispute; it is conclusive against the party and *may* be the underlying basis for a summary judgment, directed verdict, or judgment notwithstanding the verdict." *Witten v. Pack*, 237 S.W.3d 133, 136 (Ky. 2007) (emphasis added) (citing Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 8.154, at 590 (4th ed. LexisNexis 2003)).

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