

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2016-CA-000453-MR

PENNY K. BRODIE

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT  
HONORABLE JERRY CROSBY II, JUDGE  
ACTION NO. 13-CI-00402

KEVIN M. BRODIE

APPELLEE

OPINION  
AFFIRMING IN PART AND REMANDING

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BEFORE: CLAYTON, STUMBO,<sup>1</sup> AND THOMPSON, JUDGES.

CLAYTON, JUDGE: Penny K. Brodie appeals the final order and the denial of a Kentucky Civil Rules of Procedure (CR) 59.05 motion to alter, amend, or vacate this order in a dissolution of marriage action.

After careful consideration, we affirm the all issues regarding the trial court's allocation of property except that we remand the issue of back taxes for a window-washing company for the trial court's consideration.

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<sup>1</sup> Judge Janet Stumbo concurred in this opinion prior to retiring from the Kentucky Court of Appeals effective December 31, 2017. Release of this opinion was delayed by administrative handling.

## BACKGROUND

The parties were married on October 19, 1989.<sup>2</sup> They have two adult children. Penny is employed by the music department at the University of Louisville, and Kevin was previously employed at the Kentucky State Reformatory. He also operated a window-washing business.

Penny filed a petition for dissolution of marriage on June 17, 2013. Although the petition was filed in mid-2013, they did not live in different residences until mid-2015. During the pendency of this action, a domestic violence order was issued. Further, a limited decree of dissolution was entered on December 18, 2015, reserving the issues below.

The primary disputes in this action involve property matters. The trial court held a hearing on December 2, 2015, on the unresolved issues and entered a final order on February 2, 2016. Thereafter, both parties filed CR 59.05 motions, which were addressed in an order dated March 17, 2016. In this order, the trial court clarified the earlier rulings regarding the motor vehicles, ordered a double bass sold with the proceeds divided equally, explained some personal property issues, and stated that the issue regarding the back taxes was not yet ready for adjudication. Otherwise, the trial court made no changes to the final order.

Penny now appeals both orders.

## ISSUES

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<sup>2</sup> The date of marriage is listed on the petition for dissolution as October 19, 1989. It is listed on other documents as October 28, 1989.

On appeal, Penny provides the following list of disputed issues in her

brief:

1. Payment of debt
2. Distribution of certain items of personal property
3. Allocation of net proceeds from the sale of house related to the debts assigned to each party
4. The assignment of net proceeds from the sale of the house
5. Kevin's reimbursement of one-half the Chemco loan
6. Kevin's reimbursement for one-half Penny's loans from University of Louisville retirement plan in
7. Kevin's responsibility for Discover Credit Card and US Bank Credit Card
8. Kevin's reimbursement of remodeling and repair expenses to prepare marital home for sale
9. Kevin's reimbursement of mortgage payment
10. Kevin's reimbursement for one-half Penny's loans from University of Louisville retirement plan in 2014 and 2015
11. Penny's entitlement to one-half of songs and royalties written by Kevin
12. Penny's responsibility for one-half back taxes for window cleaning business
13. Kevin's responsibility for the attorney's fees incurred by Penny
14. Kevin's payment of maintenance

Kevin's response to Penny's list of error is that the trial court's decisions were not erroneous.

### STANDARD OF REVIEW

Because this appeal is from a bench trial, our standard of review is set forth in CR 52.01. Under CR 52.01, the trial court is required to make specific findings of fact and state separately its conclusions of law. Further, those “[f]indings of fact, shall not be set aside unless clearly erroneous, and due regard

shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” CR 52.01.

“If the trial judge's findings of fact in the underlying action are not clearly erroneous, i.e., are supported by substantial evidence, then the appellate court’s role is confined to determining whether those facts support the trial judge’s legal conclusion.” *Commonwealth v. Deloney*, 20 S.W.3d 471, 473–74 (Ky. 2000). Substantial evidence is evidence, when taken alone or considering all the evidence has sufficient probative value to induce conviction in the mind of a reasonable person. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Nonetheless, while an appellate court is deferential to the lower court’s factual findings, its review of legal determinations and conclusions from a bench trial is *de novo*. CR 52.01.

But when a trial court exercises its discretion, its decision is reviewed for an abuse of discretion. “The test for abuse of discretion is whether the trial judge’s decision 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).

Here, we believe it is important to point out that the many issues proffered by Penny appear to be factual disputes. Importantly, an appellate court’s role in considering factual issues and related findings is limited to one of review. Penny frames the issue as ones where the trial court erred as a matter of law but despite labeling of the issue as legal, these issues do not appear legally

questionable. Rather, Penny, for the most part, does not highlight legal errors but directly and indirectly proffers factual errors or questions the trial court's discretion. Underlying our review is the understanding that factual findings, including weight and credibility, are within the sole province of the factfinder, that is, the trial court. *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459 (Ky. 1990). Indeed, an appellate court is prohibited from infringing on the fact-finding role of the trial court. *Deloney*, 20 S.W.3d at 473–74.

Therefore, if the trial judge's findings of fact are not clearly erroneous, our role is limited to ascertaining whether those facts support the trial judge's legal conclusion. Moreover, deference to the trial judge's role as factfinder applies to an original action as well as an appeal. *Id.* If Penny is arguing that the factual findings were improper, she must establish that the findings are clearly erroneous, that is, lacking substantial evidence. But if we discern legal error, we review it *de novo*. Finally, we will review the trial court's discretion for an abuse.

With these standards in mind, we consider the issues raised in the present appeal.

## ANALYSIS

Procedurally, we will address the numerous issues in the following order - property disputes, maintenance, attorney's fees, and finally, back taxes. Many of the myriad of issues listed by Penny overlap and are duplicative. Hence, we have grouped them so that they are addressed systematically.

*Property issues*

When dividing property pursuant to KRS 403.190 in a dissolution matter, the trial court's mandate is to divide the property in an equitable fashion. *Rice v. Rice*, 336 S.W.3d 66, 68 (Ky. 2011). Under that statute, trial courts are generally directed to use a three-step process in dividing the marital estate: characterize property as marital or nonmarital; assign each party's nonmarital property to them, and lastly, equitably divide the marital property between the parties. KRS 403.190. The decisions dividing marital property are within the sound discretion of the trial court. *Muir v. Muir*, 406 S.W.3d 31, 34 (Ky. App. 2013) (citation omitted). Without an abuse of discretion, the reviewing court should uphold the trial court's division of property. *Id*

1. *Personal property including Kevin's songs*

Penny introduces an exhibit (No. 1) that lists personal property and Penny's proposed distribution. She argues that the trial court did not distribute certain items of personal property. These items include a big screen television, a glass table stand, a Blu-Ray disc player, and a conditioning unit. Although Penny does not explain whether the trial court's findings were erroneous, she would like us to allocate these items to her. As an appellate court, we do not allocate property and would have to remand for this to occur. But as Kevin's explains, the trial court has already allocated these items to her. In Paragraph 15 of the final order, the trial court states as follows:

Petitioner's exhibit #1 is a list of items that Ms. Brodie proposed that each party have. The issues left to be

decided by the Court regarding certain items on exhibit #1 are in the section titled "TO BE DETERMINED." The four items include . . . The Court awards these items to her considering all the equities in the case.

We find no error in the trial court's allocation of these items.

Penny also mentions two pieces of property that the trial court has already allocated, and which the parties agreed about the disposition. The property encompasses a double bass and parties' motor vehicles. The trial court in its order responding to the motions to alter, amend, or vacate clarified the allocation of these items. First, regarding the double bass, the trial court ordered it sold and the proceeds divided between the parties. Regarding the motor vehicles, Penny points out that the trial court judge made a mistake in the original order, but the mistake was corrected in the second order. Kevin concurred, and thus, no dispute exists as to the double bass or the motor vehicles.

Next, we consider Kevin's songs. According to Penny, Kevin was an excellent songwriter. She provided a list of songs that he had allegedly written since 1991. Penny composed the list of songs from memory but thinks he has written more songs. She argues that the songs are marital property, and therefore, she is entitled to one-half their value. Without providing a formula for dividing the songs, Penny believes that she should be allocated one-half the net proceeds and royalties from these songs. Nonetheless, no song has been sold and no royalties ever received. Kevin testified that she had correctly listed the songs. However, he cautioned that some songs were merely titles with no lyrics or music yet written.

In its order, the trial court observed that it was unclear when the songs were written, and no income or value been established for the songs. Penny established no value, and Kevin claimed no value for the songs. Hence, the trial court awarded the songs to Kevin. Penny contests this allocation arguing that the songs are marital property, and should be divided in just proportions under Kentucky Revised Statute (KRS) 403.190.

It appears that the songs are marital property, but to divide marital property, it must have a value. Penny never provided a monetary value. She observed that Kevin attempted during the marriage to market the songs and was unsuccessful. Penny alleges that some songs have been copyrighted but provided no proof in the record that the songs were copyrighted.

In *Gaskill v. Robbins*, 282 S.W.3d 306, 316 (Ky. 2009), our Supreme Court held that a business must be valued in its existing state for the purposes of dividing marital property under KRS 403.190. In other words, a business is valued in its existing state as opposed to an indefinite future state.

We analogize the *Gaskill* holding regarding business valuation to the valuation of these songs. No value has been provided for the songs. No song has been sold. Accordingly, no value can be attached to any song. Penny did not provide expert testimony to value them. And her suggestion that they may have value in the future is based on an inchoate expectancy.

For a trial court to divide property it must be valued so that a fair and reasonable division may be effectuated. KRS 403.190(1)(a); *Beggs v. Beggs*, 479



S.W.2d 598 (Ky. 1972). Here, no value was ascribed to the songs, and thus, there is no value to be divided. The songs are personal property for which the trial court, in the interest of equity, awarded Kevin.

When a trial court divides marital property, “just proportions” does not mean that the property must be equally divided but rather meet the factors in KRS 403.190. *Muir v. Muir*, 406 S.W.3d 31, 36 (Ky. App. 2013). We believe that the trial court considered these factors and allocated the personal property in “just proportions.” Additionally, the allocation of the songs was within the discretion of the trial court, and it did abuse its discretion in assigning the songs to Kevin.

1. *House and related debts*

Penny argues that the trial court erred in its allocation of the net proceeds from the sale of the house. The trial court ordered that the proceeds be split between the parties with a certain amount put in escrow to satisfy the parties’ disputed property issues. Once it is determined how much of escrow will be necessary to pay each party, the remaining amount is to be divided equally between the parties. The trial court made no error in so ordering.

Regarding the home, the trial court ordered Kevin to pay one-half the mortgage payments for the next six months, but if the home did not sell after six months, Penny, who lived in the marital residence, was to pay the mortgage until the house sold. According to Penny, the mortgage balance on October 1, 2015, was \$151,767.03. The home has sold and \$25,000 of the proceeds is an escrow account to address the disputes involving reimbursements for home repair, loans,

debts, and withdrawals. Penny disputes the efficacy of the trial court's decisions about these issues. We will address the individual demands.

First, Penny maintains that Kevin should reimburse her for one-half the Chemco loan (\$3,100); one-half the 2012 and 2013 loans from her University of Louisville retirement plan (\$2605); part of the remodeling and repair expenses; and the amount of the mortgage payment that she allegedly overpaid; and, for 2014 and 2015 withdrawals from her University of Louisville retirement plan.

Notwithstanding that Penny believes that Kevin should be responsible for one-half the Chemco loan, Kevin asserts that the trial court did not err when it did not order him to reimburse Penny for one-half this loan. Penny testified that the loan was taken out on October 26, 2015, to pay debts, including "her share" of the August and September mortgages. Interestingly, Penny's statement about "her share" of the mortgage supports Kevin's assertion that he paid his share of the mortgage. She also supported that he paid his one-half the mortgage in her testimony.

The trial court found that Penny took out the loan from Chemco to pay her share of the mortgage payment. Therefore, the loan was for her benefit alone. We deem that the trial court did not err in making this determination and no abuse of discretion occurred. Kevin does not have to reimburse Penny for one-half the Chemco loan.

Next, Penny seeks reimbursements for several loans from her pension at the University of Louisville. She initially took out \$5,210 in 2012 and 2013 for

which she avers that Kevin owes one-half or \$2,605. Penny describes these withdrawals as necessary to cover mortgage payments and other family expenses including some health care expenses. Interestingly, three withdrawals occurred during the time the parties were still married, and one was made on July 9, 2013, a couple weeks after the petition was filed. And in fact, the parties, even after the petition was filed, lived in the same residence until mid-2015. It does not appear that the trial court even addressed these withdrawals. But no error exists since the withdrawals took place prior to the dissolution action.

Penny also provides a document showing four withdrawals from this same retirement account between April 2014 and November 2015. The amount of the withdrawals was \$16,227.15. Although Penny maintains that the funds were used to make mortgage payments and household expenses, she herself reported that the money was also used to pay federal taxes and \$3,000 for the expenses of an adult son. While Penny provides a list of additional withdrawals from the University of Louisville retirement accounts, she merely states that these additional funds were used for household expenses.

Here, as in other parts of her brief, Penny blames the loss of funds in the retirement account on Kevin's drinking and lost employment. However, Kentucky is a no-fault divorce state so that either party's behavior is irrelevant to the division of assets. Further, she claims that Kevin dissipated assets and compares the facts to the facts in *Barriger v. Barriger*, 514 S.W.2d 114 (Ky. 1974). The circumstances are easily distinguishable from *Barriger*.

In *Barriger*, the husband converted approximately \$25,000 of the parties' savings into cash and then dissipated it through "reckless extravagance." *Id.* at 115. The husband testified that he took a Caribbean cruise, gambled in Las Vegas, and entertained a series of women. In the case at bar, Penny initiated the spending of the retirement fund and allegedly used these funds for household expenses. *Id.* Kevin did not withdraw the funds from Penny's retirement account nor spend it profligately on himself. The retirement funds were not dissipated.

In the final order, the trial court denied Penny's request for reimbursement because Kevin also liquidated more than \$9,000 of his retirement account to pay the mortgage and other family expenses. The trial court stated that no equitable basis existed to reimburse either party for withdrawals from their retirement accounts since both used these withdrawals for household expenses including the mortgage, an adult son, and medical expenses.

Interestingly, if the funds had remained in the parties' pensions, they likely would have been marital assets subject to division. Indeed, the trial court noted that Penny now has a small retirement account with the University of Louisville and that Kevin waived any interest in this account. Penny does not deny this finding. Further, the funds were used to make mortgage payments, which sustained the parties' home ownership. They are now dividing the proceeds on this asset. The trial court had substantial evidence to support the findings about the retirement loans and did not abuse its discretion in determining that no reimbursement for the loans from either party's retirement accounts was necessary.

In addition, Penny and Kevin both seeks reimbursement for remodeling and home repair purchases. Some listed expenses were for the repair of the marital home for sale, but Penny’s demonstrative exhibit included expenses for storage units, new decorative items, landscaping, and furniture. Other than the HVAC repair, the trial court concluded that Penny should not be reimbursed for these items because she was living in the home and using them. Plus, some items, like the furniture, would go with Penny. Further, the trial court observed that Kevin submitted expenses for reimbursement, too. Because the expenses submitted by both parties were sufficiently similar in cost, neither party would be reimbursed for these expenses except that the trial court did provide that Penny would be reimbursed for the HVAC unit<sup>3</sup> and other repairs requested by the realtor and agreed to in advance.

While we understand that Penny does not agree with the trial court’s decision regarding her expenses for the storage units and landscaping, the trial court heard the evidence and it is his role to weigh the testimony. When the judge sits as factfinder, an appellate court must defer to the trial court because “recognition must be given to [the fact-finder's] superior position to judge their credibility and the weight to be given their testimony ....” *Johnson v. Commonwealth*, 412 S.W.3d 157, 166 (Ky. 2013) (internal citation omitted).

The trial court heard the evidence and ascertained its weight. Penny provided demonstrative exhibits. One exhibit indicated that she had paid

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<sup>3</sup> Penny also claimed that a loan was needed to repair the HVAC unit. Since she is being reimbursed for this amount, the request for reimbursement of the loan is moot.

approximately \$3,000 more in mortgage payments than Kevin. Penny asserts that Kevin owes her one-half this amount. But the trial court, which listened to all the evidence, concluded that within the myriad of debts, both parties assumed an equitable responsibility, and as such, the trial court did not order this payment from the escrow account. Again, we believe that the trial court had substantial evidence to support its decision and did not err in so ordering. Therefore, according to its order, other than reimbursement for the HVAC unit and agreed repairs to sell the home, neither party will be reimbursed for any loans or expenses.

To summarize, KRS 403.190 provides the methodology for the disposition of property during a dissolution of marriage action. It is the task of the trial court is to equitably divide the marital property between the parties. But a trial court is not obligated to divide the marital property equally. *Davis v. Davis*, 777 S.W.2d 230, 233 (Ky. 1989). Instead, a trial court is responsible only to divide the marital property “in just proportions.” KRS 403.190(1). Further, a trial court has wide discretion in dividing marital property, and an appellate court may not disturb the trial court’s rulings on the division of property unless the trial court has abused its discretion. KRS 403.190(1). The trial court’s decision in this matter was not “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *See Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky.1999) (citations omitted).

## 2. Debts

The next issue is the marital debts and their assignment. This decision also overlaps with the distribution of the escrow account. Debts are generally

“assigned on the basis of such factors as receipt of benefits and extent of participation[.]” *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001).

Further, there is no presumption that debts must be divided equally or in the same proportion as the marital property. *Smith v. Smith*, 235 S.W.3d 1, 15 (Ky. App. 2006). And a trial court’s assignment of debt is within its discretion. *Rice v. Rice*, 336 S.W.3d 66, 68 (Ky. 2011). The review is for an abuse of discretion. *Id.*

The trial court heard the evidence and the testimony of the parties. It concluded regarding the balances on the Fifth Third Bank, U.S. Bank, and Discover credit cards that the debts from them should be paid from the escrow account. The credit cards for the family were in Kevin’s name since Penny had no credit cards. Penny claimed that many charges were non-marital, but the trial court found Kevin’s testimony and the demonstrative exhibits persuasive that the credit cards were used primarily for family expenses. In addition, Kevin, during the marriage and the separation, made the credit card payments and was ordered to continue making the minimum payments until the house was sold.

The division of debt between the parties is a matter for trial court discretion and, if the division is fair and equitable, it is unlikely to be overruled. *Lawson v. Lawson*, 228 S.W.3d 18 (Ky. App. 2007). Here, given the trial court’s knowledge of the parties and the facts, we cannot conclude that it was an abuse of discretion for the trial court to order that the credit card debt be paid from the home’s equity. It did not err in this decision.

The result is that each party is paying one-half the debt, which is an equitable division of the household expenses. Hence, the balance on the credit card debts is to be paid from the profits on the sale of the home.

### *3. Maintenance*

Penny requested maintenance. The trial court found that at the time of the hearing, Kevin operated a window-cleaning business making approximately \$12,000 to \$15,000 annually, and Penny was employed at the University of Louisville earning more than \$35,000 per year. It held that neither party had the resources to pay maintenance, and therefore, concluded the case was not appropriate for an award of maintenance.

Kentucky Revised Statute 403.200 governs spousal maintenance. It mandates, in pertinent part, that the trial court may grant a maintenance for either spouse only if it finds that a spouse seeking maintenance lacks sufficient property, including apportioned marital property, to provide for their reasonable needs and is unable to support themselves through appropriate employment. KRS 403.200. Further, the maintenance shall be in an amount and for a period that the trial court deems just after considering all relevant factors including: the financial resources of the party seeking maintenance; their ability to meet their needs; the time necessary to acquire sufficient education or training to allow them to find appropriate employment; the standard of living established during the marriage; the duration of the marriage; the age and condition of the spouse seeking maintenance; and lastly, the ability of the spouse from whom maintenance is



sought to meet their own needs while meeting the needs of the spouse seeking maintenance. *Id.*

An award of maintenance is within the sound discretion of the trial court. A reviewing court will not uphold the award if it finds the trial court abused its discretion or based its decision on findings of fact that are clearly erroneous. *Perrine v. Christine*, 833 S.W.2d 825, 826 (Ky. 1992). In the case at bar, given the relevant factors, the trial court did not abuse its discretion in denying an award of maintenance to Penny.

#### 4. *Attorney fees*

Under KRS 403.220, a trial court, after considering the parties' financial resources, may order a party to pay a reasonable amount of the other party's attorney's fees. Here, Penny has requested that Kevin pay her attorney's fees because he delayed the dissolution. The trial court, in its final order, held notwithstanding Penny's request, that this case was not an appropriate case for attorney's fees.

Kevin points out that it is essential for parties to a dissolution to have a disparity in income before attorney's fees are granted. This assertion about a disparity of income for an award of attorney's fees is supported by *Rumpel v. Rumpel*, 438 S.W.3d 354 (Ky. 2014), where the Court explains that in Kentucky a trial court is authorized to order one party to pay reasonable attorney's fees only if

there exists a disparity in the relative financial resources of the parties in favor of the payor. *Id.* at 363 (citations omitted). The Court comments later that the purpose of the fee-shifting statute is not intended to be punitive or sanctioning. *Id.* at 364. Moreover, even if a disparity exists, the trial court has discretion whether to award attorney's fees. *Bootes v. Bootes*, 470 S.W.3d 351, 356 (Ky. App. 2015).

The decision to award attorney's fees is committed to the sound discretion of the trial court because it is in the best position to make findings regarding financial disparity and conduct and tactics which delay the proceedings. See *Gentry v. Gentry*, 798 S.W.2d 928, 938 (Ky.1990). In the final order, the trial court noted that Kevin earned from his window-cleaning business approximately \$12,000 to \$15,000 per year, and Penny earned from her position at the University of Louisville, approximately \$35,000 per year. In the matter at hand, we do not believe that the trial court abused its discretion in not awarding Penny attorney's fees since the record discloses that this case is not appropriate for such an award.

##### *5. Back taxes for the window cleaning business*

Penny posits that the trial court erred by not ordering Kevin to be solely responsible for the back taxes owed on the income from the window cleaning company. She testified that letters from the Internal Revenue Service were sent to Kevin, but he never opened them. Nonetheless, Penny provided no specificity as to the amount of taxes owed or to the type of taxes owed.

The trial court in its final order awarded the window cleaning company to Kevin since Penny disclaimed any interest in it. Nonetheless,

regarding the back taxes, the trial court merely observed that the parties owed back taxes on the window-cleaning business but did not allocate any responsibility for the debt. In the order denying the motion to vacate, the trial court stated that it was premature to determine who owed back taxes and referenced that the final order did not address this debt.

As an appellate court, we do not usurp the fact-finding role of the trial court. There is testimony that Kevin operated a window-cleaning business during much of the marriage and that the income from the business was used to support the family. Further, at the hearing, it was stated that at one time Penny was an officer of the corporation. There is no additional evidence on this matter.

Consequently, we remand the issue of the back taxes to the trial court for a consideration of who should pay the taxes, the amount of the taxes, and when the taxes were accrued. Penny has suggested that the payment of taxes may possibly come from the escrow account. That, too, is within the purview of the trial court.

#### CONCLUSION

We affirm the decision of the Oldham Family Court on all issues related to the parties' dissolution except that we remand the issue of the back taxes for the window-washing business.

ALL CONCUR.

BRIEF FOR APPELLANT:

Stephen P. Imhoff  
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