RENDERED: JULY 10, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000448-MR

JOHN K. BROWN, III — APPELLANT

v.

APPEAL FROM FAYETTE FAMILY COURT
HONORABLE KATHY STEIN, JUDGE
ACTION NO. 17-CI-00492

SUSAN C. BROWN AND
KARA READ MARINO — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, K. THOMPSON, AND L. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: John K. Brown, III, appeals from the Fayette Family Court's findings of fact, conclusions of law, and final decree of dissolution entered on January 12, 2018. John argues that the family court abused its discretion when it divided the parties' marital bank accounts as of the date of the final hearing and the parties' retirement accounts as of the date of the decree; the family court

abused its discretion in the award of maintenance; the family court abused its discretion when it ordered that attorney fees be paid before the marital estate was divided; and the family court abused its discretion in its finding that John did not properly trace his nonmarital property.

John and Susan C. Brown were married on June 5, 1982, and have two adult children. In January 2016, the parties separated and, in October 2016, Susan filed this action for dissolution of marriage. At the time of the final hearing, John was 58 years old and Susan was 55 years old.

On November 1, 2016, the parties attempted to reach a settlement agreement. At that time, the parties separated certain marital bank accounts into their individual names with Susan retaining $184,063.16 and John retaining $186,604.00. Each party retained vehicles in their possession. The parties also had retirement accounts that were not separated into their individual names. There was no written separation agreement signed by the parties.

After the parties' negotiations did not result in a written separation agreement and mediation failed, a final hearing was held on July 19, 2017. John claimed it was agreed that for purposes of division, the parties' marital bank accounts and retirement accounts would be valued as of November 1, 2016. He also sought to be awarded $50,000.00 in nonmarital equity in the marital residence resulting from his inheritance. He requested that each party be awarded the vehicle

in his or her possession and he be awarded $7,862.50 for the excess value of the vehicle Susan retained. John requested that Susan be awarded $30,000.00 a year in maintenance for a period of three years beginning March 1, 2017, and that each party be responsible for their own attorney fees. He also requested that he be awarded $50,000.00 as his nonmarital property.

Susan requested that she be awarded $180,000.00 for her share of the marital equity in the home, that all retirement accounts be divided as of the date of the decree, and that all marital bank accounts and health savings accounts be divided as of the date of the final hearing. In her trial memorandum, Susan stated that "[a]lthough she was in agreement with separation of assets [on November 1, 2016] while the parties attempted to reach agreement, no agreement was reached." She further requested that she be awarded $270,000.00 in maintenance over seven years beginning September 1, 2017.

Evidence was introduced at the hearing regarding the parties' standard of living during the marriage and income. They enjoyed a comfortable lifestyle, including overseas travel, a home with no mortgage, and vehicles, and they provided their children with private college educations. John was an engineer earning an annual salary of $159,612.18 and he was eligible for bonuses. John's annual salary in the five years prior to trial was $171,300.00. He also received income of $5,000.00 a year from a nonmarital account.

Susan has two master's degrees and is certified as a spiritual director. She was sporadically employed during the marriage as an office manager and an adjunct faculty member but primarily stayed home to care for the parties' children. As of the date of the final hearing, Susan had begun a spiritual practice.

To support her claim for maintenance, Susan testified she had a monthly income of $660.00 and a budget of $4,762.20, including $1,067.00 in business expenses. Her spiritual practice was operating at a loss of $842.00 a month. Susan presented her business plan and testified that she anticipates earning over $40,000.00 per year in seven years. Susan's testimony and business plan were supported by expert testimony presented at the final hearing.

John testified that his current net income was $9,669.83 per month and that his monthly budget was $7,016.37. John introduced the expert testimony of Austin Duvall, a certified financial planner, who opined that Susan's income, the marital property, and the three-year maintenance award proposed by John would be sufficient to support her in the lifestyle to which she was accustomed during the marriage through age 90. However, Duvall testified that Susan would have to use tax deferred savings prior to age 59 1/2 and that he would not advise John to make the same withdrawal from retirement funds.

John claimed that he was entitled to $50,000.00 he received as an inheritance from his parents as his nonmarital property in the marital residence.

However, John acknowledged that the funds had been commingled with marital funds. Further facts will be developed as necessary.

The family court divided all marital bank accounts and the IRA account as of the date of the final hearing and John's retirement accounts and health savings accounts as of the date of the decree.[1] The family court found that there was no meeting of the minds on November 1, 2016, regarding the valuation date for the division of the marital bank accounts even though those accounts were separated into the parties' individual names. The family court further found that the retirement accounts in John's name were marital property to be divided as of the date of the decree of dissolution. Specifically, the family court found that "the parties did not reach an agreement regarding the division of these accounts and it would be inequitable for John to receive the increased value in these retirement accounts since November 1, 2016 without there having been an agreement regarding division of the marital estate and maintenance."

The family court found that John had not traced the alleged nonmarital funds into any marital asset. The family court awarded John the marital residence valued at $360,000.00 and awarded Susan $180,000.00 as her share of

[1] Susan agreed that the bank accounts and IRA should be divided as of the date of the final hearing.

the marital equity. It found that it was reasonable for Susan to purchase a home for $264,900.00.

In making its maintenance award, the family court discounted Duvall's testimony because he did not meet with Susan, did not know the parties' standard of living during the marriage, did not know Susan's risk assessment, did not have accurate information regarding Susan's income or monthly expenses, and his proposal that Susan make early retirement withdrawals was unreasonable. The family court found that Susan's expenses were reasonable, and she had a shortfall in income of $5,728.60. It further found that John's reasonable monthly expenses were $4,069.27 giving him a surplus income of $5,869.83 per month. Maintenance was awarded to Susan as follows: September 1, 2017, through August 31, 2018, $5,500.00 per month; September 1, 2018, through August 31, 2019, $5,000.00 per month; September 1, 2019, through August 31, 2020, $3,500.00 per month; September 1, 2020, through August 31, 2021, $2,750.00 per month; September 1, 2021, through August 31, 2022, $2,250.00 per month; September 1, 2022, through August 31, 2023, $2,000.00 per month; and September 2, 2023, through August 31, 2024, $1,500.00 per month.

Susan made a claim for attorney fees pursuant to Kentucky Revised Statutes (KRS) 403.220. Prior to the final hearing, Susan's counsel was paid $9,888.75 from the marital accounts that were in Susan's name, and $565.20 was

paid for her expert witness. John paid $3,000.00 from marital funds towards Susan's attorney fees pursuant to an April 2017 order. John did not specify how much he had paid his attorney. The family court found that Susan does not have sufficient funds to pay her attorney fees and ordered that any fees should be paid from the marital estate prior to its division.

Our standard of review was summarized in *Muir v. Muir*, 406 S.W.3d 31, 34 (Ky.App. 2013) (citations omitted):

> It has long been recognized that the reviewing court cannot disturb the findings of the trial court unless those findings are clearly erroneous. How property is divided is well within the sound discretion of the trial court. Without an abuse of discretion, the reviewing court should uphold the trial court's division of property. A family court has broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it. It is also entitled to make its own decisions regarding the demeanor and truthfulness of witnesses, and a reviewing court is not permitted to substitute its judgment for that of the family court unless its findings are clearly erroneous.

We address John's arguments under the stated standard of review.

John argues that the family court abused its discretion when it divided the retirement accounts as of the date of the decree and the marital bank accounts as of the final hearing rather than as of November 1, 2016. John's argument is premised on an alleged oral agreement entered into between the parties on that date as to the division of their marital property. He contends that in reliance on that

alleged agreement, he put additional amounts in the marital bank account in his name which, at the time of the final hearing, had a value of $206,895.21, and he and his employer continued to contribute to his retirement accounts.

KRS 403.190(3) provides that all property acquired by a spouse "after the marriage and before a decree of legal separation is presumed to be marital property[.]" Based on the express statutory language, all property acquired prior to a dissolution of marriage is marital property including "marital property earned or purchased in the interim between an 'actual' separation and the decree of dissolution." *Stallings v. Stallings*, 606 S.W.2d 163, 164 (Ky. 1980). Generally, "the proper date to value marital assets is the date the decree of dissolution is entered." *Jones v. Jones*, 245 S.W.3d 815, 819 n.3 (Ky.App. 2008) (citation omitted).

While a court is required to divide property in dissolution of marriage actions in accordance with the applicable statutes, the parties may divide the property by agreement. KRS 403.180(1) (emphasis added) provides:

> To promote amicable settlement of disputes between parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may *enter into a written separation agreement* containing provisions for maintenance of either of them, disposition of any property owned by either of them, and custody, support and visitation of their children.

As required by the italicized language, separation agreements are required to be in writing and signed by the parties. *Bratcher v. Bratcher*, 26 S.W.3d 797, 799 (Ky.App. 2000). Therefore, because it is undisputed that John and Susan did not enter into a signed written agreement, John and Susan did not enter into a valid and enforceable agreement on November 1, 2016. Consequently, there was no enforceable agreement that the marital retirement accounts and marital bank accounts were to be valued as of that date.

John argues that regardless of whether there was a written agreement as required by KRS 403.180, Susan should be estopped from denying that she entered into an agreement with him based on the theories of promissory estoppel and equitable estoppel.[2]

The doctrine of promissory estoppel provides:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Meade Constr. Co., Inc. v. Mansfield Commercial Elec., Inc., 579 S.W.2d 105, 106 (Ky. 1979) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Draft No. 2, 1965)). Although also a form of estoppel, equitable estoppel is different from

[2] Although John suggests that estoppel by acquiescence is a separate theory from equitable estoppel, they are the same. *See Sparks v. Trustguard Ins. Co.*, 389 S.W.3d 121 (Ky.App. 2012).

promissory estoppel in that it requires a material misrepresentation by one party and reliance by the other party. *Fluke Corp. v. LeMaster*, 306 S.W.3d 55, 62 (Ky. 2010). The elements of equitable estoppel are:

> (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts.

Id. (quoting *Sebastian-Voor Properties, LLC v. Lexington-Fayette Urban Cty. Government*, 265 S.W.3d 190, 194-95 (Ky. 2008)).

John seeks to circumvent the writing requirement of KRS 403.180 by arguing that Susan should be estopped from denying she entered into an oral agreement on November 1, 2016. Assuming the writing requirement of the statute can be avoided by the doctrine of estoppel, we cannot logically fit the facts into any theory of estoppel.

"Promissory estoppel can be invoked when a party reasonably relies on a statement of another and materially changes his position in reliance on the statement." *Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.*, 113 S.W.3d 636, 642 (Ky.App. 2003). Although John claims that he continued to fund the retirement accounts and the marital bank account in his individual name after November 1, 2016, in reliance on Susan's alleged oral promise that the accounts

would be valued as of that date, he cannot demonstrate that his reliance was reasonable. John and/or his counsel knew or should have known that KRS 403.180 requires a property settlement agreement to be in writing and certainly knew that no written settlement agreement was reached on that date.

John's claim of equitable estoppel is equally flawed. That doctrine "may be invoked by an innocent party who has been fraudulently induced to change their position in reliance on an otherwise unenforceable oral agreement." *Id*. at 643 (citation omitted). There is no evidence that Susan engaged in any fraudulent conduct or made any fraudulent statements of which John had no means to determine the truth.

Moreover, the family court specifically found that the parties did not enter into an oral agreement on November 1, 2016. "The question of the existence of a contract is a question of fact" for the fact-finder to determine. *Audiovox Corp. v. Moody*, 737 S.W.2d 468, 471 (Ky.App. 1987). Kentucky Rules of Civil Procedure (CR) 52.01 states:

> In all actions tried upon the facts without a jury . . . the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment . . . . Findings 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.

"A finding of fact is clearly erroneous when it is not supported by substantial evidence." *Stanford Health & Rehab. Ctr. v. Brock*, 334 S.W.3d 883, 884 (Ky.App. 2010) (citation omitted).

Susan denied that she agreed that the marital retirement and bank accounts would be valued as of November 1, 2016. She stated that the marital bank accounts were only divided on that date and separated for the individual use of each party. Susan's denial of any agreement and the lack of any written agreement constitutes substantial evidence to support the family court's finding that there was not a meeting of the minds on November 1, 2016. If there was no promise made by Susan, there can be no estoppel.

John argues that the family court abused its discretion in the award of maintenance because the amount was too high, and the duration of the award was too long. Again, we disagree with John that the family court abused its discretion.

KRS 403.200(2) provides that maintenance shall be in such amounts and for such period as the court deems just, 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 awarding maintenance, the family court must first make relevant findings of fact and then determine maintenance considering those facts. *Perrine v. Christine*, 833 S.W.2d 825, 826 (Ky. 1992). "In order to reverse the trial court's decision, a reviewing court must find either that the findings of fact are clearly erroneous or that the trial court has abused its discretion." *Id*.

"The 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). Susan was awarded approximately $991,404.05 in various retirement accounts and approximately $361,686.10 in cash. John argues that the family court was required to conclude that this amount, along with Susan's ability to earn an income and a maintenance award of $30,000.00 per year for three years, are sufficient to meet her reasonable

needs in accordance with the standard of living established during the marriage based on Duvall's testimony. We disagree.

As the fact-finder, the family court was not bound by Duvall's testimony. The family court gave specific reasons for not accepting his opinion that only a $30,000.00 award of yearly maintenance for three years was proper. The family court found that Duvall was not aware of the standard of living during the marriage, and he did not have accurate information regarding Susan's income or monthly expenses. Moreover, Duvall admitted his opinion required that Susan begin depleting her retirement assets before reaching full retirement age despite his testimony that he would not recommend his clients do so, particularly before age 59 1/2. We agree with the family court that Susan should not be required to expend her retirement funds to reduce the amount of spousal maintenance required for her needs. *See Powell v. Powell*, 107 S.W.3d 222, 225 (Ky. 2003).

We also disagree with John's contention that the family court abused its discretion when it found that Susan's spiritual practice is reasonable employment and when it included business expenses as reasonable expenses when determining the amount of maintenance. Susan presented expert testimony that Susan is well-suited for the occupation of spiritual advisor and she should be able to establish her business within five to six years. Based on that evidence, the family court awarded maintenance for seven years. The award was rehabilitative

in nature in that it terminates when Susan and her expert project Susan's spiritual practice will generate sufficient income so that maintenance is no longer needed. Susan's testimony and her expert's testimony constitute substantial evidence to support the family court's finding.

As to the business expenses required to build Susan's spiritual practice, those expenses were properly included. Just as a court is permitted to base an award on the need to obtain additional education to become employable so that maintenance is no longer needed, *see, e.g., Van Bussum v. Van Bussum*, 728 S.W.2d 538, 539 (Ky.App. 1987), a court may consider the expense of starting a business to reach that same goal.

The family court properly considered all the factors in KRS 403.200 in considering both the amount and duration of the maintenance award. Over the five-year period prior to the hearing, John earned $171,300.00, considerably more than Susan's projected income even with the rehabilitative maintenance award. Although Susan was awarded $361,686.10 in cash, she will need to purchase a home, which the family court found, in accordance with the standard of living during the marriage, would cost approximately $264,900.00. As the family court found, that amount will exceed the amount awarded to Susan as her share of the marital residence.

The parties enjoyed a comfortable lifestyle during the parties' thirty-five-year marriage and, for the most part, Susan stayed home and cared for the children while John advanced his career. While John complains that he will be unable to meet his own reasonable needs during the seven years maintenance is owed, based on his income he has a monthly excess of income of $5,869.00 after meeting his reasonable needs. The family court did not abuse its discretion.

John argues that the family court abused its discretion when it awarded Susan $5,500.00, rather than $3,800.00, in maintenance beginning September 1, 2017. He argues that because Susan was awarded $3,800.00 in temporary maintenance beginning March 1, 2017, and there was no evidence that her expenses increased from that date until the entry of the decree on January 12, 2018, the increase from September 2017 to January 2018 was an abuse of discretion.

Although a final hearing was held on July 19, 2017, the family court did not enter its findings of fact, conclusions of law, and decree of dissolution until January 12, 2018. We conclude the family court did not abuse its discretion by awarding Susan maintenance to which she was entitled beginning September 1, 2017. *See Higbee v. Higbee*, 89 S.W.3d 409, 410 (Ky. 2002).

John argues the family court erred in ordering that all attorney fees be paid from the marital estate prior to its division. An award of attorney's fees in a dissolution of marriage action is governed by KRS 403.220, which provides:

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

In *Smith v. McGill*, 556 S.W.3d 552 (Ky. 2018), the Kentucky Supreme Court reversed more than forty years of precedent interpreting KRS 403.220 that mandated a financial disparity must exist between the parties in a dissolution action before an award of attorney's fees could be made. In *Smith*, the Supreme Court held:

> The statutory language here is plain: after a trial court considers the parties' financial resources, it may order one party to pay a reasonable amount of the other party's attorney's fees. The statute does not require that a financial disparity must exist in order for the trial court to do so; rather, that language is a creature of case law born out of this Court's decisions—and today, we slay this forty-year-old dragon hatched from precedent.
>
> While financial disparity is no longer a threshold requirement which must be met in order for a trial court to award attorney's fees, we note that the financial disparity is still a viable factor for trial courts to consider

> in following the statute and looking at the parties' total financial picture. . . .
>
> . . . .
>
> We agree with the portion of *Gentry* [*v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990)] which holds, "[t]he amount of an award of attorney's fees is committed to the sound discretion of the trial court[.]"

Id. at 556.

In accordance with the family court's order, attorney fees are to be paid from the marital estate, which would consist of property awarded to each party. John argues that Susan incurred approximately $1,900.82 more in attorney fees than he did making the family court's award an abuse of discretion.

As noted in *Smith*, in Kentucky, the award of attorney fees remains within the sound discretion of the family court. *Id*. While John argues there is no disparity of assets between the parties, there is a disparity in income between the parties. We conclude the family court did not abuse its discretion.

John's final argument is that the family court erred when it found that he did not trace $50,000.00 as his nonmarital property from an inheritance from his parents. The concept of "tracing" was explained in *Sexton v. Sexton*, 125 S.W.3d 258, 266 (Ky. 2004) (internal brackets, quotation marks, and footnotes omitted):

> "Tracing" is defined as the process of tracking property's ownership or characteristics from the time of its origin to the present. In the context of tracing nonmarital property, when the original property claimed to be

> nonmarital is no longer owned, the nonmarital claimant must trace the previously owned property into a presently owned specific asset. The concept of tracing is judicially created and arises from KRS 403.190(3)'s presumption that all property acquired after the marriage is marital property unless shown to come within one of KRS 403.190(2)'s exceptions. A party claiming that property, or an interest therein, acquired during the marriage is nonmarital bears the burden of proof.

The funds John claims were indisputably commingled with marital funds and there was no documentary evidence that those funds were used as a nonmarital contribution to the marital residence. In the absence of such evidence, we will not disturb the family court's finding that John did not adequately trace his claimed nonmarital funds.

For the reasons stated, the findings of fact, conclusions of law, and decree of dissolution of the Fayette Family Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEES:
Stephanie Tew Campbell Lexington, Kentucky	Kara Read Marino Lexington, Kentucky