

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

NO. 2009-CA-000466-MR  
and  
NO. 2009-CA-002222-MR

GEORGE W. EPPERSON

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT  
HONORABLE DONNA DELAHANTY, JUDGE  
ACTION NO. 07-CI-504410

MARY EPPERSON

APPELLEE

OPINION  
AFFIRMING IN PART,  
VACATED IN PART  
AND REMANDING

\*\* \*\* \* \* \* \* \*

BEFORE: CAPERTON, COMBS, and KELLER, Judges.

COMBS, JUDGE: This case involved an action for the dissolution of marriage in Jefferson Family Court. George Epperson appeals the court's division of property and debt as well as its post-trial order directing him to pay a portion of the new

mortgage of his ex-wife, Mary. After our review, we affirm in part, vacate in part, and remand for further proceedings.

George and Mary were married on June 13, 1981. No children were born of the marriage, but they raised children from their previous marriages: George's daughter and Mary's two sons.

George and Mary separated on November 6, 2007. Three weeks later, Mary filed a petition for dissolution of the marriage. They had originally intended to live separately in their home at Harness Court during the course of the proceedings. However, tensions developed to such an extent that they sought mutual restraining orders. The relationship continued to deteriorate, and George was ordered out of the house by the court. At the end of June 2008, George began sharing expenses and living space with Mary's sister.

George and Mary had worked for JBS Swift & Company (a meat-packing facility in Louisville) for more than thirty years when each of them retired. Each receives pension benefits from the company, but Mary supplements her income with a position as a cafeteria manager at a Jefferson County public elementary school. Until his health became a concern, George supplemented his retirement and Social Security benefits by taking on small-scale, home-remodeling projects with his relatives.

A trial was conducted on September 17, 2008.<sup>1</sup> After considering the evidence, the family court concluded that George had shown a non-marital

---

<sup>1</sup> Subsequent hearings were held in January, March, July, and August 2009.

contribution of \$28, 700.00 toward the acquisition of the parties' marital home. However, it also concluded that his contribution had lost its non-marital status over the years. Consequently, the court ordered that as of January 31, 2008, the equity in the property would be divided equally between them. Equity that had accrued since February 2008 was awarded to Mary alone as her compensation for having paid the mortgage payments as of that date without assistance or participation from George. Furthermore, the court determined that Mary should retain the home and pay to George the value of his interest in the property within sixty days. If Mary decided not to retain the residence (or became unable to do so), the parties were to list the property for sale. The family court's findings of fact and conclusions of law were entered by the clerk on December 22, 2008.

On January 2, 2009, George filed a motion to alter, amend, or vacate the judgment. Among his complaints, George objected to the court's award of attorney's fees to Mary and to its determination that his non-marital interest in the Harness Court property had essentially evaporated.

On January 9, 2009, Mary filed a motion requesting the court to order George to pay her new home-loan origination fee and a portion of her new monthly mortgage payment. She explained that the origination fee and a higher interest rate had been imposed by the lender as a result of her lowered credit score. Mary claimed that her credit score had been adversely affected by George's failure to make payments toward a particular credit card debt following the trial in September 2008. George responded that he had never agreed to pay the parties'

outstanding joint indebtedness and said that Mary had never forwarded to him any statements regarding their joint indebtedness after he was required to leave the Harness Court home in late June 2008. He testified at trial that he had paid all the household bills through June and indicated that he had not paid the disputed credit card bill since he had not received a statement.

In an order entered March 4, 2009, the family court denied George's motion to alter, amend, or vacate. The court also ordered George to convey his interest in the Harness Court property to Mary. On March 10, 2009, George filed an appeal to this Court.

From his share of equity in the Harness Court property, the court on August 28, 2009, ordered George to pay to Mary the sum of \$9,457.37, which represented, in part: an offset in the value of the parties' vehicles; Mary's award of attorney's fees; the amount of the 2008 property taxes; and one-half the value of the mortgage payments made between February 2008 and December 2008 from his share of equity in the Harness Court property. On November 10, 2009, George was ordered to pay any increased amount that Mary had incurred with respect to her home loan as a result of her impaired credit score. (The penalty that the lender originally sought to impose had by now been withdrawn, and George was not ordered to pay it.) On December 1, 2009, George filed his second appeal to this Court.

For convenience, these separate appeals were addressed together at a prehearing conference; they were briefed by the parties and heard together. We shall make our disposition of the appeals in this single opinion.

On appeal, George contends that the family court erred by dividing the Harness Court equity without taking into account his non-marital interest in the property. After reviewing the evidence presented, we agree that the family court erred in distributing the property without properly taking into account both its marital and non-marital components.

With respect to the disposition of property in an action for dissolution of marriage, Kentucky Revised Statute[s] (KRS) 403.190 directs the court, in relevant part, as follows:

(1) [T]he court shall assign each spouse's property to him. It also shall divide the marital property . . . in just proportions. . . .

(2) For purposes of this chapter, "marital property" means all property acquired by either spouse subsequent to the marriage except:

\* \* \* \* \*

(b) Property acquired in exchange for property acquired before the marriage . . . ;

\* \* \* \* \*

(e) The increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during marriage.

(3) All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section.

Under the provisions of this statute, the family court must engage in a three-step process. First, the court must categorize each piece of disputed property as either marital or non-marital. Second, the court must assign to each party his non-marital property. Finally, the court must equitably divide the marital property.

This process can become complex where a spouse contends that the property to be distributed has both marital and non-marital components. Nevertheless, the family court “must determine the parties’ separate nonmarital and marital share or interests in the property on the basis of the evidence before [it].” *Travis v. Travis*, 59 S.W.3d 904, 909 (Ky.2001).

The court’s task can be further complicated where disputed property appreciates during the course of the marriage. Under that circumstance, courts apply the “source of funds” rule to determine the marital and non-marital components of the disputed property. *Id.* The “source of funds” rule provides that any increase in value of non-marital property acquired before the marriage remains non-marital as long as the appreciation is attributable to general economic conditions rather than as a result of the parties’ efforts. Graham, Louise and Keller, James, *Kentucky Practice, Domestic Relations Law* Sec. 15:64 (Ky.2008). A party claiming that appreciation is non-marital bears the burden of showing that the increase in value was not due to the combined efforts of the parties. *Smith v. Smith*, 235 S.W.3d 1.

The undisputed evidence establishes that George purchased a home on Ledyard Road in Louisville in March 1976 for \$27,000.00. Shortly after George and Mary married in 1981, they purchased a home on Harness Court in Louisville for \$53,500.00. George and Mary assumed the seller's remaining mortgage of \$24,800.00 and received a bridge loan against George's equity in the Ledyard Road house for the balance of the purchase price. In 1983, the Ledyard Road property sold for \$46,000.00.

According to Mary, the Ledyard Road property sat vacant for two years before it finally sold. She contends that during this time, marital funds were used to "fix up" the residence and to make the mortgage payments associated with the property. On cross-examination, however, Mary conceded that the residence was leased during the parties' marriage and that the renters bought the Ledyard Road property eighteen months after she and George were married. Mary remembered that the bridge loan had been repaid, but she could not recall the circumstances.

George indicated that he repainted the Ledyard Road property and undertook some repairs before he and Mary were married. George explained that Mary refused to live in the Ledyard Road house because he and his former wife had shared the home. George testified that the Ledyard Road property was re-carpeted after his marriage to Mary. He indicated that the proceeds from the sale of the Ledyard Road property were used to pay off the mortgage on that property and to pay off the parties' bridge loan for the Harness Court property.

The assumed mortgage on the Harness Court property was eventually paid off with marital funds. Over the years, the parties borrowed money for various uses based on the home's equity. They repaid the loans with marital funds.

George's expert indicated that the fair market value of the Harness Court property was \$158,000.00 as of March 2008. The parties' equity in the property totalled more than \$133,000.00.

During the dissolution proceedings, George claimed as his separate property a non-marital contribution toward the purchase of the Harness Court property of \$28,700 (an exchange of his equity from the Ledyard Road property for equity in the Harness Court property) and a portion of the increase in the home's value attributable to general economic contradictions for a total of \$67,000.00 of the home's equity as his non-marital property.

At trial, Mary acknowledged that George had entered the marriage with a substantial asset. She indicated that George had also entered the marriage with substantial debt, an allegation that George denied vehemently. As a consequence of this debt, Mary believed that no part of the Harness Court property ought to be assigned to George as his non-marital property. Additionally, Mary contended that the Harness Court property had appreciated in value entirely as a result of the parties' joint efforts. She explained that she and George had added a new roof, replaced windows, refurbished an existing bathroom, installed flooring, and added a bathroom, den, and bedroom to the basement at Harness Court.



Having examined this evidence, the family court determined that George had “put down \$28,700.00 [toward the purchase price of the Harness Court property], which he received from the sale of his prior home, and the parties assumed a loan in the amount of \$24,800.00 for the remainder of the purchase price.” Findings of Fact and Conclusions of Law at 3. The court further observed as follows:

After the parties paid off the first mortgage, they refinanced the [Harness Court] home several times, making several significant home improvements along the way, one being a remodeling of the basement in the approximate amount of \$31,000.00. The value of the [Harness Court] home increased dramatically over the years, due in large part to the updates and improvements made to the home by the joint efforts of the parties. Each refinancing was repaid by use of joint marital funds.

*Id.* The court determined from these facts that George’s non-marital contribution to the purchase of the Harness Court property “was effectively commingled with the marital investment over the years.” *Id.* It reasoned that “[t]he act of paying off the original mortgage with joint funds, then refinancing the asset and repaying the reoccurring debt with marital funds extinguished any non-marital interest . . . .”

*Id.* The court concluded that as a consequence, the residence was now “wholly marital in nature.” *Id.*

On review of the family court’s division of property, we must defer to the discretion of the trial court. *Herron v. Herron*, 573 S.W.2d 342 (Ky.1978). We may not reverse the trial court’s findings of fact unless they are clearly erroneous. Kentucky Rule[s] of Civil Procedure (CR) 52.01. Findings of fact are not clearly erroneous if they are supported by substantial evidence. *Owens-Corning Fiberglas*

*Corp. v. Golightly*, 976 S.W.2d 409 (Ky.1988). “Substantial evidence” is evidence sufficient to induce conviction in the minds of reasonable people. *Id.* However, the family court’s conclusions of law are reviewed *de novo*. *Hunter v. Hunter*, 127 S.W.3d 656 (Ky.App.2003). A trial court’s classification of property as marital or non-marital constitutes a matter of law. *Wilder v. Wilder*, 294 S.W.3d 449 (Ky.App.2009). While we defer to the family court with respect to the factual findings supporting the determination of whether property is marital or non-marital, we give no deference to the court’s overall classification of the property. *Smith, supra*.

The evidence at trial indicated that the Harness Court property was acquired – in part – in exchange for George’s non-marital property. The family court found that George had “put down \$28,700.00 [toward the purchase price of the Harness Court property], which he received from the sale of his prior home.” Findings of Fact and Conclusions of Law at 3. Nevertheless, the court eventually concluded that the entirety of the Harness Court property was marital property. This characterization is inconsistent with the requirements of KRS 403.190.

KRS 403.190(2)(b) requires a court to assign to each spouse all of his non-marital property, including “[p]roperty acquired in exchange for property acquired before the marriage. . . .” When non-marital property is exchanged for property acquired following the marriage, the party claiming some non-marital component must “trace” the non-marital asset into the disputed asset. Tracing involves “the process of tracking property’s ownership or characteristics from the time of its

origin to the present.” *Sexton v. Sexton*, 125 S.W.3d 258, 266 (Ky.2004), quoting *Black’s Law Dictionary* 1499 (7<sup>th</sup> ed. 1999).

The family court acknowledged that George had adequately traced his non-marital property prior to the acquisition of the Harness Court property. However, it concluded that this component of the property had lost its non-marital status by virtue of having been “commingled with the marital investment over the years.” This conclusion was based on uncontested evidence indicating that the parties had paid off the assumed mortgage on Harness Court with marital funds and had refinanced the property several times over the course of the marriage.

The family court erred as a matter of law by concluding that George’s non-marital interest in the Harness Court property was extinguished by the parties’ decision to refinance (or to take equity from the home in some other way) several times over the years. The family court determined that George had made a considerable non-marital investment in the property. The Ledyard Road property was a substantial non-marital component of the value of the Harness Court property. There is no reason to assume that refinancing transactions or subsequent new mortgages extinguished or depleted George’s non-marital interest in the property. An interest in property may be set-off by other financial activities, but it does not evaporate or become extinguished. It is the function of the court to determine what set-offs may be allowed against the integrity of the non-marital property. See *Atkisson v. Atkisson*, 298 S.W.3d 858 (Ky.App.2009).

On remand, the value of George's non-marital interest in the Harness Court property must be restored to him pursuant to the requirements of KRS 403.190. Appropriate adjustments may be made in order to allow for the division of the marital property without obliterating the non-marital interest that preceded it.

With respect to the distribution of the Harness Court property, George argues additionally that the family court erred by failing to assign to him a portion of the property's passive appreciation. He contends that he is entitled to receive as his non-marital property that portion of the appreciation attributable solely to his initial non-marital investment in the property. To the extent that George established that a portion of the increase in value of the Harness Court property was attributable to market conditions, we agree.

Again, KRS 403.190(2)(e) provides that the "increase in value of property acquired before the marriage [is non-marital] to the extent that such increase did not result from the efforts of the parties during the marriage." It is indeed likely that some portion of the increase in the property's value was due to general economic conditions. In fact, George's expert witness indicated as much. And, while the court found specifically that the "value of the home increased dramatically over the years, due *in large part* to the updates and improvements made to the home by the joint efforts of the parties," it did not undertake to determine **how much of the increase** was due to market conditions (as opposed to the parties' joint efforts). Findings of Fact and Conclusions of Law at 3. (Emphasis added).

There is no presumption that general economic conditions caused the increase in an asset's value, and George clearly assumed the burden of proof on this issue. *Travis v. Travis*, 59 S.W.3d 904 (Ky.2001). Nevertheless, on remand the family court must determine from the evidence what portion of the increased value of the Harness Court property could be attributed to general economic conditions rather than to improvements made upon the property. The family court is entitled to weigh the evidence presented and to exercise its discretion. After the court characterizes the property's appreciation, it must assign to George (as his non-marital property) the appreciation attributable to his initial non-marital contribution toward the property.

Next, George contends that the family court abused its discretion by awarding the marital home to Mary without allowing him the opportunity to retain it – especially where no findings of fact were made to support the court's decision. While it is clear that the house could be awarded to only one of the parties, we agree that on remand the family court should clarify the basis of its decision.

George also argues that the family court abused its discretion by ordering him to pay one-half of a debt that Mary incurred just days before the trial and upon which no evidence was offered. Mary admits that the existence of this debt was disclosed to George and to the family court only in her proposed findings of fact and conclusions of law. Nevertheless, she contends that the issue is unpreserved for our review since George failed to address this issue in his motion to alter, amend, or vacate.

George's timely motion to alter, amend, or vacate, insured that the family court retained jurisdiction to consider the issues he raised post-trial, including the issues he raised in a supplemental motion filed more than ten days after the court's judgment was entered. Additionally, the alleged error is a palpable one entitling George to relief. *See CR 61.02.*

There is no presumption that debt incurred during the course of a marriage is marital debt. *Bodie v. Bodie*, 590 S.W.2d 895 (Ky.App.1979). Instead, when distributing the parties' debt, the family court must consider the nature of the disputed debt based upon the receipt of benefits and the extent of each spouse's participation. *Id.* In this matter, the family court must have *presumed* that the debt was marital since no evidence was presented by either party with respect to it. Since the court's finding of fact with respect to the nature of this debt is not supported by the evidence, it is clearly erroneous. The family court abused its discretion by finding that the \$5,000.00 debt to Stock Yards Bank was a marital debt to be divided between the parties. Consequently, this portion of the court's judgment must be vacated.

George next contends that the trial court erred by ordering him to pay a portion of Mary's monthly mortgage obligation as a consequence of his failure to make payments toward the parties' joint credit card debt on a timely basis. We disagree.

Following a hearing held in March 2009, the family court concluded that the parties had entered into "a working agreement" during their separation that

required George to make monthly payments toward their Bank of America credit card throughout the proceedings. This conclusion was adequately supported by evidence indicating that the parties had agreed to divide their monthly financial obligations – including their mortgage, household bills, and credit card bills – when they established separate checking accounts in February 2008. The evidence indicated that George agreed to pay the utility bills, to make payments toward the Bank of America credit card debt, and to pay other recurring debts totalling between \$600.00 and \$700.00. Mary agreed to pay a Chase credit card account established for her use as well as the monthly mortgage payment of \$418.00.

As the direct result of George's three late payments to Bank of America, Mary's credit score declined. The lender's documentary evidence attributed a monthly increase of \$66.90 to the mortgage payment solely to the drop in Mary's credit score. George had agreed to keep this obligation current. His failure to do so resulted in a direct and measurable financial hardship to Mary. Under these circumstances, the family court did not err by ordering George to bear the additional monthly costs of Mary's mortgage.

Finally, George contends that the trial court abused its discretion by giving credit to Mary for the payment of the parties' mortgage from February 2008 (when the parties established their separate checking accounts) until November 2008 and by deducting the value of one-half of the parties' monthly mortgage payment from George's share of his interest in the marital portion of the Harness Court property. We agree.

As discussed above, the family court was persuaded that the parties had entered into an agreement to divide their financial obligations (including their monthly mortgage payment, household bills, and credit card bills) during the duration of the dissolution proceedings. The evidence indicated that George agreed to pay between \$600 and \$700.00 toward their debts, and Mary agreed to make the mortgage payment (\$418.00) and to pay toward the balance of a Chase credit card account that she used during the proceedings. Under circumstances indicating that the family court intended to divide the couple's marital property equally between them, these computations fall short of an equitable allocation of responsibility. Although the mortgage payment was paid from Mary's separate checking account, the evidence indicates that George paid more than half of the couple's total monthly financial obligation. Under these circumstances, the court abused its discretion in excluding George from participation in the equity that accrued after February 2008 and in deducting one-half of the value of the mortgage payments made between February 2008 and December 2008 from his share of the equity in the Harness Court property.

The judgment of the family court is affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

ALL CONCUR.



BRIEF FOR APPELLANT:

Kenneth H. Baker  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Harold L. Storment  
Louisville, Kentucky