

RENDERED: AUGUST 14, 2015; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2013-CA-001724-MR  
AND  
NO. 2013-CA-001749-MR

SANDRA POPPLEWELL (HANKLA)      APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM RUSSELL CIRCUIT COURT  
v.      HONORABLE JENNIFER UPCHURCH EDWARDS, JUDGE  
ACTION NO. 10-CI-00277

MEL HANKLA      APPELLEE/CROSS-APPELLANT

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF; COMBS AND MAZE, JUDGES.

ACREE, CHIEF JUDGE: Sandra Popplewell and Mel Hankla appeal and cross-appeal the Russell Circuit Court's September 23, 2013 findings of fact, conclusions of law, and final order dividing their property as part of the dissolution of their marriage. Sandra's main contention on appeal is with the circuit court's

distribution of certain funds from the sale of the parties' marital residence. In his cross-appeal, Mel takes issue with the circuit court's disposition of specific pieces of antique property. After careful review of the record, we affirm the circuit court's rulings.

### **I. Factual and Procedural Background**

Sandra Popplewell and Mel Hankla were married in 1984. Prior to and during the course of their marriage, they accumulated several antique items. Sandra filed a petition for dissolution of marriage in May 2010, and a decree of dissolution was entered by the Russell Circuit Court in August 2011. In the decree, the circuit court reserved certain issues relating to the division of personal property and distribution of disputed funds from the sale of the parties' marital residence.

The parties entered into agreements regarding some of the property, memorialized in an Agreed Order dated September 30, 2011, as well as two additional Agreed Orders both dated October 26, 2012. Several hearings were held and numerous witnesses testified to aid the court in dividing the parties' remaining property. The court entered an order on September 23, 2013, distributing the remaining property. This appeal and cross-appeal followed. Additional facts will be discussed as they become relevant.

### **II. Standard of Review**

“The question of whether an item is marital or nonmarital is reviewed under a two-tiered scrutiny in which the factual findings made by the court are reviewed under the clearly erroneous standard and the ultimate legal conclusion denominating the item as marital or nonmarital is reviewed de novo.” *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006). A trial court has broad discretion in its division of marital property, and absent an abuse of that discretion, we will not disturb its decisions. *Kleet v. Kleet*, 264 S.W.3d 610, 613 (Ky. App. 2007).

### **III. Analysis**

The parties purchased the marital residence in Russell County, Kentucky, in 1990 and obtained a mortgage through Monticello Banking Company. They retired the mortgage in 2007 with funds from brokerage accounts belonging to Mel’s mother. Sandra first contends on appeal there is no evidence in the record supporting the circuit court’s determination that the funds used to pay off the mortgage on the marital residence were Mel’s nonmarital property. She argues that Mel failed to meet his burden of proof that the lump sum applied to the balance of their mortgage was not a marital gift. We disagree.

Kentucky Revised Statutes (KRS) 403.190 controls the classification and division of property in a dissolution proceeding. The Kentucky Supreme Court provided an explanation of the statute in *Sexton v. Sexton*, 125 S.W.3d 258 (Ky. 2004):

The disposition of parties’ property in a dissolution-of-marriage action is governed by KRS 403.190, and neither record title nor the form in which it is held, *e.g.*,

partnership, corporation, or sole proprietorship, is controlling or determinative. Under KRS 403.190, a trial court utilizes a three-step process to divide the parties' property: "(1) the trial court first characterizes each item of property as marital or nonmarital; (2) the trial court then assigns each party's nonmarital property to that party; and (3) finally, the trial court equitably divides the marital property between the parties." "An item of property will often consist of both nonmarital and marital components, and when this occurs, a trial court must determine the parties' separate nonmarital and marital shares or interests in the property on the basis of the evidence before the court." Neither title nor the form in which property is held determines the parties' interests in the property; rather, "Kentucky courts have typically applied the 'source of funds' rule to characterize property or to determine parties' non-marital and marital interests in such property." "The 'source of funds rule' simply means that the character of the property, *i.e.*, whether it is marital, nonmarital, or both, is determined by the source of the funds used to acquire the property."

*Id.* at 264-65 (footnotes to internal citations omitted).

Relevant to Sandra's claim and the "source of funds" rule mentioned above is the concept of "tracing." The *Sexton* Court further provided:

"Tracing" is defined as "[t]he process of tracking property's ownership or characteristics from the time of its origin to the present." In the context of tracing nonmarital property, "[w]hen 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.

*Id.* at 266 (footnotes to internal citations omitted).

The evidence Mel presented to the circuit court concerning the mortgage payoff included a copy of the check for \$87,659.34 issued directly to Monticello Banking Company from the Morgan Stanley account on which only his and his brother's names appear. Mel also provided account statements which designate Mel and his brother as the account holders.<sup>1</sup> It is undisputed that the funds used to pay off the mortgage on the marital residence came from Mel's mother's brokerage accounts. A mortgage statement also appears in the record showing a payment of \$87,659.34 applied on October 5, 2007, eliminating the mortgage account balance. Additionally, the parties' September 30, 2011 Agreed Order provides:

[Sandra] acknowledges that [Mel] and his brother, Bill Hankla, are the record title holders to [Mel's] mother's residence, and to bank and brokerage accounts held for the benefit of [Mel's] mother. [Sandra] acknowledges that [Mel] has made no financial contribution to his mother's residence or to the brokerage and/or bank accounts upon which [Mel] and his brother's name appear. Thus, [Sandra] makes no claim to [Mel's] mother's residence, nor to any brokerage and/or bank accounts owned by [Mel's] mother, but on which [Mel] and his brother's name appear.

The record is clear that Mel was able to satisfactorily trace the mortgage payoff to a nonmarital source. Accordingly, it was not clearly erroneous for the circuit court to find the sum of \$87,659.34 to be Mel's nonmarital property.

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<sup>1</sup> Mel and his brother served as power of attorney for their mother since 2002.

Sandra's second argument on appeal is a general claim that substantial evidence did not support the court's September 23, 2013 order awarding to Mel (and others) certain property the court deemed Mel's nonmarital property. She also claims proof of Mel's ownership of that property was lacking and that the property, mostly antiques, should have been considered marital property.

Sandra fails to specifically identify the items she believes should have been ruled marital property. There were hundreds of items the circuit court had to divide and assign among the parties throughout their dissolution proceedings as evidenced by the three Agreed Orders. Because Sandra does not specify on appeal particular items with regard to which the circuit court allegedly erred, we would have to speculate as to which of as many as 45 items she is referring. Such speculation is inappropriate and unwarranted. Having otherwise thoroughly reviewed the record, we conclude the circuit court's findings classifying property as Mel's nonmarital property are supported by substantial evidence.

Mel's cross- appeal takes issue with specific items he says were distributed contrary to the evidence presented to the circuit court. Those items include a Conrad Humble rifle; three other firearms – a Winchester Model 4, a MAS Model 34, and a Springfield, USA Army, Model of 1922; an antique Kentucky clock; a large Don Wright powder horn; yet another firearm – a Winchester Model 75; a powder horn collection sold at auction; a plantation desk; and the parties' 2009 income tax refund in the amount of \$4,124.00. Each of the items will be discussed in turn.

### ***Conrad Humble Rifle***

The circuit court found the Conrad Humble rifle to be marital property. Mel argued the purchase of the weapon could be traced to a nonmarital source of funds – a powder horn owned by his children, Isaac, Paige, and Melody. He said the Conrad Humble rifle, like the powder horn, was an investment for his children. Mel testified that he purchased the rifle in 2003 before receiving the proceeds of the sale to the Fort Pitt museum of the children’s powder horn, but while the sale was the subject of the museum’s verbal agreement to purchase it. The powder horn was eventually sold to the Fort Pitt museum in 2005. The receipt from Fort Pitt from the sale of the powder horn indicates that payment was made directly to the Hankla children. All three children testified that the rifle belonged to them because it was acquired with funds belonging to them through the sale of their powder horn.

The presumption that all property acquired by either spouse during the marriage is marital property under KRS 403.190(3) is overcome by a showing that the property was acquired in a way described in one of the five exceptions listed in KRS 403.190(2), including (a) property acquired by gift, bequest, devise, or descent, (b) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent, (c) property acquired by a spouse after a decree of legal separation, (d) property excluded by valid agreement of the parties, or (e) the increase in the value of

property acquired before the marriage to the extent that such an increase did not result from the joint efforts of the parties during the marriage.

The evidence undoubtedly showed that the Conrad Humble rifle was acquired in 2003 during the marriage and Mel maintained possession of it. Despite Mel's claim that there is no evidence contrary to his testimony and that of his children indicating to whom the Conrad Humble rifle ultimately belonged, Mel failed to show that acquisition of the rifle qualifies under any of the exceptions of KRS 403.190(2). Additionally, there are several emails in the record from Mel to various collectors stating that he had wanted an early Kentucky rifle for his collection and that he had finally purchased one. There was no mention in the emails about the rifle belonging to, or as being intended for, Mel's children. We cannot say the circuit court erred in concluding that Mel did not overcome the presumption that property acquired during the marriage is marital property subject to division between the parties.

***Winchester Model 4, MAS Model 34, and Springfield, USA Army, Model of 1922***

Mel contends there were five firearms that were gifts to him from his father prior to his marriage to Sandra, yet the circuit court deemed three of those five marital property. Mel cites the testimony of Sue Hankla, his ex-wife to whom he was married from 1977 until October 1984, as evidence that these three firearms were his nonmarital property because they were given to him prior to their marriage. However, we have reviewed Sue's testimony and these three specific



firearms were not discussed and do not appear on the list of items to which she testified.

Mel also relies on the testimony of Darrell Selby, a life-long friend to Mel, to corroborate his nonmarital claim to the three rifles. However, Darrell's testimony is lacking in detail. These rifles were not specifically addressed in Darrell's testimony nor do they appear in the list of items to which Darrell testified he was familiar.

Mel complains the circuit court was inconsistent with its findings for failing to include these rifles among his nonmarital property based upon Sue's and Darrell's testimony. We conclude that the circuit court did not err in finding the rifles to be marital property as the evidence does not show that Mel acquired these specific rifles prior to the parties' marriage.

### ***Antique Kentucky Clock***

Mel argues that he purchased the antique clock as Power of Attorney for his mother and, therefore, it should not be considered marital property. The record contains a handwritten note dated July 15, 2008, from Ronald Sandone stating that he sold a "Kentucky made tall case clock" to Mel's mother through Mel acting as her agent and power of attorney.

Sandra testified that Mel brought an antique clock to their marital residence a year or so before the divorce proceedings. She stated that when she left the marital residence, she left the clock at the house out of fear that moving it would

possibly cause damage to it. She further stated that she currently does not know the location of the clock.

Mel contends that the clock belonged to his mother; however, Sandra submitted photographs of the clock located at their marital residence and a photograph of the clock from Mel's mother's residence to show that although similar, close inspection of the photographs reveals that there were two different clocks. Consequently, based upon the evidence presented pertaining to the antique clock, it was not clearly erroneous for the circuit court to determine that it was marital property.

### ***Large Don Wright Powder Horn***

Mel's and Sandra's testimony regarding the large Don Wright powder horn was conflicting. Mel testified he had owned the item prior to the parties' marriage, and Sandra testified that it was acquired after they were married. It is the province of the circuit court to determine the credibility of testimony and to give weight to the evidence in reaching its conclusions. Kentucky Rules of Civil Procedure (CR) 52.01. Accordingly, we find no error in the court's conclusion that this particular item was marital property.

### ***Winchester Model 75***

Again, Mel's and Sandra's testimony regarding the Winchester Model 75, .22 caliber, long rifle, serial number 76934, was conflicting. Mel maintained that it was a gift to him from his friend Charles Crume,<sup>2</sup> and Sandra testified that it was

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<sup>2</sup> Charles Crume was a collector and professor at Western Kentucky University where Mel and his ex-wife, Sue, attended school.

acquired after their marriage. The circuit court found Sandra's testimony about this specific piece of property to be credible, and we are not persuaded the circuit court committed any error in determining the rifle to be marital property.

***Powder Horn Collection Sold by James Julia at Auction for \$69,900***

One half of the sale price of \$69,900 for the "Folky Artist" powder horn collection was credited to Sandra. Mel contends he had the powder horn collection on consignment from Michael Worley. There is an affidavit in the record from Michael Worley stating that on March 21, 2010, he gave Mel "[f]ourteen (14) [a]ntique [p]owder [h]orns, dated 1754-1775, engraved by the 'Folksy Artist' . . . ." Mel further claims that Michael Worley then sold the collection through James Julia for \$69,900 in September 2012, and Mel did not receive any proceeds from the sale.

Sandra testified that she and Mel had collected the thirteen "Folky Artist" powder horns throughout their marriage. She submitted photographs of the pieces at the marital residence shortly before she moved out of the house. She testified that at mediation Mel claimed to have sold the powder horns and that they now belonged to Michael Worley. Sandra stated that she was not aware of the sale, and there is no record of the sale. Sandra testified that she does not believe Mel sold the powder horns to Michael Worley, but that he sold them at auction through James Julia. She submitted copies of the web page where the collection was listed

for sale for \$69,900. Sandra testified that Mel repeatedly referred to the collection as his “401k.” Based upon the testimony and evidence presented, it was not clearly erroneous for the circuit court to find the collection to be marital property, and accordingly, to award Sandra an amount representing half of the sale proceeds of the “Folky Artist” powder horn collection.

### ***Plantation Desk***

Mel testified that the plantation desk in dispute was a gift to him from his grandmother. However, Sandra stated that Mel’s testimony was the first time she had heard the desk had belonged to his grandmother. She stated Mel brought the desk to their marital residence, and they had it for approximately twenty years without mention that it was his grandmother’s desk. The circuit court found Sandra’s testimony to be more persuasive regarding the desk and determined it to be marital property. Again, on disputed testimony regarding the nature of property, it is the circuit court’s prerogative to believe one party and not believe the other.

### ***2009 Income Tax Return***

The final item with which Mel takes issue is the parties’ 2009 income tax refund in the amount of \$4,124. Mel simply asserts that the refund was marital property of which he is entitled to half. However, the circuit court is not obligated to divide marital property equally. KRS 403.190(1) requires the circuit court to distribute marital property in “just proportions considering all relevant factors including: (a) contribution of each spouse to acquisition of the marital property ...;

(b) value of the property set apart to each spouse; (c) duration of the marriage; and (d) economic circumstances of each spouse when the division of property is to become effective . . . .” It is clear from reviewing the circuit court’s order and all of the evidence of record that it considered the factors of KRS 403.190(1) in its determination and distribution of marital and nonmarital property between Mel and Sandra. Accordingly, the circuit court did not abuse its discretion in awarding Sandra the entire balance of the parties’ 2009 income tax refund.

#### **IV. Conclusion**

For these reasons, we affirm the findings of fact, conclusions of law, and final order of the Russell Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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