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NOT TO BE PUBLISHED

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

NO. 2012-CA-000882-MR

DONALD GENE SIMPSON

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE DOUGLAS GEORGE, JUDGE  
ACTION NO. 10-CI-01737

DORIS JEAN SIMPSON

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MOORE, NICKELL AND STUMBO, JUDGES.

STUMBO, JUDGE: Donald Gene Simpson appeals from a Decree of Dissolution of Marriage rendered by the Pulaski Circuit Court. He argues that the circuit court erred in its allocation of marital assets, distribution of a 2009 Toyota and characterization of a bank account as nonmarital property. We find no error, and accordingly affirm the Decree of Dissolution.

Donald Gene Simpson ("Appellant") and Doris Jean Simpson ("Appellee") were divorced on February 24, 2012, by way of a Decree of Dissolution of Marriage rendered by the Pulaski Circuit Court. No children were born of the marriage. At the time of dissolution, the parties were 71 and 64 years old, respectively, and had been married for 12 years. Appellant worked as a self-employed barber, and received social security benefits. Appellee is retired from the Commonwealth of Kentucky.

In addition to dissolving the marriage, the Decree of Dissolution disposed of the marital residence, retirement income, personal property and bank accounts. As to the residence, the court applied a formula to calculate the parties' respective contributions throughout the marriage and concluded that Appellant could keep the house so long as he paid to Appellee the sum of \$46,000. Additionally, the court awarded to Appellee a 2009 Toyota Camry. Finally, the court characterized Appellee's bank accounts as her nonmarital property. It is the disposition of these three assets - the residence, 2009 Toyota and Appellee's bank accounts - with which Appellant now takes issue.

Appellant first argues that the circuit court committed reversible error in characterizing the residence as marital property subject to division based on the parties' respective contributions during the marriage. The focus of Appellant's argument on this issue is his contention that with the exception of a short period during the marriage, all mortgage payments on the residence were made from his nonmarital income. In support of this argument, Appellant recites the history of

his acquisition of the unimproved real property some 17 years prior to the marriage, which he then gave to his son. In 1989, he contends that the son transferred the realty back to Appellant. Appellee claimed that this transfer was done for the purpose of hiding assets from a previous wife, which Appellant denies.

According to Appellant, he began construction on the residence in 1997 using \$50,000 of his own cash. He obtained two mortgages, and three years later the parties were married. Appellant recites how the mortgages were consolidated, that a joint checking account was opened at Cumberland Security Bank, and that mortgage payments were made from that account. Appellant claims that "almost all" of the money deposited into the joint account came from his "individual resources." Appellant goes on to address the addition of a sunroom, various property tax evaluations after the improvement, the construction of two decks, and how these improvements were funded. The focus of Appellant's claim of error on this issue, however, is his assertion that he was entitled to have the house and property characterized as his nonmarital property on dissolution because "he is the one who paid all of the payments."

KRS 403.190 addresses the disposition of property on marital dissolution. It states that,

(1) In a proceeding for dissolution of the marriage or for legal separation, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court

shall assign each spouse's property to him. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:

- (a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
  - (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, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.
- (2) For the purpose of this chapter, “marital property” means all property acquired by either spouse subsequent to the marriage except:
- (a) Property acquired by gift, bequest, devise, or descent during the marriage and the income derived therefrom unless there are significant activities of either spouse which contributed to the increase in value of said property and the income earned therefrom;
  - (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; and
  - (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.

In characterizing the property as a marital asset, the circuit court noted that "the parties both contributed to a joint checking account at Cumberland Security Bank throughout the majority of the marriage, and paid the mortgage on the residence from that account, along with other household bills." The court also found that Appellee "presented receipts and bank records indicating that she invested an additional \$11,000 in improvements to the residence, including the addition of a deck and sunroom, landscaping, and some concrete work. She proved that these funds came from a non-marital account and thus the Court finds that this is her non-marital contribution to the house." These findings are supported by the record. Though the unimproved realty was owned by Appellant prior to the marriage, and the residence constructed some three years before the marriage, the mortgages were paid during the pendency of the marriage and the record supports the court's finding of Appellee's marital and nonmarital contribution to paying the mortgages.

“On appellate review of a trial court's ruling regarding the classification of marital property, we review *de novo* because the trial court's classification of property as marital or non-marital is based on its application of KRS 403.190; it is

thus a question of law.” *Heskett v. Heskett*, 245 S.W.3d 222 (Ky. App. 2008).

Conversely, determining what constitutes a just division lies within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion.

*Hempel v. Hempel*, 380 S.W.3d 549 (Ky. App. 2012). In reviewing *de novo* the Pulaski Circuit Court's characterization of the property as marital, we conclude that the court properly applied KRS Chapter 403. Additionally, we find no basis for concluding that the court abused its discretion in its division of this marital asset. The court entered into a comprehensive analysis of all converging factors dating back to Appellant's acquisition of the unimproved realty in 1987 and continuing forward through the time of dissolution. In so doing, the court fashioned a formula for determining the parties' respective contributions to the mortgage and improvements, and its conclusion is supported by the record and the law. We find no error on this issue.

Appellant next argues that the circuit court improperly failed to distribute the marital equity in the 2009 Toyota Camry. As a basis for this contention, Appellant maintains that the court also improperly characterized a Dodge truck as marital, that Appellant had properly traced nonmarital assets to the purchase of the Dodge truck, and that the court's award of the Camry to Appellee was apparently done to offset Appellee's marital interest in the truck. In Appellant's view, since the Dodge truck was actually his nonmarital asset, the Camry should not have been distributed to Appellee to offset Appellant's receipt of the truck.

We find no error on this issue. Appellant's contention that his usage of nonmarital funds was properly traced to the purchase of the Dodge truck is refuted by the record, as he acknowledges that "he did not introduce the documents from which he was testifying". Additionally, we characterize as purely speculative his contention that the court "apparently" distributed the Camry to Appellee to offset Appellant's receipt of the Dodge truck. Again, in considering whether the trial court properly characterized assets as marital or nonmarital, we examine the matter *de novo*. *Heskett, supra*.

The court characterized the Camry as marital properly, and this characterization is supported by both the record and Appellant's acknowledgement. Appellee paid a \$10,000 downpayment on the vehicle using marital assets, with the remaining payments being made from marital income. Having determined that the Camry was a marital asset, the question then is whether the court abused its discretion in distributing the asset to Appellee. Given the totality of the record as it relates to the parties' marital vehicles, including the marital Dodge truck and Chevrolet Corvette, the court's order of sale as to the Dodge Truck and Corvette, and its award of the marital Camry to Appellee and nonmarital GMC Envoy and Pontiac Trans-Am to Appellant, we cannot conclude that court abused its discretion in this regard. We find no error.

Lastly, Appellant avers that the circuit court improperly characterized Appellee's bank accounts as her nonmarital property. In awarding the bank accounts to Appellee as her "separate property", the court determined that Appellee

"established the receipt of proceeds from the sale of a house owned before the marriage and the deposit of funds in accounts in her name at L&N Federal Credit Union and BB&T Bank[.]" Appellant maintains that this conclusion is not supported by the evidence and therefore is in error.

As noted above, all property acquired during the marriage is presumed to be marital. KRS 403.190(3). Property may be characterized as nonmarital, however, if it falls within one of the limited exceptions set out in KRS 403.190(2). The process of tracking assets to nonmarital sources is termed as "tracing." *Sexton v. Sexton*, 125 S.W.3d 258, 266 (Ky. 2004).

“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. (Internal citations omitted).

*Id.*

While the burden rests with the party seeking to prove that an asset is nonmarital, it may be demonstrated without absolute precision. In *Allen v. Allen*, 584 S.W.2d 599 (Ky. App. 1979), for example, a panel of this Court retreated somewhat from earlier and more stringent decisions and held that “the requirement



of tracing should be fulfilled, at least as far as money is concerned, when it is shown that nonmarital funds were deposited and commingled with marital funds and that the balance of the account was never reduced below the amount of the nonmarital funds deposited.” *Id.* at 600. The more relaxed tracing requirements were affirmed in subsequent decisions of the Kentucky Supreme Court. In *Chenault v. Chenault*, 799 S.W.2d 575 (Ky. 1990), the Court moved to "relax some of the draconian requirements heretofore laid down." *Id.* at 579.

In the matter before us, Appellee demonstrated that she sold a residence prior to marrying Appellant, and that the proceeds funded accounts at L&N Federal Credit Union and BB&T Bank. While it is unclear whether marital funds were subsequently comingled with Appellee's nonmarital assets, we conclude that the funds were traced with sufficient precision to satisfy *Allen* and its progeny. Having reviewed this issue *de novo*, *Heskett, supra*, we find no error.

For the foregoing reasons, we affirm the Decree of Dissolution of Marriage of the Pulaski Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ralph D. Gibson  
Somerset, Kentucky

BRIEF FOR APPELLEE:

Douglas G. Bengé  
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London, Kentucky