

RENDERED: OCTOBER 4, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000774-MR

JOYCE MCPHEE

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE MARCUS L. VANOVER, JUDGE
ACTION NO. 16-CI-00960

ALLAN MCPHEE

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** * * * **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND SPALDING, JUDGES.

CLAYTON, CHIEF JUDGE: Joyce McPhee appeals from the Pulaski Family Court's findings of fact and conclusions of law and its order denying in part and granting in part her motion to alter, amend or vacate in this dissolution of marriage case. She contends the family court made insufficient findings to support its

classification of the marital and nonmarital property, improperly assigned half the marital debt to Joyce, and erred in not dividing the parties' bank accounts.

Joyce and Allan McPhee were in their fifties when they married in 1995. Joyce worked for one year and Allan for five years before retiring. The couple separated in August 2016. At the time of the trial in 2017, Joyce was seventy-seven years of age and Allan was seventy-three.

Prior to the marriage, Allan owned several tracts of real property, including two houses in California. One of these, the Lucas Street property, located in the San Fernando Valley, was acquired by Allan in 1971 and paid off in full before the marriage. From 2006 to 2016, Allan and Joyce divided their time between the Lucas Street property and the Oak Hill property, a residence they purchased in Kentucky for \$189,000 and which was paid off in full.

In 2009, Allan took out a home equity line of credit (HELOC) on the Lucas Street property and made several withdrawals which by 2016 totaled \$125,000. Some of these funds were used for living expenses and to purchase an automobile. In 2008, \$21,750 of the HELOC was used to purchase a residence, 5 Arrowhead Drive, for Joyce's daughter. She lived there for several years but failed to contribute to the mortgage as she had promised or to maintain the property.

The other California property owned by Allan before the marriage was the Dronfield property, located in Los Angeles. Allan acquired this property

in 1986 in divorce proceedings from his first wife. Allan made monthly mortgage payments on the Dronfield property in the amount of \$317 per month for a period which included several years of his marriage to Joyce. The mortgage was paid off in November 2001. Allan testified that the property was rented and the rental proceeds also helped to pay the mortgage. Allan sold the Dronfield property in 2005. The proceeds from the sale were \$535,549.56.

Allan also owned other property in California and Nevada which Joyce did not contest was nonmarital.

Allan purchased numerous tracts of real property during the marriage to Joyce. In addition to the aforementioned Arrowhead Drive property, these included the Estill Hackney property, purchased for \$16,500 in 2009; the Highway 70 Property, purchased for \$86,000 in 2015; the Sturgis and Bear Creek property, consisting of three lots, purchased for a total of \$49,000 in September 2016; and the South Main and Bourne Avenue properties purchased for \$24,516 and \$44,320, respectively.

Allan owned two investment accounts through Fidelity and Allianz Life Insurance Company, containing \$80,000 and \$78,000, respectively. The Allianz account was the source of the funds used to purchase the Sturgis and Bear Creek properties.

The couple had incurred considerable credit card debt totaling over \$92,000. Other debts included the \$125,000 Lucas Street HELOC and \$90,000 of funds Allan had taken from his father's estate while acting as its executor.

Joyce testified that during the marriage Allan handled their finances and took very good care of her and she wanted for nothing. Evidence was adduced that Allan was very financially astute in the past but had recently behaved erratically and made several reckless purchases. Joyce testified that following their separation, Allan went on a spending spree and in addition to real estate, purchased cargo trailers and a command motor home. These vehicles were encumbered with a debt of \$25,000. Allan also purchased over \$18,000 in coins at that time. Allan testified that he was experiencing various physical and mental health problems that affected his memory and mental acuity.

Joyce testified that Allan warned her at the end of August 2016 that all the credit cards were "maxed out" and to be careful in her spending. In January 2017, she testified that he "cut her off" completely. Joyce sought temporary maintenance at that time and was awarded \$1,000 per month.

Allan's monthly income at the time of trial was \$4,186, comprised of Social Security benefits and two pensions, from Western Teamster and Delta. Joyce's monthly income consisted of \$800 from Social Security and the temporary maintenance of \$1,000. Joyce also had a 401K with a value of \$38,000.

Following the trial, the family court entered findings of fact, conclusions of law and a decree of dissolution of marriage on January 2, 2018. The family court found the following properties to be marital: the residence at 2896 Oak Hill Road, the Estill Hackney Road property, the Arrowhead Drive property, the Highway 70 property, and the Bourne Avenue and Main Street properties.

The family court ordered the sale of the following: the command vehicle and trailers, the Estill Hackney Road property, the Arrowhead Drive property, the Highway 70 property, and the coins purchased by Allan. The proceeds from the sale were to be applied to the debts which the court ranked in the following order of priority: first, the \$90,000 debt to Allan's father's estate; second, the credit card debts and, finally, the HELOC secured by the Lucas Street property in California. Allan was made responsible for any remaining unpaid balance on the HELOC as he incurred the debt without consulting Joyce and the HELOC was secured by his nonmarital residence.

Allan was awarded the remaining proceeds, if any, from the Dronfield property and the Nevada properties, the Lucas Street (HELOC) property, and the Sturgis and Bear Creek properties as his nonmarital property. The marital residence on Oak Hill was ordered to be sold and the proceeds divided equally. The family court specified if any debt remained on Allan's father's estate and the

credit cards, these debts were to be satisfied before the division of the Oak Hill proceeds.

The family court awarded Joyce monthly maintenance in the amount of \$1,000 until one of the parties died or Joyce remarried.

Joyce filed a motion to alter, amend or vacate which the family court granted in part, denied in part, and clarified some of its earlier rulings. This appeal by Joyce followed.

When disposing of property in a dissolution of marriage action, the trial court is required by Kentucky Revised Statutes (KRS) 403.190 to follow a three-step process: “(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.” *See Travis v. Travis*, 59 S.W.3d 904, 908-09 (Ky. 2001) (citations and footnotes omitted).

KRS 403.190(3) creates a presumption that all property acquired after the marriage is marital property unless the property can be shown to have originated in one of the ways outlined in KRS 403.190(2). *See Sexton v. Sexton*, 125 S.W.3d 258, 266 (Ky. 2004). “A party claiming that property acquired during the marriage is other than marital property, bears the burden of proof.” *Terwilliger v. Terwilliger*, 64 S.W.3d 816, 820 (Ky. 2002). “While the word does not appear

in the statute, judicial construction of KRS 403.190 has given rise to the concept of ‘tracing.’” *Id.* (citing *Chenault v. Chenault*, 799 S.W.2d 575 (Ky. 1990)).

“Essentially, the tracing requirement simply means that ‘[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.’”

Maclean v. Middleton, 419 S.W.3d 755, 767 (Ky. App. 2014) (quoting 15 Graham & Keller, *Kentucky Practice, Domestic Relations Law*, § 15.10 at 512 (2nd ed. 2000)).

On appeal, we review the family court’s findings of fact only to determine if they are clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. A factual finding is not clearly erroneous if it is supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). The family court’s division of the marital property will not be disturbed except for an abuse of discretion. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001).

Joyce argues that the family court made insufficient findings of fact to support its classification of the marital and nonmarital property. Specifically, she challenges the family court’s treatment of three ostensibly related assets: the Dronfield property, the Allianz and Fidelity accounts, and the Sturgis and Bear Creek properties. As recounted earlier in this opinion, the Dronfield property in

Los Angeles was acquired by Allan in divorce proceedings from his former wife and prior to his marriage to Joyce. The mortgage was paid off on November 15, 2001. According to Allan, approximately \$30,000 of the mortgage was paid off during the period he was married to Joyce.

Allan sold the Dronfield property in December 2005 and received proceeds of \$535,549.56. These funds were deposited into a Western Credit Union account. Allan wrote two checks from that account, each in the amount of \$100,000. One check was deposited into an account titled in the names of Allan, Joyce and M.M. McPhee, Allan's son. The second check went into another account, titled in the names of Allan and a relative, Marc E. McPhee. The family court found that the funds transferred into the joint bank account bearing Joyce's name more than offset any marital contribution made by Joyce to the Dronfield property. The family court awarded any additional marital interest in the Dronfield property to Allan on equitable grounds.

According to Allan, he also used some of the Dronfield proceeds to purchase two investment accounts with Fidelity and Allianz Life Insurance, containing \$80,000 and \$78,000, respectively. The funds in the Allianz account were subsequently used by Allan in 2016 to purchase the Sturgis and Bear Creek property. The family court found the property was nonmarital because Allan had adequately traced the funds to a nonmarital source, relying on documentation from

Allianz Life Insurance Company of North America, dated August 4, 2016, indicating the owner of the account, Allan E. McPhee, had surrendered his annuity contract, and copies of two checks written by Allianz to Allan E. McPhee, on August 4, 2016, for \$3,190.47 and on August 5, 2016, for \$87,542.70.

Joyce concedes that the Dronfield property was nonmarital, but argues she is entitled to a marital portion of the Dronfield proceeds based on the mortgage payments and improvements made to the property during the course of the marriage. Allan argues that because he acquired the property before the marriage, Joyce bore the burden of proving a marital interest but failed to offer any evidence of her contribution to the property or proof of its value before and after the marriage. No proof was offered regarding the value of the marital interest in the property except Allan's testimony that the marital contribution to the mortgage was \$30,000. Joyce does not dispute the monthly mortgage payment on the property was \$317 per month and payments were made during the course of the marriage for a period of six years. Even if we accept Joyce's argument that these mortgage payments were of greater value than earlier payments because they would have been directed almost entirely towards the principal rather than interest, the total would not exceed \$30,000. The family court's determination that Joyce's share of the account containing \$100,000 in proceeds from the Dronfield sale

compensated her for her share of the marital contribution is equitable and based on substantial evidence in the record.

Joyce further contends that Allan has not adequately traced the Allianz annuity to nonmarital Dronfield proceeds. The only evidence that the annuity was purchased with the Dronfield proceeds was Allan's own testimony.

The Kentucky Supreme Court has recognized that "tracing to a mathematical certainty is not always possible, noting that: '[w]hile such precise requirements for nonmarital asset-tracing may be appropriate for skilled business persons who maintain comprehensive records of their financial affairs, such may not be appropriate for persons of lesser business skills or persons who are imprecise in their record-keeping abilities.'" *Maclean*, 419 S.W.3d at 767 (quoting *Chenault*, 799 S.W.2d at 578).

During the course of the hearing, Allan testified that he paid for the Sturgis and Bear Creek properties by cashing in his annuity. He testified that the annuity contained \$87,000 and he used \$49,000 of those funds to purchase the property in question. To support this testimony, he entered into evidence a letter addressed to Allan from Allianz Life Insurance Company of North America, dated August 4, 2016, stating in part: "We are sorry to learn of your decision to surrender your annuity contract. We complied with your request and the attached check in the amount of \$87,542.70 represents the cash surrender value." When he

was asked by his attorney for the source of the funds in the annuity, he replied that the money came from the Dronfield proceeds, stating: “I put \$100,000 into there.”

Later in the hearing, however, when Allan was being examined about the source of the funds used to purchase the Highway 70 property, he testified he had a 401K with Delta, his former employer, and he rolled the funds in that account into a Fidelity IRA and into the Allianz annuity, specifying the latter originally contained \$100,000.

Although “testimony alone may be sufficient to satisfy the tracing requirement[,]” *id.*, this serious inconsistency in Allan’s testimony regarding the source of the funds in the Allianz annuity must be resolved and requires the matter to be remanded in order for the family court to make further findings. In addressing Joyce’s motion to alter, amend or vacate, the family court granted her request that she be awarded one-half of the marital portion of Allan’s Delta retirement account as well as interest accrued on the marital portion and ordered a Qualified Domestic Relations Order to be entered to that effect. If indeed the Delta 401K retirement account was the source of the funds in the Allianz account, the family court must further determine the marital portion of the Sturgis and Bear Creek properties.

Joyce’s next argument concerns the family court’s assignment of debt. KRS 403.190 “does not create a presumption in regard to debt, though as a

practical matter, the assignment of debts acquired during the marriage speaks to whether a debt is marital or nonmarital, and is reviewed for abuse of discretion. The burden of proving that a debt is marital is upon the party that incurred it and now claims it is marital.” *Rice v. Rice*, 336 S.W.3d 66, 68 (Ky. 2011) (internal citations omitted). In assigning debt, the family court is directed to consider four factors: “(1) Was the debt incurred for the purchase of marital property? (2) Was the debt necessary to maintain and support the family? (3) What was the extent and participation of each party in incurring or benefitting from the debt? and (4) What are the economic circumstances of the parties after divorce to allow for payment of the debt?” *Id.* at 69.

As a preliminary matter, Joyce contends the family court failed to make findings mandated by CR 52.01 regarding whether the debts were marital or nonmarital. Our review of the findings of fact indicates that the family court adequately characterized the debts. In Paragraph 6 of its conclusions of law, the family court explained that its highest priority was addressing the debt to Allan’s father’s estate, describing it as an unauthorized loan that could result in sanctions. Implicit in the family court’s conclusion was a finding that the estate debt was marital. It expressly described the other remaining debts as marital, except for the HELOC on the Lucas Street property. The family court made the following findings relating to the four factors set forth above. As to the first factor, whether

the debt was incurred for the purchase of marital property, the family court found most of the real property purchased by Allan during the course of the marriage was marital property. As to the second factor, whether the debt was necessary to support and maintain the family, Allan testified that the debt was necessary to support their lifestyle and to make ends meet. The family court noted Joyce's testimony that Allan took very good care of her and that she wanted for nothing. As to the third factor, the extent and participation of each party in incurring or benefitting from the debt, the family court expressly found that Allan had recently incurred excessive and unnecessary debt. Fourth and finally, as to the economic circumstances of the parties after the divorce, the family court noted that Joyce would receive one-half the equity in the marital home, her 401K plan, her automobile, and was entitled to monthly maintenance of \$1,000.

Joyce contends that Allan was largely responsible for incurring the debt through profligacy and poor decisions and the evidence showed Joyce did not know of or approve the debt. She contends that there is no evidentiary nexus linking her to the credit card debt because Allan did not produce any statements, bills, receipts or other evidence showing what the credit cards were used to purchase. Joyce testified that at the time of their separation, Allan warned her that the credit cards were "maxed out," from which it can be inferred that Joyce had use of the credit cards. This is confirmed by Allan's testimony that at the time

immediately preceding their separation Joyce began renting moving trucks and he “started taking her off the cards.” Joyce offered no evidence, documentary or testimonial, to show the nature of her credit card expenses. Such evidence might have aided the family court in characterizing the expenses and possibly separating Allan’s expenses from hers. In light of the evidence before it, the family court did not abuse its discretion in characterizing the credit card debt as marital.

As to the \$125,000 HELOC debt associated with Allan’s nonmarital Lucas Street property, the family court found that it was used for the purchase of marital real property and expenses. It characterized the HELOC as marital but ruled that because it was adequately secured by Allan’s nonmarital property, it would be given the lowest repayment priority. It directed any unpaid balance on the HELOC to be Allan’s responsibility as he incurred the debt without consulting Joyce and because the debt was secured by his nonmarital residence.

In her motion to alter, amend or vacate, Joyce disputed the characterization of the HELOC as marital debt because there was no evidence it was used to make marital purchases other than Allan’s testimony that \$21,750 of the HELOC was used to purchase the Arrowhead Drive property as a residence for Joyce’s daughter. Joyce moved the court to vacate its judgment with regard to the HELOC debt and deem the debt nonmarital or assign the HELOC debt to Allan.

In its order addressing Joyce's motion, the family court responded as follows: "Per testimony, the HELOC debt was used to purchase property that was nonmarital. Petitioner shall solely be responsible for this debt. Petitioner's request for the Court to vacate its judgment, with regard to the HELOC debt, and to deem that debt nonmarital and/or make Respondent responsible for the HELOC debt is DENIED."

The family court's response is confusing in light of its earlier holding and actually places Joyce in a worse position than before. We do not believe this was the intent of the family court, which was faced with addressing over twenty issues raised in Joyce's motion. Consequently, we reverse this portion of its order and remand for reinstatement of the original terms of the judgment. The original findings of fact and conclusions of law regarding the marital nature of the HELOC are based on substantial evidence and the family court did not abuse its discretion in making Allan responsible for any unpaid balance.

Next, Joyce argues that the \$90,000 in funds Allan removed or misappropriated from his father's estate should not be classified as a marital debt because there is no evidence to show such a loan existed, that she knew or approved it, or derived any benefit from it. Allan described the funds as an unauthorized loan which he removed from the estate in three installments, beginning in 2013, in order to pay marital expenses. The record contains a check

in the amount of \$55,126.13, dated November 23, 2016, drawn on a Bank of America account in San Fernando, California, in the name of Allan McPhee, Executor of the Estate of Angus Edward McPhee. These funds were used to purchase the South Main and Bourne Avenue properties.

No evidence was offered to support Allan's assertion that his withdrawals from this account over a three-year period were unauthorized or how they could result in sanctions. Nor was any evidence offered regarding the identity of any beneficiaries of the estate. Consequently, there was no evidentiary basis to find the existence of a debt of \$90,000 to be satisfied from marital proceeds. The matter must be remanded for further findings regarding the nature of the funds in the estate account.

Finally, Joyce argues that the family court erred in failing to divide the parties' bank accounts. She contends that the family court accepted bank statements noting the value of each account. The family court acknowledged the bank statements from three accounts, each in the name of A.E. McPhee, Marc E. McPhee and Joyce A. McPhee, containing \$172.41, \$5.64, and \$3,177.62. The fourth account, with Forcht Bank, contained a balance of \$12,355, according to Joyce, and a negative balance of \$5,000, according to Allan. The family court made no further reference to these accounts.

In her motion to alter, amend or vacate, Joyce stated as follows:

The Court did not divide the bank accounts. Nor did Respondent provide proof of how the bank accounts had been depleted during the past year during the parties' separation. Wherefore, Petitioner moves the Court to order Respondent to provide proof of the value of each bank account as of the date of separation and for Respondent to be ordered to pay Petitioner for ½ of the value of each of the accounts as of the date of separation. Petitioner had proof at the hearing that had been subpoenaed from the parties' bank in California of large amounts of funds that had been transferred by Respondent from the accounts and wanted to inquire of Respondent as to where those funds had been placed. Petitioner's Exhibit 1 included the bank statements. However, petitioner was not able to finish inquiring of Respondent due to the Court's time restraints.

The record indicates that Joyce introduced the banking records into evidence but did not testify about their contents nor raise any allegations that Allan had depleted the accounts since their separation. Allan was not cross-examined about the alleged depletion of the accounts and the record does not show this was due to any time restrictions placed by the family court. Furthermore, in the motion to alter, amend or vacate, Joyce did not request the bank accounts to be valued as of January 2, 2018, as she now requests for the first time on appeal. Under the circumstances, this argument is unpreserved and will not be addressed here.

For the foregoing reasons, the findings of fact and conclusions of law of the Pulaski Family Court are affirmed in full, except for the following:

(1) the original portion of the judgment regarding the HELOC, insofar as it was altered by Paragraph 7 of the family court's order addressing Joyce's motion to

alter, amend or vacate, is ordered to be reinstated; (2) the family court shall make further findings of fact and conclusions of law regarding the source of the funds contained in the Allianz annuity which were subsequently used to purchase the Sturgis and Bear Creek properties; and (3) the family court shall make further findings of fact and conclusions of law regarding the character of the \$90,000 removed by Allan as executor from the estate account of his late father.

ALL CONCUR.

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