

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Karen D. Hood,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 10AP-999
v.	:	(C.P.C. No. 06DR-09-3654)
	:	
Toby D. Hood,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on July 28, 2011

Golden & Meizlish Co., LPA, and Keith E. Golden, for appellant.

James Wilmore Brown, for appellee.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations.

BRYANT, P.J.

{¶1} Plaintiff-appellant, Karen D. Hood, appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, determining that plaintiff's payment, during the marriage, of \$10,354.30 on a Lowe's credit card account from her separate property was not traceable to any existing asset and did not require reallocation of the parties' assets as part of their divorce. Plaintiff assigns a single error:

THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW IN FINDING THAT THE APPELLANT'S EXPENDITURE OF SEPARATE PROPERTY FUNDS TO PAY A MARITAL DEBT WAS NOT AN INVESTMENT OF SEPARATE PROPERTY FUNDS.

Because plaintiff failed to carry her burden to trace her separate property, we affirm.

I. Facts and Procedural History

{¶2} Plaintiff and defendant were married on August 6, 2003; no children were born as issue of the marriage. Plaintiff filed a complaint for divorce on September 6, 2006, and defendant filed an answer and counterclaim for divorce on October 19, 2006. A final hearing commenced January 8, 2009, after which each party submitted proposed balance sheets. The trial court issued a judgment entry-decree of divorce on July 20, 2009, finding, pursuant to the parties' stipulations, that each party was entitled to a divorce. Again pursuant to the parties' stipulations, the trial court determined the de facto termination of the marriage was January 12, 2006 when the parties separated, and the duration of the marriage for purposes of property valuation and division was from August 6, 2003 through January 12, 2006. *Hood v. Hood*, 10th Dist. No. 09AP-764, 2010-Ohio-3618, ¶2.

{¶3} When defendant and plaintiff met, defendant owned real property located at 2488 Lytham Road, Columbus, Ohio ("Lytham"). Although defendant lived at Lytham, he was also enlarging and renovating the property. *Id.* at ¶3-4. Prior to their marriage, defendant and plaintiff decided to complete the renovation of Lytham and sell it for a profit. *Id.* at ¶4. In June 2003, defendant and plaintiff refinanced defendant's existing \$127,315.12 mortgage and obtained a new mortgage in the amount of \$160,000. *Id.* At the same time they refinanced, the parties obtained a home equity line of credit on

Lytham in the amount of \$68,300, which they later expanded to \$90,400. Id. Based on the refinanced mortgage and original home equity line of credit, the trial court concluded the value of Lytham at the time of the parties' marriage in 2003 was \$228,300.

{¶4} Although the parties intended the line of credit to pay for materials to complete the renovation of Lytham, they used the majority of the line of credit on personal expenses, vacations, custody litigation with plaintiff's ex-husband, and living expenses. Id. at ¶4. The parties also used \$14,000 from the line of credit to purchase property in Bexley, Ohio in June 2004 that became the parties' marital residence. Id. at ¶8. The renovation of Lytham remained incomplete when the parties separated in January 2006. Id. at ¶5. Arthur Russo, a licensed realtor and broker, who also renovates properties for sale, testified at the final hearing that if he had to purchase Lytham in its "as is" condition, he would pay between \$200,000 and \$220,000.

{¶5} In the divorce decree, the trial court determined the fair market value for Lytham "as is" to be \$210,000, representing an \$18,300 loss in value from 2003. The court also found that, on the de facto termination date of the marriage, the balance remaining on the Lytham mortgage was \$149,070.40, the balance remaining on the home equity line of credit was \$89,512, and marital contributions to the property's equity totaled \$8,041.38. The total debt Lytham secured at the end of the marriage was \$238,582.40, leaving the property with a negative home equity of \$28,582.40. The trial court distributed the property accordingly.

{¶6} Plaintiff appealed from the judgment entry-decree of divorce, raising two assignments of error. Id. at ¶10. Pertinent to the present appeal, plaintiff asserted the trial court erred in failing to factor into the property division her payment of \$10,354.30 from

her separate property to extinguish the debt on a Lowe's credit card, representing the purchase price of kitchen cabinets installed at Lytham. Id. at ¶11.

{¶7} Defendant purchased the kitchen cabinets for Lytham in April of 2004 on a Lowe's credit card that offered no interest for 12 months. Id. at ¶16. At the end of the 12-month interest-free period, plaintiff undisputedly paid the entire balance with pre-marital money from her American Funds account to avoid paying interest on the cabinet purchase. Defendant characterized plaintiff's payment as "a choice decision she made," and he stated her payment was voluntary as "[s]he wrote the check and signed it." Id.; (Tr. 355, 445.) Plaintiff disputed defendant's characterizing her payment as voluntary, stating she made the payment "so that we didn't get hit with more interest." Id.; (Tr. 276.)

{¶8} In plaintiff's initial appeal, we noted "[t]he trial court neither classified Karen's payment as marital or separate property, despite Karen's request that it be characterized as separate property and credited to her in the property division." Id. at ¶17. Citing *Neighbarger v. Neighbarger*, 10th Dist. No. 05AP-651, 2006-Ohio-796, we stated it was "arguable that Karen's payoff of the Lytham cabinets was traceable and remained her separate property." *Hood* at ¶19. Because the trial court issued no written findings regarding plaintiff's payment to Lowe's for the cabinets, we remanded the matter to the trial court to make written findings regarding that payment and to recalculate the division of marital property, if necessary. Id. at ¶20.

{¶9} The trial court issued a decision and judgment entry on September 22, 2010 finding plaintiff's payment to Lowe's for the cabinets was not traceable to any existing asset. The court distinguished *Neighbarger*, stating plaintiff's payment to Lowe's "was not a direct investment of separate property funds into the Lytham Road project but

constituted voluntary payment of a marital debt." Moreover, although evidence indicated the value of the cabinets when they were purchased from Lowe's in 2004, the trial court could find no evidence reflecting the amount by which plaintiff's payment on the cabinet debt increased the value of Lytham. "In fact," the court noted, "the residence actually experienced a loss in its value of \$18,300 during the term of the marriage, in spite of the installation of the cabinets purchased from Lowe's."

{¶10} Plaintiff timely appealed, contesting the trial court's disposition of the issue remanded for the trial court's consideration.

II. Plaintiff's Payment Not Traceable

{¶11} In divorce proceedings, the trial court determines what constitutes marital property and separate property. R.C. 3105.171(B). The court then must "divide the marital and separate property equitably between the spouses." *Id.* "Marital property" includes (1) "[a]ll real and personal property that currently is owned by either or both of the spouses * * * and that was acquired by either or both of the spouses during the marriage," (2) "[a]ll interest that either or both of the spouses currently has in any real or personal property * * * and that was acquired by either or both of the spouses during the marriage," and (3) "all income and appreciation on separate property, due to the labor, monetary, or in-kind contribution of either or both of the spouses that occurred during the marriage." R.C. 3105.171(A)(3)(a)(i)-(iii).

{¶12} "Separate property," as relevant here, means "[a]ny real or personal property or interest in real or personal property that was acquired by one spouse prior to the date of the marriage." R.C. 3105.171(A)(6)(a)(ii). "The commingling of separate property with other property of any type does not destroy the identity of the separate

property as separate property, except when the separate property is not traceable." R.C. 3105.171(A)(6)(b). See also R.C. 3105.171(D) (stating "the court shall disburse a spouse's separate property to that spouse," but, if it does not, it "shall make written findings of fact that explain the factors that it considered" for not making that distribution).

{¶13} When parties contest whether an asset is marital or separate property, the asset is presumed marital property, unless proven otherwise. *Miller v. Miller*, 7th Dist. No. 08 JE 26, 2009-Ohio-3330, ¶20, citing *Sanor v. Sanor*, 7th Dist. No. 2001 CO 37, 2002-Ohio-5248, ¶53. Traceability is "the focus when determining whether separate property has lost its separate character after being commingled with marital property." *Peck v. Peck* (1994), 96 Ohio App.3d 731, 734. A party requesting that an asset be classified as separate property bears the burden of tracing that asset to his or her separate property. *Dunham v. Dunham*, 171 Ohio App.3d 147, 2007-Ohio-1167, ¶20, discretionary appeal not allowed, 115 Ohio St.3d 1408, 2007-Ohio-4884 (noting "the party seeking to have property declared separate has the burden of proof by a preponderance of the evidence") (citations omitted).

{¶14} An appellate court's job is not to reweigh the evidence but to determine whether competent, credible evidence in the record supports the trial court's findings. *Dunham* at ¶27; *Taub v. Taub*, 10th Dist. No. 08AP-750, 2009-Ohio-2762, ¶15 (noting that "characterization of property as marital or separate is a factual inquiry for the trial court, * * * we review that characterization under a manifest weight of the evidence standard," and we will affirm if competent, credible evidence supports the classification) (citations omitted). Once the domestic court factually determines whether the property is marital or separate, the court has broad discretion to make divisions of property.

Middendorf v. Middendorf (1998), 82 Ohio St.3d 397, 401, citing *Berish v. Berish* (1982), 69 Ohio St.2d 318. The trial court's role in dividing the property is to evaluate all relevant facts and arrive at an equitable division. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 355. "Equitable need not mean equal." *Id.* We review a trial court's division of property for an abuse of discretion.

{¶15} The \$10,354.30 at issue was originally plaintiff's separate property because she possessed the money in her American Funds account before she married defendant. R.C. 3105.171(A)(6)(a)(ii). Applying *Neighbarger* to that premise, plaintiff contends the trial court erred in determining the funds she used to pay the Lowe's debt were no longer her separate property.

{¶16} In *Neighbarger*, the husband testified he invested \$5,000 of his separate property funds into the marital residence for renovations, which he estimated increased the value of the home by about \$10,000. *Id.* at ¶30. Over the course of the marriage, the marital residence increased in value in the amount of \$70,100 and, at the time of divorce, held positive equity of \$84,000. *Id.* at ¶5, 9. This court determined it did not need to consider whether the husband's expenditure caused the property to appreciate under R.C. 3105.171(A)(6)(a)(iii), because the husband unquestionably used his separate property funds to renovate the marital residence.

{¶17} We instead determined that whether the husband's \$5,000 remained his separate property depended upon R.C. 3105.171(A)(6)(b) and whether the funds were traceable after being commingled into the marital residence. The record in *Neighbarger* presented competent, credible evidence to support the finding that the \$5,000 remained the husband's separate property because, even though the husband "did not produce

receipts for his expenditures, he did testify concerning how much he spent, what he purchased, and what renovations he made." *Id.* at ¶33.

{¶18} In determining the issue we remanded, the trial court distinguished *Neighbarger* because the husband in that case directly invested his separate property into the marital residence, but plaintiff here voluntarily paid a marital debt from her separate property when she paid the amount owed to Lowe's for the cabinets after the 12-month interest free period. Although the trial court correctly noted plaintiff used her separate funds to pay off a marital debt, that fact does not fully address the dispute under the circumstances here. Instead, pursuant to R.C. 3105.171(A)(6)(b), plaintiff's separate funds remained her separate property only if they were traceable after she paid for the cabinets by paying the debt to Lowe's. Cf. *Lowry v. Lowry* (June 30, 1999), 6th Dist. No. WD-98-058.

{¶19} Although the trial court characterized the money plaintiff paid to Lowe's for the debt incurred in buying cabinets as a voluntary payment of a marital debt, the court did not go so far as to deem it an inter vivos gift. See *Butler v. Butler*, 11th Dist. No. 2009-P-0002, 2009-Ohio-5065, ¶38 (concluding that because the husband "voluntarily paid off a portion of the second mortgage on" the marital residence using his separate property funds his "action was in the nature of a gift"). Accordingly, we need not determine whether plaintiff's payment satisfies the elements for an inter vivos gift. *Id.* at ¶22, quoting *Barkley v. Barkley* (1997), 119 Ohio App.3d 155, n.2, citing *Bolles v. Toledo Trust Co.* (1936), 132 Ohio St. 21, paragraph one of the syllabus.

{¶20} Instead, the sole issue remains traceability, and plaintiff had the burden in the trial court to demonstrate by a preponderance of the evidence that her separate

property was traceable and thus remained her separate property. *Dunham* at ¶20. Because plaintiff paid the debt to Lowe's for kitchen cabinets, her funds are traceable to the cabinets; because the cabinets became permanently affixed to Lytham, plaintiff needed to trace her funds to an increase in Lytham's value attributable to the kitchen cabinets. *Paras v. Paras* (Dec. 7, 2000), 8th Dist. No. 77253 (observing that husband inherited a sum of money which he deposited into the couple's joint checking account and then used funds from the account for home improvements, but husband failed to carry his burden and trace the funds because "there [was] no evidence showing what portion of the increased value of the home [was] directly attributable to those improvements").

{¶21} The testimony in *Neighbarger*, on which plaintiff relies, reflected how much of the husband's separate property funds he spent, what renovations he made, and the amount by which those renovations increased the value of the marital residence. Here, by contrast, the testimony indicated the amount paid for the cabinets, it estimated the then current value of the cabinets to be the amount by which the cabinets increased the value of Lytham, and it set Lytham's value at the start of plaintiff's marriage to defendant as well as its reduced value at the end of the marriage. Apart from that general testimony, the parties presented no evidence concerning the current value of the cabinets to which plaintiff's \$10,354.30 could be traced or the amount by which the cabinets increased Lytham's value.

{¶22} Indeed, Lytham had no increased value to which plaintiff could have traced her separate funds. If, at the end of a marriage, "property then no longer exists, it cannot be divided as marital property or awarded as separate property pursuant to R.C. 3105.171 in a decree of divorce." *Wertz v. Wertz*, 2d Dist. No. 19520, 2003-Ohio-3782,

¶17. See also *Rash v. Rash*, 6th Dist. No. F-04-016, 2004-Ohio-6466, ¶29 (deciding separate monies which husband deposited into son's checking account and thereafter husband withdrew for various reasons, were not "positively traceable to any current asset"). Where an asset has lost value, it is difficult, if not impossible, for the court to award one of the parties a financial benefit from investments in the property. *Wilson v. Wilson-Michelakis*, 10th Dist. No. 09AP-81, 2010-Ohio-370, ¶28. Here, Lytham lost \$18,300 in value over the course of the parties' marriage and held negative equity of \$28,582.40 at the end of the marriage. Even had plaintiff attempted to present evidence concerning the portion of Lytham's value attributable to the kitchen cabinets, Lytham's depreciation in value subsumed plaintiff's separate funds, rendering inappropriate a decision to allow plaintiff to recapture her payment to Lowe's for the debt for the kitchen cabinets. Cf. *Brandon v. Brandon*, 3d Dist. No. 10-08-13, 2009-Ohio-3818, ¶20-21, discretionary appeal not allowed, 123 Ohio St.3d 1523, 2009-Ohio-6487 (concluding that even though wife argued mortgage paid with marital funds entitled her to receive appreciation on the property or the value of mortgage payments made, "the property [was] under greater mortgage encumbrance now, than at the start of the marriage," meaning "there was no increase in value due to mortgage payments").

{¶23} The lack of evidence provided the trial court with the basis on which to conclude plaintiff did not trace her separate property funds that were infused into the marital property. See *Paras; Peck* at 735 (concluding that if a party fails to present sufficient evidence tracing their separate property, the trial court can conclude the separate property became commingled with the marital estate); *Mumma v. Mumma* (Mar. 24, 2000), 2d Dist. No. 99 CA 32 (determining wife failed to trace her separate monies

where she presented no documentary evidence "as to the route and eventual destination of her trust fund distributions").

{¶24} After the trial court determined the nature of property, it was required to equitably divide the property. *Cherry*. Concluding plaintiff failed to trace her separate funds, the court implicitly determined those funds were marital property. In the divorce decree, the trial court divided evenly between the parties the \$8,041.38 of marital equity in Lytham, the \$18,300 loss in value, and the \$89,512 debt on the home equity line of credit Lytham secured. The court did not abuse its discretion in so doing.

{¶25} Plaintiff and defendant took out the home equity line of credit, which they later extended, to finance the renovation of Lytham. The parties intended to sell Lytham and share the profits. Instead of using the line of credit to renovate Lytham, the parties used a majority of the funds to finance their personal lives. *Hood* at ¶4. Had the parties not lived off the line of credit, they may well have used the money from the line of credit, instead of plaintiff's premarital funds, to pay the debt to Lowe's for the cabinets. Equity thus also supports the court's decision. *Welsh-Pojman v. Pojman*, 3d Dist. No. 3-03-12, 2003-Ohio-6708, ¶14, citing *Nuding v. Nuding* (Dec. 7, 1998), 3d Dist. No. 10-97-13; see also *Wright v. Wright* (Jan. 3, 1996), 9th Dist. No. 95 CA 2423-M (stating "[t]he parties evidenced an intent to combine their separate property to increase the value of their home, a marital asset" and wife accordingly transmuted her separate funds into marital property when she deposited them in a joint checking account and used the funds to pay for home improvements and marital debts); *Ockunzzi v. Ockunzzi*, 8th Dist. No. 86785, 2006-Ohio-5741, ¶28, discretionary appeal not allowed, 113 Ohio St.3d 1443, 2007-Ohio-1266 (same).

III. Disposition

{¶26} Because plaintiff presented no positive value to which she could trace her separate monies that were used to pay off a credit card debt to Lowe's for kitchen cabinets installed into a home that lost value over the course of the parties' marriage, the trial court properly concluded plaintiff failed to prove her separate funds were traceable. Accordingly, plaintiff's sole assignment of error is overruled and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is affirmed.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.
