

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

NORED A G. BAUER,	:	
Appellee and Cross-Appellant,	:	CASE NOS. CA2019-04-033
	:	CA2019-04-040
- vs -	:	<u>O P I N I O N</u>
	:	2/10/2020
JOHN H. BAUER,	:	
Appellant and Cross-Appellee.	:	

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. 17DR39644

The Lampe Law Office, LLC, Adam C. Gedling, Thomas Sapinsley, 9277 Centre Pointe Drive, Suite 100, West Chester, Ohio 45069, for appellee and cross-appellant

John D. Smith Co., LPA, John D. Smith, Andrew P. Meier, 140 North Main Street, Suite B, Springboro, Ohio 45066, for appellant and cross-appellee

HENDRICKSON, P.J.

{¶ 1} John Bauer ("John") appeals and his ex-wife, Noreda Gail Bauer ("Gail"), cross-appeals from the decision of Warren County Common Pleas Court, Domestic Relations Division, terminating their marriage by granting a divorce and ordering a division of their marital and separate property. For the reasons described below, this court sustains John's

appeal in part and overrules Gail's cross-appeal.

{¶ 2} John and Gail married in 1971. Throughout the marriage, John worked at AK Steel while Gail was a homemaker. In 2011, John and Gail purchased a home on 12 acres in Clarksville, Ohio. They purchased the home for \$194,573.62 in cash, all of which was paid for with marital funds.

{¶ 3} In less than a month after the home purchase, both of John's parents passed away. John was an only child and inherited approximately \$500,000 from his parents. The inheritance money consisted of proceeds from John's father's bank account, the sale of his parent's home, the sale of their vehicles, and life insurance proceeds. Most of these assets passed to John outside of probate.

{¶ 4} Due to the limited amount of probate assets, John's attorney filed documents in the probate court relieving the estate from a full administration. An administration was necessary to transfer title to two of John's father's vehicle, which were the only estate assets listed in the application. However, John had also received his parents' jewelry and \$60,000 in cash, which cash his father had saved during his life and hidden away in his home.¹ Although these were probate assets subject to distribution pursuant to will or by descent, John admitted he did not tell the attorney about the jewelry and cash.² Thus, these items were not reported to the probate court.

{¶ 5} Except for the jewelry and cash, John deposited his inheritance money into a joint savings account with Gail at First Financial Bank. The jewelry and cash were placed into a safety deposit box in both of the parties' names at First Financial Bank because they

1. The evidence submitted at a hearing in the case indicated that some of the jewelry belonged to John's father and some to his mother, without specifically identifying every individual piece of jewelry and to which parent the piece belonged.

were

concerned that it could be stolen by an adult son with a drug habit.

{¶ 6} The home in Clarksville was to be John and Gail's "dream home." John began spending substantial sums of his inheritance money to make improvements to the home. He represented that he spent \$60,000 on landscaping, \$30,000 on new flooring, \$30,000 on new cabinets, \$5,000 on lighting, \$20,000 for a new bathroom, \$15,000 on two new outbuildings, \$10,000 on a backup generator system, \$3,000 for a shower door, \$3,000 on a new fireplace, \$1,700 on fencing, and many other purchases of a lesser value.

{¶ 7} While making the improvements, John paid the couple's usual monthly expenses from a First Financial joint checking account, which received regular deposits via John's AK Steel pension and social security checks. Sometime later, Gail's social security checks were also deposited into the joint checking account.

{¶ 8} For home improvement purchases, John would transfer inheritance monies from the joint savings account into the joint checking account and write a check for the expenditure. The only exception was when John used \$10,000 in cash from the safety deposit box to make a payment for cabinets.

{¶ 9} In 2016, Gail accused John of stealing her social security money. She believed that John was mismanaging their money and demanded that John give her control over their finances. John agreed to this request and in August 2016, Gail removed \$240,000 from the joint savings account, which funds were from John's inheritance, and deposited the same into an account at Fifth Third bank in her name only. Simultaneously, Gail went to the bank and removed the contents of the safety deposit box, although she would later claim that there was only jewelry and no cash in the safety deposit box. Even though John was aware that

2. The evidence only indicated that John's father executed a will and there was no indication as to a will

Gail had liquidated the joint savings account, he continued paying their monthly bills from the First Financial joint checking account.

{¶ 10} Gail stopped living with John in April 2017 and filed for divorce in June 2017. At the time of the divorce filing, Gail reported only \$180,000 remained of the \$240,000 she had taken from the First Financial joint savings account. While the divorce was pending, the Clarksville home sold for a net of \$401,200.

{¶ 11} Prior to granting a divorce, the domestic relations court held a hearing on several contested issues. Relevant to this appeal, John argued that he was entitled to reimbursement for some of the funds that Gail took from the First Financial joint savings account because those funds were his inheritance and separate property.³ Additionally, John asked for reimbursement for the jewelry and cash that Gail allegedly removed from the safety deposit box. Finally, John asked that he be reimbursed from the proceeds of the home sale for the improvements paid with his inheritance monies.

{¶ 12} During his case-in-chief, John testified that he believed that the value of the improvements was the difference between the purchase price of the home and the amount received in the sale. During Gail's testimony, she could not account for approximately \$32,000 that had been spent from the funds removed from the First Financial joint savings account. She claimed she used the remainder to pay for rent, dental work, and attorney fees.

{¶ 13} Gail admitted that she took the jewelry from the safety deposit box but denied that the box held any cash or that she had taken any cash. Gail's son's ex-girlfriend testified and cast doubt on her story. The ex-girlfriend had been friendly with Gail during the divorce

executed by his mother. However, the evidence does indicate that John was the sole heir of his parents' estates.
3. John did not seek reimbursement for all of the funds taken by Gail as he agreed to be responsible for her dental work.

and had helped her go to the bank to obtain records. The ex-girlfriend testified that she had

seen Gail with this money, which she described as wrapped in bundles marked as containing \$10,000 each.

{¶ 14} The court issued a decision finding that the \$240,000 Gail removed from the First Financial joint savings account was John's separate money. The court ordered Gail to reimburse John for the \$60,000 missing from that account. The court concluded that Gail used the funds for her own individual purposes and rejected her claim that she used the funds on marital expenses. The court further rejected Gail's claim that she needed the money for support after finding John had been paying the household expenses during the pendency of the divorce.

{¶ 15} With respect to the Clarksville home, the court conceded that it did not believe it likely that the home would double in value merely from passive appreciation. However, the court found that John had not demonstrated how much of the increase was due to the improvements versus passive appreciation. In the absence of such evidence, the court determined it would be forced to speculate. Accordingly, the court found that the proceeds from the sale of the home were marital property and should be split evenly between the parties.

{¶ 16} Finally, with respect to the jewelry and cash taken from the safety deposit box, the court found that Gail was not credible and that she had removed the cash. Still, the court found that the jewelry and cash were property of John's deceased parents and thus subject to probate in the Warren County Probate Court. The court stated it could not divide the property in the divorce until such time as the probate court had determined to whom the property belonged.

{¶ 17} John appeals, raising two assignments of error. Gail raises a single assignment of error in her cross-appeal.

{¶ 18} Assignment of Error No. 1:

{¶ 19} THE TRIAL COURT ERRED IN CONCLUDING THAT ALL OF THE PROCEEDS FROM THE SALE OF REAL ESTATE ARE MARITAL PROPERTY.

{¶ 20} John argues that he demonstrated his separate property interest in the home by tracing over \$200,000 of improvements paid for with his inheritance monies. John contends that he was not required to prove that the increase in value of the home was caused by these improvements and not due to passive appreciation. Gail argues that John failed to prove that the increase in the value of the property was caused by his improvements, and specifically points to the lack of expert testimony explaining how each improvement increased the value of the home.

{¶ 21} In divorce proceedings, the Revised Code requires the domestic relations court to determine what constitutes marital property and what constitutes separate property. R.C. 3105.171(B). After making this determination, the court then must equitably divide the marital property and separate property between the spouses in accordance with the provisions of R.C. 3105.171. *Id.*

{¶ 22} After the domestic relations court has classified property as marital or separate, it possesses broad discretion to determine an equitable and fair division of the marital estate. *Cherry v. Cherry*, 66 Ohio St.2d 348, 355 (1981). This court will not reverse a domestic relation court's decision regarding the division of property in a divorce proceeding absent an abuse of discretion. *Id.* An abuse of discretion implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 23} "Marital property" is defined as "[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." R.C. 3105.171(A)(3)(a)(i). "'Marital property' does not include any separate property." R.C. 3105.171(A)(3)(b). Separate property includes "[a]n inheritance by one spouse by bequest, devise, or descent during the course of the marriage." R.C. 3105.171(A)(6)(a)(i).

{¶ 24} "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). "Thus, when one spouse contributes equity in the parties' marital home and that spouse can trace the equity to his or her pre-marital funds, those funds remain the spouse's separate property." *Jones v. Jones*, 4th Dist. Athens No. 07CA25, 2008-Ohio-2476, ¶ 21, citing *Moore v. Moore*, 12th Dist. Brown No. CA2000-03-006, 2000 Ohio App. LEXIS 5648 (Dec. 4, 2000). The party seeking to have a particular asset classified as separate property has the burden of proof, by a preponderance of evidence, to trace the asset to separate property. *Peck v. Peck*, 96 Ohio App. 3d 731, 734 (12th Dist.1994).

{¶ 25} There are several appellate court decisions supporting the principle that separate property improvements in the marital home remain separate property for purposes of dividing property in divorce proceedings. The Eleventh District Court of Appeals noted that prior to the passage of R.C. 3105.171, courts characterized the issue of nonmarital funds being used to improve marital property as an issue of "transmutation," i.e., "the process by which property that would otherwise be separate is converted into marital property." *Frederick v. Frederick*, 11th Dist. Portage No. 98-P-0071, 2000 Ohio App. LEXIS 1458, *26. (Mar. 31, 2000) Under prior case law, a court would consider various circumstantial factors to determine whether the separate property had lost its nonmarital quality, including the intentions of the parties, the source of funds, and the date of marriage. *Id.* at *27. After the

General Assembly passed R.C. 3105.171, the doctrine of transmutation was supplanted by the "source of funds" rule, embodied by R.C. 3105.171(A)(6)(b):

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.

Id.

{¶ 26} The court noted that through this statute, "the General Assembly was codifying the view that if the right to hold separate property is to be meaningful, then the classification of property as marital or nonmarital must be determined by the source of contributions. Therefore, the only scenario by which transmutation may still occur under the current provisions of R.C. 3105.171 is a situation wherein a spouse is not able to trace his or her separate property." (Citations omitted.) *Id.* at 28.

{¶ 27} A Tenth District Court of Appeals case involved a divorcing husband's claim to recover separate funds he used to make improvements to a marital home. *Neighbarger v. Neighbarger*, 10th Dist. Franklin No. 05AP-651, 2006-Ohio-796. The husband paid \$5,000 from his separate annuity for home renovations to a home that was purchased by the husband and wife during the marriage. *Id.* at ¶ 5. The domestic relations court found that \$5,000 was the husband's separate property within the equity of the marital residence. *Id.* at ¶ 7. On appeal, the wife argued that the husband had not shown whether the home increased in value due to passive appreciation or to what extent the renovations paid for with separate funds had contributed to the increase. *Id.* at ¶ 31. The appeals court rejected this argument, stating:

To determine that the \$ 5,000 was separate, and remained separate, we need not determine whether his expenditure resulted in appreciation. Rather, our inquiry arises from R.C. 3105.171(A)(6)(b), which provides that the commingling of

separate property (the money from the annuity fund) with other property (the Sycamore Knoll property) does not destroy the identity of the separate property as separate property, except when the separate property is not traceable.

Id. at ¶ 32. In affirming the domestic relations court, the appellate court noted that while the husband had not produced receipts for his expenditures, he had testified about how much he spent, what he purchased, and what renovations he made. *Id.* at ¶ 33. The wife did not dispute that the husband had spent his separate money but could not recall the exact amount. *Id.* at ¶ 29.

{¶ 28} In a second case from the Eleventh District Court of Appeals, a husband contributed \$30,000 of his inheritance monies to make improvements to a marital home and the domestic relations court ordered that he should receive this amount back as separate property in the divorce. *Hatch v. Hatch*, 11th Dist. Lake No. 2018-L-094, 2019-Ohio-1414. The court noted that the parties stipulated that the husband had received an inheritance during the marriage and that inheritance was used to make improvements to the marital home. *Id.* at ¶ 8. That stipulation included an accounting, with receipts that documented the expenditures. *Id.* The court found the evidence was sufficient to establish that the funds were directly traceable to the husband's separate property inheritance. *Id.* at ¶ 8-9.

{¶ 29} The court rejected the wife's argument that the husband was required to "demonstrate the equity invested into the home concomitantly increased its value." *Id.* at ¶ 9. The court noted that the wife had not cited any authority for that argument and the parties otherwise agreed that the inheritance had improved the marital home. *Id.* at ¶ 9.

{¶ 30} This court affirmed an award of separate property where the wife "clearly traced" her separate funds used for making home improvements. *Balser-LeForge v. LeForge*, 12th Dist. Clinton No. CA2002-12-047, 2003-Ohio-5878, ¶ 17. The domestic

relations court found the marital residence was separate property of the husband because he had purchased it prior to the marriage. *Id.* at ¶ 8. During the marriage, the wife had made improvements to the home using \$16,000 of her premarital funds, which she could "clearly trace" and which the husband did not dispute on appeal. *Id.* at ¶ 11, 17.

{¶ 31} Separate property can lose its nonmarital quality when it cannot be clearly traced because of extensive and repeated commingling. The Seventh District Court of Appeals reversed a domestic relations court decision finding that a marital home was the separate property of the wife. *Shaffer v. Shaffer*, 7th Dist. Jefferson No. 92-J-18, 1993 Ohio App. LEXIS 4694 (Sep. 30, 1993). Prior to the marriage, the wife had inherited a home from her prior deceased husband. *Id.* at *2. She and her new husband lived in this inherited home for ten years and made many improvements to it with both marital and separate funds. They then sold the inherited home and commingled the proceeds with marital funds. They then purchased another home three and one-half years later. *Id.* at *2-3. On these facts, the court of appeals held that the wife's original separate property in the inherited home was not traceable. *Id.* at *4.

{¶ 32} Upon review, this court concludes that the domestic relations court abused its discretion when it determined that the home was entirely marital property and that John had no separate property interest in the home. Both through testimony and substantial documentary evidence, John submitted evidence that he had expended tens of thousands of dollars of his inheritance monies improving the home.⁴ John submitted evidence attempting

4. The total amount of improvements made to the home with John's separate property was presented inconsistently and in generalized fashion in the hearing below. John's counsel represented total separate property improvements of \$230,000 or \$250,000. The parties' testimony concerning the amounts spent were "rough" estimates. For example, John testified that he spent \$30,000 on cabinets but Gail thought it was closer to \$26,000. John further testified he spent "less than" \$5,000 on new lighting, "probably" \$20,000 on bathroom remodels, and "\$3,000 maybe" on a fireplace.

to trace his inheritance from his parents' assets to his joint savings account through various financial records. Proof that the inheritance was then spent on the home was offered through John's testimony, along with bank records, corresponding receipts, and invoices.

{¶ 33} Citing this court's case in *Flynn v. Flynn*, 12th Dist. Butler No. CA2011-01-002, 2011-Ohio-4714, the domestic relations court found that that there was no evidence before it as to whether the increase in the value of the home was due to John's improvements, or passive appreciation, or both. *Flynn*, however, involved a home that was the separate property of one spouse, which home had appreciated in value during the marriage. *Id.* at ¶ 3, 11. As detailed in *Flynn*, the Revised Code addresses the issue of whether the appreciation in the value of separate property is separate or marital. *Id.* at ¶ 12-13. When the income or appreciation to separate property is due to or caused by the "labor, money, or in-kind contribution" of either of the spouses during the marriage, then the income or appreciation is considered marital property. R.C. 3105.171(A)(3)(a)(iii). On the other hand, if the income or appreciation was not the result of "labor, money, or in-kind contribution," that is to say, if the appreciation is "passive," then the income will be considered separate property. R.C. 3105.171(A)(4) and (6)(a)(iii).

{¶ 34} Unlike *Flynn*, this case does not involve income or appreciation to separate property. Rather, this case involves improvements to marital property made with separate, traceable property. Placing its focus on the analysis in *Flynn*, the domestic relations court concluded that it required proof that John's separate property improvements *caused* the increase in the value of the home. Yet as discussed above, R.C. 3105.171(A)(6)(b) does not require evidence of appreciation to determine that John's improvements remained separate property.

{¶ 35} Once John met his burden of proof by clearly tracing the improvements to his

separate property, the burden shifted to Gail to show that the funds used were not separate property, i.e., the funds used were marital, or evidence challenging John's ability to trace the improvements to his separate property.⁵ See *Frederick*, 2000 Ohio App. LEXIS 1458 at *28.

Gail presented no such evidence in this case.

{¶ 36} This is not a case like *Shaffer*, where the ability to trace the separate property improvement was limited by extensive and repeated commingling of the original separate property with marital property. John clearly traced the improvements to his separate property and therefore the domestic relations abused its discretion in finding that John had no separate property interest within the equity of the home.

{¶ 37} John's appellate brief indicates that he used "over \$200,000" of his inheritance money in improvements at the home and specifically references an exhibit admitted into evidence at the hearing. The invoices and receipts in that exhibit only appear to substantiate a portion of that claim (for landscaping and tree installation, cabinets, flooring, two outbuildings, a bathroom remodel, the electrician's fee to install the generator, and a fence).⁶

That exhibit also contains what appears to be a summary of purchases from the First Financial joint checking account that occurred between 2011 and 2017. It is difficult to determine from this exhibit whether some or all of these purchases were related to the improvements at the home. For example, while there are invoices or receipts for home improvement purchases that correspond to checks written from the joint checking account,

5. Absent agreement between the parties or an admission by the opposing party, the best evidence in cases such as this will be detailed documentation supported by testimony clearly tracing separate property. Anything less, e.g., uncorroborated testimony, would be subject to much greater scrutiny as to whether the proponent has met the burden of proof to clearly trace separate property.

6. Despite John's claim that he paid for the cabinets with his separate property, we note his testimony at the hearing indicated that he used \$10,000 of the safety deposit box money to pay for some of the cabinets. However, as will be discussed in the subsequent assignment of error, the safety deposit funds were never transferred to John through the probate process and could not presently be considered his separate property.

there are also numerous checks written with no supporting receipt or testimony, e.g., purchases at Lowes, etc. There are also many expenditures listed for purchases that clearly were not for home improvement, e.g., funeral and medical expenses.

{¶ 38} Traceability presents a question of fact and we ordinarily defer to the trial court as the factfinder. *Maloney v. Maloney*, 160 Ohio App.3d 209, 2005-Ohio-1368, ¶ 23 (2d Dist.), citing *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978). As such, this court sustains John's first assignment of error and remands this matter to the domestic relations for a factual determination of the amount of John's separate property clearly traceable from his inheritance to the equity of the home and a new order dividing the proceeds of the home pursuant to R.C. 3105.171.

{¶ 39} Assignment of Error No. 2:

{¶ 40} THE TRIAL COURT ERRED IN FAILING TO DIVIDE JEWELRY AND CASH OR, IN THE ALTERNATIVE, FAILING TO MAKE A DISTRIBUTIVE AWARD FOR THE VALUE OF THE JEWELRY AND CASH.

{¶ 41} John contends that the domestic relations court abused its discretion in failing to exercise jurisdiction over and equitably divide the jewelry and cash Gail removed from the safety deposit box. John argues that the jewelry and cash would have been inherited by him had it gone through the probate process and therefore the domestic relations court had the legal authority to award him the items in the divorce.

{¶ 42} The probate court has exclusive jurisdiction to "direct and control the conduct and settle the accounts of executors and administrators and order the distribution of estates * * *." R.C. 2101.24(A)(1)(c). And the Revised Code provides for a special statutory cause of action in the probate court for when a person interested in an estate claims that estate assets have been concealed. R.C. 2109.50. The Revised Code also provides that the probate

court exercises concurrent jurisdiction with the court of common pleas in actions "with respect to a probate estate" that involve "[t]he passing of assets upon the death of an individual *otherwise than by will*, intestate succession, or trust." (Emphasis added.) R.C. 2101.24 (B)(1)(c)(v).

{¶ 43} The domestic relations court did not abuse its discretion in determining it lacked jurisdiction over the jewelry and cash and instead directed John to litigate his claims in the probate court. It appears undisputed that the jewelry and cash were assets of John's parents that should have been subject to probate.⁷ John's father died testate, which indicates this is an issue within the probate court's exclusive jurisdiction under R.C. 2101.24(A)(1)(c). The items were not "passed" to John or Gail through a method outside probate which could arguably bring the issue within the concurrent jurisdiction of the common pleas court pursuant to R.C. 2101.24(B)(1)(c)(v).

{¶ 44} Since the probate court has exclusive jurisdiction over these two assets passing to beneficiaries pursuant to John's father's last will and testament and John's mother's estate plan, the domestic relations court did not have jurisdiction to resolve ownership issues over this property. This court overrules John's second assignment of error.

{¶ 45} Cross-Assignment of Error No. 1:

{¶ 46} THE TRIAL COURT'S DECISION WAS AN ABUSE OF DISCRETION AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE WHEN IT FOUND THAT FUNDS SPENT DURING THE MARRIAGE BY CROSS-APPELLANT FROM HER SEPARATE BANK ACCOUNT SHOULD BE REIMBURSED TO CROSS-APPELLEE AS HIS SEPARATE PROPERTY.

7. Despite John's argument that the jewelry and cash would have been transferred to him given his status as his parents' sole heir, there was a dispute between the parties over ownership of the jewelry. Gail claimed that some of the jewelry had been gifted to her by John's mother during her lifetime.

{¶ 47} Gail contends that the domestic relations court abused its discretion in ordering her to reimburse John \$60,000 for the money taken from the First Financial joint savings account. At trial, the evidence indicated that Gail used approximately \$60,000 of John's inheritance monies to pay her lawyer and for other purchases she could not account for but which she testified were used to pay for her rent, insurance, gas, food, and clothing.

{¶ 48} A spouse's separate property "shall" be disbursed to that spouse except in certain specific exceptions set forth under R.C. 3105.171(E)(1) through (5). R.C. 3105.171(D). Gail did not argue or put forth evidence indicating that any of these exceptions applied. Therefore, given that competent, credible evidence supported the finding that the funds used were John's separate property, the domestic relations court did not abuse its discretion in ordering Gail to reimburse John's separate property. This court overrules Gail's sole cross-assignment of error.

{¶ 49} Judgment reversed in part, affirmed in part, and remanded.

RINGLAND and PIPER, JJ., concur.