

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Teresa A. Burkhart,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 11AP-39
	:	(C.P.C. No. 08DR-05-1863)
Douglas O. Burkhart,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on January 22, 2013

Babbitt & Weis LLP, Gerald J. Babbitt, and C. Gustav Dalberg, for appellee.

Mills, Mills, Fiely & Lucas, and Laura L. Mills, for appellant.

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

CONNOR, J.

{¶ 1} Defendant-appellant, Douglas O. Burkhart, appeals from a judgment entry and decree of divorce entered by the Franklin County Court of Common Pleas, Division of Domestic Relations.

{¶ 2} Mr. Burkhart and plaintiff-appellee, Teresa A. Burkhart, married on May 19, 1984. Mrs. Burkhart filed her complaint for divorce on May 8, 2008. The matter went to trial on February 18, 2010, and the trial court used that date as the final day for calculating the duration of the marriage.

{¶ 3} Because of the commendable efforts of the parties and their counsel, many important issues were either fully resolved prior to trial or do not appear to have been the

source of serious contention at trial. Most significantly, we note that the allocation of parental rights and responsibilities with respect to the parties' sole remaining minor child (three older children are emancipated) was settled pursuant to a proposed shared parenting plan submitted by Mrs. Burkhart, with no indication of adverse evidence or argument from Mr. Burkhart. The trial court awarded spousal support in the amount of \$8,000 per month payable by Mr. Burkhart to Mrs. Burkhart for a minimum of ten years, an amount and duration that is not contested on appeal by Mr. Burkhart. Likewise, several significant financial issues were resolved pursuant to stipulation, most significantly the marital property status of Mr. Burkhart's ownership stake in his family business, Goodale Auto Truck Parts Company, Inc., where he is also employed as vice president and general manager. The stipulations address the value and allocation of retirement accounts, vehicles, primary and secondary residences, and certain outside investments made by Mr. Burkhart, primarily in real estate, during the course of the marriage.

{¶ 4} Despite this agreeable resolution of many significant property issues, the trial court was left to resolve several very substantial issues at trial. Chief among these was the allocation and valuation of two large life insurance policies paid upon the death of Mr. Burkhart's mother, Jean Burkhart, and several smaller policies insuring the life of his father, Ray Burkhart. The trial court also addressed several loan obligations satisfied or incurred by Mr. Burkhart. The final item contested in this appeal is the trial court's decision to award attorney fees in the amount of \$50,500 chargeable to Mr. Burkhart in the property division. Mr. Burkhart has timely appealed and brings the following four assignments of error:

- (1) The trial court erred and abused its discretion in failing to award to Appellant his separate property.
- (2) The trial court erred and abused its discretion in concluding that the \$27,500.00 loan obligation was Appellant's separate debt.
- (3) The trial court erred and abused its discretion in failing to credit Appellant for paying the Chase Bank Judgment from his separate funds.

(4) The trial court erred and abused its discretion in awarding \$50,500.00 in legal fees to Appellee.

{¶ 5} Mr. Burkhart's first assignment of error addresses the trial court's treatment of life insurance benefits. The bulk of the disputed amount involves two large life insurance policies issued by Travelers Insurance Company on the life of Jean Burkhart. Travelers policy No. x9240 belonged to Racer LLC, a company owned by Ray Burkhart. The death benefit on the Racer policy was \$5,244,000. Travelers policy No. x7997, with a death benefit of \$2,756,000, was owned by Goodale Auto Truck Parts Profit Sharing Plan ("Goodale PSP"), in which Jean Burkhart held an interest. Mr. Burkhart also received benefits from several policies insuring the life of his father. While there were a number of such policies, some of which had lapsed and yielded only a refund of premiums, Mr. Burkhart confines his arguments on appeal to payments received from Pacific Life in the amount of \$85,949.59, and furnishes no further detail or figures on appeal to address the other policies on his father's life.

{¶ 6} The trial court treated all these life insurance proceeds as marital property, and further found that, even if they were treated as separate property at the outset, the insurance proceeds had later been so commingled with marital funds as to be untraceable.

{¶ 7} We first examine the trial court's treatment of the Travelers policies as marital property ab initio. In the context of Ohio domestic relations law, "marital property" includes "[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[.]" as well as "[a]ll interest that either or both of the spouses currently has in any real or personal property * * * that was acquired by either or both of the spouses during the marriage." R.C. 3105.171(A)(3)(a)(i) and (ii). Marital property will also include income or appreciation on otherwise separate property that results from the labor, monetary, or in-kind contribution of either or both spouses during the marriage. R.C. 3105.171(A)(3)(a)(iii); *Middendorf v. Middendorf*, 82 Ohio St.3d 397, 400 (1998).

{¶ 8} In contrast, "separate property" includes real or personal property acquired by a spouse prior to the marriage, inheritances and gifts received during the course of the marriage and proved by clear and convincing evidence to have been given to only one spouse rather than to the couple jointly, and passive income or appreciation connected

with such property during the marriage. R.C. 3105.171(A)(6)(a). The party seeking to establish an asset as separate property bears the burden of showing the origin and eligibility of the asset. *Rank v. Rank*, 10th Dist. No. 10AP-273, 2010-Ohio-5717, ¶ 5.

{¶ 9} In applying these statutory definitions, the domestic relations court has broad discretion when making property allocations. *Id.* at ¶ 17; *Berish v. Berish*, 69 Ohio St.2d 318 (1982). We review the trial court's classification of property as marital or separate under a manifest weight of the evidence standard, and affirm if the classification is supported by some competent, credible evidence. *Taub v. Taub*, 10th Dist. No. 08AP-750, 2009-Ohio-2762, ¶ 15; *Roberts v. Roberts*, 10th Dist. No. 08AP-27, 2008-Ohio-6121, ¶ 16.

{¶ 10} The trial court first rejected outright Mr. Burkhart's position that the proceeds from the Travelers life insurance policies were his separate property received by inheritance. The court expressly indicated at trial that it considered that these funds were the fruits of "a contractual obligation * * * not inheritance." (Tr. 632.) The court further found that the premiums on one of the policies had been funded at least partly prior to Jean Burkhart's death with marital property, and that this also provided a basis upon which to find that this policy was a marital asset.

{¶ 11} Upon Jean Burkhart's death in July 2004, the Travelers policies paid out to their respective owner/beneficiaries, Racer LLC and Jean Burkhart's interest in Goodale PSP. Both entities then rolled over the insurance proceeds to another entity, the N. Jean Burkhart Irrevocable Trust. As a beneficiary of this trust, Mr. Burkhart shared with his siblings in subsequent disbursements and received the sum of \$2,005,952.26, which he first deposited in a National City Bank account held jointly with his wife. The funds thereafter moved briefly through three Merrill Lynch investment accounts, also joint, and then into other investments. Chief among these was Mr. Burkhart's investment in a loan to an entity known as Crawford Hoying, LLC; this loan eventually became an ownership interest in Olentangy Commons Acquisitions, LLC.

{¶ 12} To establish that one of the Travelers policies was at least partially funded with marital assets, Mrs. Burkhart presented evidence at trial, mostly in the form of her own testimony, that Mr. Burkhart's parents made regular gifts to the parties, and that some of these gifts were applied toward premium payments on policy No. x7997. This

was done because the funds in Jean Burkhart's share in the Goodale PSP were after a time insufficient to pay premiums for policy No. x7997 before Jean Burkhart's death. Mrs. Burkhart introduced as evidence an email written in late 2002 or early 2003 in which Mr. Burkhart informed her that due to the shortfall in Jean Burkhart's share of Goodale PSP, all four of the elder Burkharts' children would be responsible for premium payments on policy No. x7997. Mrs. Burkhart testified that she believed, without being able to produce documentary evidence, that all the children, including her and Mr. Burkhart, had made up the difference to pay the policy premiums.

{¶ 13} We first decide whether the trial court erred when it refused to characterize the Travelers life insurance proceeds as an inheritance. For purposes of this discussion, we provisionally leave aside the question of whether one policy may have been purchased in part with marital funds, and assume no marital contribution to the premiums.

{¶ 14} The definition of "inheritance" under R.C. 3105.171(A)(6)(a)(i) as it applies to life insurance proceeds is not further specified in the statute nor well developed in Ohio cases. Multiple cases from other states, however, have held that life insurance death benefits paid to one spouse are the separate property of that spouse. *See, e.g., Angell v. Angell*, 777 N.W.2d 32, 37 (Minn.App.2009); *In re marriage of Goodwin*, 606 N.W.2d 315 (Iowa 2000); *Smith v. Smith*, 235 S.W.3d 1, 11 (Ky.App.2006). In some states, that conclusion is aided by broader wording in the relevant statute: Wisconsin, for example, avoids the use of the term "inheritance" and more broadly defines as separate all funds received " '[b]y reason of the death of another, including, but not limited to, life insurance proceeds.' " (Emphasis added.) *Campbell v. Campbell*, 306 Wis.2d 126 (2007), fn.1, quoting Wis. Stat. Ann. section 767.255. In states lacking this broad language, courts have considered policy proceeds that do not identifiably transit through an estate, but rather are paid directly to the beneficiary, as a gift from the person paying the policy premiums. *Angell* at 37; *Goodwin* at 317; *Keller v. Keller*, La. App. No. 2010-2101 (July 7, 2011) (applying civil-law concept of "donation" rather than common-law "gift.").

{¶ 15} While Ohio does recognize that gifts may be separate property, and thus the logic applied in the above-cited cases would fit equally well under Ohio law, we are handicapped in the present case by the fact that the parties never raised this characterization of the life insurance proceeds in the trial court. The court therefore did

not have the opportunity to address the status of the life insurance proceeds as gifts, and never received any developed argument from the parties to this effect. Because the trial court never decided it in the first instance, we cannot decide the case on this basis upon appeal.

{¶ 16} We therefore solely consider whether Mr. Burkhart proved by clear and convincing evidence that the Travelers life insurance proceeds were received by inheritance. Again, Ohio cases provide little guidance and we can freely consider the implications of the question. We begin by stating that we do not adopt the trial court's stated position that the proceeds of the life insurance policies must be distinguished from an inheritance solely because they were the fruits of a "contractual obligation." We find no authority for a blanket exclusion of life insurance proceeds on this basis. The status of these proceeds must be evaluated with an eye to such factors as who owns the policy, who is the beneficiary, and when the proceeds are paid. In the easiest permutation of facts, there would be no question regarding the status of life insurance benefits from policies owned by the insured and payable to his or her estate. Upon distribution to the heirs or legatees, these would be assets received by inheritance. Conversely, policies owned and funded by beneficiaries and payable upon the death of a third party have nothing to do with the estate of the decedent and would not constitute an inheritance. Somewhere in between these extremes, one might debate the status of policies owned by the decedent but paid directly to the beneficiaries without transiting through the estate.

{¶ 17} Here, the policies were owned by and payable to third parties. One of these entities, her share in Goodale PSP, was owned by the decedent, Jean Burkhart; the other, Racer LLC, was not. Under circumstances not particularly made clear in the record, both Goodale PSP and Racer LLC paid over the life insurance funds to a trust which, from its name, can be assumed to comprise part of Jean Burkhart's estate plan. From the trust, Mr. Burkhart then received his share of the funds. Particularly for the transfer from Racer LLC, in which the decedent held no interest, the transit through the estate for all these life insurance funds may well have seemed strained to the trial court. The court here was rightly reluctant to characterize those insurance proceeds as inherited. Mr. Burkhart bore the burden of rebutting the statutory presumption that his investments acquired during the course of the marriage were marital assets. R.C. 3105.171(A)(3)(a)(i) and (ii). He

strove to do so by demonstrating that these investments were funded from his separate property in the form of the life insurance benefits received upon the death of his mother. The trial court concluded that Mr. Burkhart had not proven by clear and convincing evidence that he received the Travelers life insurance proceeds by way of inheritance. Given the great latitude afforded to trial courts in making such classifications of property, particularly when the determination turns on an assessment of convoluted facts, we cannot find an abuse of discretion in the trial court's refusal to categorize the Travelers policy proceeds as inherited by Mr. Burkhart. Because Mr. Burkhart based his separate-property position on this characterization of the life insurance proceeds as inherited, once the court rejected that proposition it was appropriate to conclude that the subsequent investments were marital because they were in fact acquired with marital funds.

{¶ 18} Because we find that the trial court did not err in characterizing the Travelers life insurance proceeds as marital property from the outset because they were not "inherited," we find that the issue of whether policy No. x7997 was specifically paid in part with marital funds does not control. Likewise, it becomes futile to consider arguments asserting that the insurance proceeds are fully traceable to subsequent investments. These arguments are now moot because any tracing would only further establish that the later investments are in fact marital because they were fully funded by monies that came into the possession of the couple as marital assets ab initio.

{¶ 19} We now turn to the question of the proceeds from life insurance paid upon the death of Mr. Burkhart's father. The trial court determined that these policies were marital assets because Mrs. Burkhart testified that she believed that the premium payments were made in later years from marital funds. Mr. Burkhart's sister, Deborah Comer, testified at length regarding the policies, and described how she and her siblings customarily paid the premiums on several policies, and would discuss amongst themselves which policies should be maintained and which should be allowed to lapse. (Tr. 738-62.) Although Ms. Comer's testimony does not specifically address the Pacific Life policy that Mr. Burkhart identifies on appeal, the trial court justifiably noted that "[t]he parties had a long history of paying premiums on policies insuring Mr. Burkhart's parents during the marriage as part of their estate planning, and had regularly paid

premiums on at least one policy insuring Mr. Burkhart's father * * * since the early 1990's." (Judgment Entry Decree of Divorce at 8-9.)

{¶ 20} The trial court concluded that proceeds from an insurance policy for which the premiums were paid from marital funds should be considered a marital asset, relying on *Janosek v. Janosek*, 8th Dist. No. 86771, 2007-Ohio-68. The basis for this approach is that property that was purchased with marital funds, but titled or held in the name of a third party, must be treated where equitable as marital property, regardless of whether the asset has been retransmitted to one spouse via inheritance. While Mr. Burkhart now objects to this "pre-tracing" of assets, the fundamental principle underlying the trial court's decision is sound. As set forth in *Janosek*, to prohibit any tracing of the origins of an asset received through inheritance, and treat the nominal title of the asset as dispositive, would leave no recourse in cases in which one party succeeded in "parking" marital funds in the name of a parent or other third party, fully intending to recoup them later as separate property through inheritance or reconveyance.

{¶ 21} As the proponent of the separate property claim with respect to the life insurance policies on his father's life, Mr. Burkhart bore the burden of demonstrating the absence of marital contribution to the asset. Based upon Mrs. Burkhart's testimony and that of Ms. Comer regarding the payments for the policies insuring Ray Burkhart's life, there was competent, credible evidence in the record to support the trial court's conclusion, and nothing further to specifically establish to the contrary that the policy premiums were exclusively paid from sources other than marital funds. We accordingly find that the trial court did not abuse its discretion in deciding that the Pacific Life policy proceeds were marital in nature.

{¶ 22} In accordance with the foregoing, Mr. Burkhart's first assignment of error is overruled. The trial court did not err in its allocation of the various life insurance proceeds as marital assets.

{¶ 23} Mr. Burkhart's second assignment of error asserts that the trial court abused its discretion in finding that a \$27,500 debt obligation assumed by Mr. Burkhart toward Chase Bank was his separate debt. Mr. Burkhart entered into this obligation pursuant to his position as a principal in a real estate development company. The entity, Tartan Development Company West ("Tartan West"), reached an agreement with the city

of Dublin, Ohio, for favorable tax treatment on future improvements. Under this tax incentive fund ("TIF") agreement, Mr. Burkhart through Tartan West will receive a portion of future TIF revenues garnered by city. (The testimony received at trial seems to indicate that these future benefits are speculative at best, and the parties stipulated that the value of this investment was currently nominal if not nil.) During the pendency of the present case, Mr. Burkhart increased his ownership interest in Tartan West in exchange for assuming another owner's obligation under a judgment obtained by Chase Bank. In assuming this \$27,500 obligation, Mr. Burkhart's percentage of ownership increased, and thus his potential benefit from future TIF benefits.

{¶ 24} The trial court's disposition of these further TIF revenues and the associated debt is inconsistent. The trial court ordered that Mrs. Burkhart would receive 50 percent of all future TIF benefits received by Tartan West, even those attributable to Mr. Burkhart's newly-acquired share. The court then characterized the increased debt incurred by Mr. Burkhart as his separate liability. As Mr. Burkhart points out on appeal, Mrs. Burkhart's half of future TIF funds is directly increased by Mr. Burkhart's increased ownership share of Tartan West. As such, Mr. Burkhart has been burdened with all liabilities connected with his increased ownership share, but only blessed with half the benefits flowing therefrom.

{¶ 25} However, Mr. Burkhart does not dispute on appeal that he incurred the additional debt in connection with Tartan West after the trial court had issued restraining orders in this litigation. These, Mrs. Burkhart points out, barred Mr. Burkhart from incurring additional liabilities until the parties settled their affairs. The trial court's decision essentially, if not explicitly, states that it is imposing the additional debt burden solely upon Mr. Burkhart as a penalty for his breach of the trial court's order. Given the nature of that breach in relation to the overall assets of the parties and the financial context of the case, this was not an unmeasured response. While a court must equitably divide the marital assets, that division need not be strictly equal to be equitable. *Galloway v. Khan*, 10th Dist. No. 06AP-140, 2006-Ohio-6637, ¶ 8. The factors considered may include the circumstances under which the parties incurred post-separation debt. *Id.* at ¶ 18. We find that the trial court did not abuse its discretion in

allocating the increased debt to Mr. Burkhart as his separate debt. Mr. Burkhart's second assignment of error is therefore overruled.

{¶ 26} Mr. Burkhart's third assignment of error asserts that the trial court erred in failing to give credit to Mr. Burkhart for paying his share of a judgment in favor of Chase Bank connected with the Tartan West project. As of the final day of trial, Mr. Burkhart had paid and satisfied in full this judgment in the amount of \$161,861. It is unclear from the record whether this debt includes the additional \$27,500 Tartan West obligation discussed under Mr. Burkhart's second assignment of error.

{¶ 27} Mr. Burkhart points out that he satisfied this marital debt from his separate funds primarily by incurring additional separate debt. The parties stipulated to sources of funding he used to repay this amount, including a garnishment from his checking account, \$100,000 borrowed by Mr. Burkhart from his father's trust, \$10,000 distributed to Mr. Burkhart from Crawford Hoying, \$30,000 borrowed by Mr. Burkhart from his employer, and \$16,057 received from an annuity in his name.

{¶ 28} The parties stipulated that the assets from which this obligation originated, Tartan West, was a marital asset and the trial court's judgment treats it as such as we have discussed above. The trial court also noted that the parties had agreed that each would be liable for half of any future capital calls required by Tartan West or its related entities. From this the trial court held by extension that "each party will be responsible for 50% of any additional liability to these entities beyond further capital calls." (Judgment Entry Decree of Divorce at 30.) We accordingly conclude that the trial court intended for this Chase Bank judgment arising out of the Tartan West development to be treated as marital debt, with the exception of any additional amounts.

{¶ 29} Again, the trial court's resolution of this property issue leaves Mr. Burkhart with the burden of having satisfied a marital obligation without the benefit of having done so with marital property. In particular, Mr. Burkhart incurred \$130,000 in loans upon which Mrs. Burkhart is undisputedly not obligated. Because there is no debate about the respective marital and separate character of the liabilities and assets involved, we accordingly find that it was inequitable to deny Mr. Burkhart any credit for satisfaction of this marital obligation. We limit this conclusion to exclude any part of this debt that may reflect the additional \$27,500 debt discussed above under Mr. Burkhart's second

assignment of error. Mr. Burkhart's third assignment of error accordingly has merit and is sustained. Upon remand the trial court shall credit Mr. Burkhart for satisfaction of this marital debt to the extent that he did so with his separate funds, and that it does not include the additional \$27,500 obligation incurred as separate debt during the pendency of the case.

{¶ 30} Mr. Burkhart's fourth assignment of error asserts that the trial court erred in ordering him to pay Mrs. Burkhart \$50,500 toward her legal fees. Again, an award of attorney fees is generally within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Wagenbrenner v. Wagenbrenner*, 10th Dist. No. 10AP-933, 2011-Ohio-2811, ¶ 19.

{¶ 31} This disputed award of fees consists of two components. The trial court first awarded Mr. Burkhart to pay \$15,500 to Mrs. Burkhart to equalize the extent to which previous fees had been paid from marital assets. The court then ordered a discretionary award of \$35,500. Mr. Burkhart disputes both components.

{¶ 32} With respect to the first, Mr. Burkhart points out that the trial court correctly concluded that Mrs. Burkhart had used approximately \$34,000 in marital assets to pay her legal fees. The court found that Mr. Burkhart had paid a total of approximately \$67,000 to his attorney and expert. Mrs. Burkhart paid approximately \$64,000 to her attorney and expert. The parties agreed that each had paid some of their fees using \$25,000 disbursed to each from a marital investment account for this purpose. The trial court heard no additional evidence regarding the source of funds used by Mr. Burkhart to pay his attorneys and experts.

{¶ 33} On the state of the record, it is impossible for us to find an abuse of discretion by the trial court because the respective use by the parties of marital funds to pay their experts and attorneys was not fully developed at trial. Moreover, it is not on its face error for a trial court to award reimbursement of fees from one party to another merely because this would result in an unequal award of fees and a subsidy from one party to another for fees. Pursuant to R.C. 3105.73(A), the trial court will consider in its award of fees the parties' marital assets, temporary support orders, the conduct of the parties, and any other relevant factor deemed appropriate. The trial court included and stated in its decision that Mr. Burkhart had both greater resources and greater access to

borrow funds with which to pay attorney fees. The court noted that Mr. Burkhart had violated several restraining orders, and that Mr. Burkhart had not produced sufficient documentation to support the relative legal expenses of the parties or the manner which they were paid.

{¶ 34} On the state of the record, we cannot find an abuse of discretion on part of the trial court. The trial court's equalization calculations are neither supported nor disproved by the absence of evidence to support them in detail. Proposed calculations presented on appeal by Mr. Burkhart are premised on numbers that were never submitted to the trial court. We accordingly find that the trial court did not abuse its discretion in its award of attorney fees in the matter, and Mr. Burkhart's fourth assignment of error is overruled.

{¶ 35} In summary, Mr. Burkhart's first, second, and fourth assignments of error are overruled. His third assignment of error is sustained. The judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is affirmed in part and reversed in part, and the matter is remanded for further proceedings in accordance with law and this decision.

*Judgment affirmed in part
and reversed in part; cause remanded.*

BROWN and SADLER, JJ., concur.
