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ARKANSAS COURT OF APPEALS
DIVISION I
No. CV-21-551

DOYLE OSCAR PHILMON

APPELLANT

V.

TONYA LYNN PHILMON

APPELLEE

Opinion Delivered March 15, 2023

APPEAL FROM THE SCOTT
COUNTY CIRCUIT COURT
[NO. 64DR-19-22]

HONORABLE TERRY SULLIVAN,
JUDGE

AFFIRMED AS MODIFIED

BART F. VIRDEN, Judge

Appellant Doyle Oscar Philmon appeals from the Scott County Circuit Court’s divorce decree in which the trial court determined that \$175,000 in gold and silver coins is marital property to be sold at public auction and the proceeds evenly divided by the parties. Doyle argues that the trial court erred in awarding his ex-wife, appellee Tonya Philmon, any interest in the gold and silver coins because he “unrefutably acquired” them using his retirement funds. Doyle also contends that the trial court erred in not awarding other personal property to him. We affirm as modified.

I. *Background*

In 2006, a child was born to Doyle and Tonya. Although the parties lived together, they did not marry until June 26, 2014. During the marriage, the parties’ income derived primarily from rental properties. Doyle owned eight premarital tracts of land, and the parties

acquired at least four more tracts during the marriage. In February 2019, Tonya filed for divorce. The main source of contention was gold and silver coins.

Testimony at the hearing established that the parties had been collecting coins separately before the marriage and that they had also accumulated coins during the marriage. Tonya testified that the parties had buried gold and silver coins on land that Doyle had given to her before the marriage.¹ Roughly \$115,000 in gold and silver coins was buried in three plastic tubes—approximately three feet long—on which Tonya had written the dates. Tonya testified that the first tube had been buried on the Aurora Road property in 2015 and that the parties had buried two more tubes in 2016 or 2017. According to Doyle, he had first buried coins on the Aurora Road property in 2010 before his marriage to Tonya. Doyle testified that he had dug up those coins in 2015 and reburied them, along with additional silver coins, on a different section of the Aurora Road property, where they remained throughout the parties' marriage.

Doyle testified that he had used his retirement funds to purchase all of the gold and silver coins in the parties' possession. Doyle explained that in early 2014—before he married Tonya—he retired from his job as an insurance salesman for Nationwide Insurance and other

¹In late November 2013, Doyle gave Tonya a deed to approximately forty-seven acres on Aurora Road in Parks. He candidly testified that he had put the land in Tonya's name in order to defraud his first ex-wife in their divorce proceedings. In September 2019, after the parties had separated, the home on Aurora Road, in which Tonya and the parties' then thirteen-year-old son had been living, was destroyed by a fire. After considering evidence on the subject, the trial court concluded that Doyle had either burned the home or arranged to have it burned.

independent insurance companies after forty-three years. He testified that he could not get “cash money” from his retirement for two years and that, because his former employer paid “good interest,” he left his money with Nationwide. In July 2017, Doyle received two retirement checks for \$72,385.63 and \$232,465.39. Doyle testified that he had put that money into his IRA and later bought gold and silver coins.

Tonya denied that all of the gold and silver coins in the parties’ possession had originated from Doyle’s retirement funds or his IRA. Tonya identified invoices and purchase orders dated between 2016 and 2018 showing the purchase of gold and silver coins from Patriot Gold Group and the sale of coins back to the gold group. She also identified wire transfers from JM Bullion, Inc., and Halt Gold Group, LLC, of significant sums of money being deposited into the parties’ joint bank accounts from the sale of gold and silver. Tonya testified that all of the parties’ bank accounts were joint accounts, to which she had full access after the marriage in 2014. Tonya agreed that Doyle’s retirement funds had been used to purchase gold and silver coins; however, she testified that the parties had also invested the retirement money in stocks and had purchased rental properties. Doyle himself testified that he had sold some of the coins back to the gold groups and then bought rental properties and additional gold and silver coins.

In the trial court’s letter opinion, the following findings were made regarding the gold and silver coins:

One of the most contentious areas in this very contentious divorce action is over the ownership of gold and silver which has been appraised at over \$175,000.00 by Mr. Dale White, who the parties agreed would appraise these coins. These monies

are currently being held in the registry of the Court by the Scott County Sheriff's Office.

[Doyle] earnestly argues that the gold and silver should all be awarded to him because he had collected it for many years prior to 2010, and that he had used monies from his previous insurance business to purchase these [gold and silver coins], and that he had cashed out his retirement, etc.

[Tonya] argues that the gold and silver was bought jointly between the parties and essentially has been co-mingled and is essentially co-marital property. It is undisputed that there was over \$115,000.00 in gold and silver dug up from the ground, as evidenced by Exhibit #30 introduced into evidence, and from the testimony of [Tonya] that it was placed in three (3) tubes and buried in the ground in 2015 by the parties, and that it was buried on the premarital property of [Tonya]. Owen Robinson, the son of [Tonya], testified that he knew of the parties constantly ordering gold and silver on-line, and that they did a lot of bartering and trading with it, and that he had cut the tubes to be used to bury the gold and silver on the property, and that he had helped bury it. It is also essentially undisputed from Exhibit #30 that when the Court ordered the parties to bring in the gold and silver they each had in their possession, [Tonya] brought in a value of \$18,000.00 and [Doyle], after he was found in contempt of court and was incarcerated until he brought in the gold and silver that was in his possession, brought in a value in excess of \$40,000.00.

The testimony reflects that there were significant transfers in and out of the parties' marital accounts relating to gold and silver occurring between 2016 and 2018. Exhibit #26, which the Court heavily relies on in making its decision, shows a particular exhibit of a joint checking account of the parties which shows transfers on July 13, 2016, to J.M. Bullion, Inc., which does verify that gold and silver was transferred into marital accounts between the parties. Taking into account that the parties agreed to bury some \$115,000.00 in gold and silver on [Tonya]'s premarital property, the transfers in and out of the various accounts over the years during the marriage, and the fact that [Tonya] had a significant amount of gold and silver in her possession and [Doyle] had a significant amount of gold and silver in his possession, this Court finds that this property has been so co-mingled that there is no way to separate out the gold and silver by the individual invoices, purchase orders, transfers in and out of the accounts, or the gold and silver owned separately by [Doyle] prior to the marriage. Since this property has been so co-mingled and the parties knew exactly what they were doing when some \$115,000.00 in gold and silver was buried on [Tonya]'s pre-marital property, and they each kept significant portions of the gold and silver in their possession and continued to buy and sell the gold and silver during the time they were living together, the Court finds that the approximate \$175,000.00

in gold and silver that this Court has jurisdiction of and is currently in the registry of the Court is marital property and that since the parties are not able to agree on any disposition of the gold and silver it is to be sold and the proceeds are to be divided equally between the parties.

The trial court later entered a divorce decree in which the letter opinion was incorporated. Included in the decree was a catch-all provision stating that “all property not specifically addressed in this Decree is awarded to the party who has possession of it.”

II. *Standard of Review*

This court reviews cases involving the division of marital property de novo. *Ballegeer v. Ballegeer*, 2019 Ark. App. 269, 577 S.W.3d 66. With respect to the division of property in a divorce case, we review the trial court’s findings of fact and affirm them unless they are clearly erroneous or against the preponderance of the evidence. *Id.* A finding is clearly erroneous when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Id.* In order to demonstrate that the trial court’s ruling was erroneous, the appellant must show that the trial court abused its discretion by making a decision that was arbitrary or groundless. *Id.* We give due deference to the trial court’s superior position to determine the credibility of witnesses and the weight to be given their testimony. *Id.*

III. *Discussion*

A. Gold and Silver Coins

Doyle argues that he had acquired gold and silver coins before he ever married Tonya and that he had bought gold and silver coins in his own name during the marriage using

funds that can be traced to his retirement, which occurred before his marriage to Tonya. He asserts that Tonya even admitted that his two retirement checks had been used to purchase gold and silver coins. Doyle argues that there was no commingling of the retirement funds in that there was no evidence that those funds had been deposited into or had passed through a joint bank account. In his reply brief, Doyle states that just because his premarital funds may have passed through a joint account does not mean that all of the gold and silver is now marital property. He argues that tracing should have been permitted and relies on *McKay v. McKay*, 340 Ark. 171, 8 S.W.3d 525 (2000). Doyle also argues that the fact that he buried coins on Tonya's property did not convert the gold and silver into marital property.

At the time a divorce decree is entered, marital property, which is defined as all property acquired by either spouse subsequent to the marriage with certain exceptions, shall be distributed one-half to each party unless the court finds such a division to be inequitable. Ark. Code Ann. § 9-12-315(a)(1)(A) & (b) (Supp. 2021). In determining whether property remains under the control of one spouse upon divorce or is the property of both spouses, "tracing" may be used by the court. *McKay, supra*. One claiming ownership of nonmarital property that has been commingled with marital property bears the burden of tracing the separate property so that it can be treated as such for property-division purposes upon divorce. *Scott v. Scott*, 86 Ark. App. 120, 161 S.W.3d 307 (2004). When transactions result in great difficulty in tracing the manner in which nonmarital and marital property have been commingled, the property acquired in the final transaction may be declared marital property.

Karolchyk v. Karolchyk, 2018 Ark. App. 555, 565 S.W.3d 531; *Ellis v. Ellis*, 2017 Ark. App. 661, 536 S.W.3d 166.

In *McKay*, on which Doyle relies, the trial court awarded a joint bank account to the husband as his separate property after tracing the funds. The checking account had been in the husband's name before the marriage and had been funded exclusively by the husband's disability benefits. The husband had merely added the wife's name to the account after the marriage, and she had used that particular account only with his permission or at his direction. *McKay* is readily distinguishable given that there was no apparent commingling of the husband's disability funds with any marital money and because the bank account was not used by the wife except with the husband's permission.

Here, there was no real attempt to distinguish who owned each individual gold and silver coin or even each lot of coins. The parties' coins had been commingled to such an extent and for so long a period that there was no way to separate them. Moreover, Doyle failed to prove that the gold and silver coins could be traced to his retirement funds. Doyle did not receive his retirement funds until 2017, and the parties had been collecting gold and silver long before that. The testimony established that Doyle did use his retirement funds to purchase gold and silver coins; however, Doyle admitted that he had sold some of those coins, and the evidence showed wire transfers from gold groups to a joint bank account to which Tonya had access. Doyle had the burden of proving that the gold and silver coins originated from his premarital retirement funds, but tracing became difficult—if not impossible—once the coins had been sold and then had been used to purchase rental

properties, which Doyle conceded in his proposed findings were marital.² Further, the fact that gold and silver coins had been buried on the Aurora Road property and remained there for the duration of the parties' marriage was evidence that Doyle had not attempted to keep the gold and silver coins separate and distinct. Doyle owned several other tracts of *premarital* property on which he could have buried gold and silver coins that he claimed were his separate property. Instead, he buried and left them on property that he had deeded to Tonya. We are simply not left with a firm conviction that the trial court made a mistake in determining that the gold and silver coins had been commingled such that tracing was not feasible and that the gold and silver coins were thus marital property.

B. Other Personal Property

Doyle also argues that the trial court clearly erred in awarding his premarital personal property to Tonya. In his proposed findings, Doyle had requested his mother's belongings and furniture, his premarital guns, and his food and food-storage container. He states that the trial court did not specifically address his mother's belongings or the food and food-storage container and that we should remand for the court to award the items to him because they were clearly premarital property. We decline to do so, especially when Doyle failed to fully develop his argument on appeal by identifying his mother's "belongings" and the "premarital guns." *See, e.g., Richards v. Richards*, 2022 Ark. App. 309, 651 S.W.3d 190;

²The trial court awarded two of the marital properties in Boles to Tonya to compensate her for the loss of her home and personal belongings, which were destroyed in a fire that Doyle was found to have started.

Pilkinton v. Pilkinton, 2018 Ark. App. 624, 569 S.W.3d 882. In a divorce proceeding, the burden is on the party who asserts an interest in property to establish that it is, in fact, separate property not subject to division under Ark. Code Ann. § 9-12-315(b). *McKinnis v. McKinnis*, 2020 Ark. App. 479, 612 S.W.3d 730.

Tonya identified a couple of items belonging to Doyle's mother in a photo that was taken after the fire that destroyed her home. She mentioned an old wood stove and an icebox, and this corresponds to items Doyle specifically listed in his proposed findings.³ Tonya testified that she has no objection to Doyle's having his mother's belongings. In fact, she makes no argument on appeal in opposition to Doyle's assertion that he should have these things. There is no need to remand this matter when Tonya has asserted no claim over the items. We, therefore, modify the divorce decree to reflect that Doyle is entitled to the old wood stove and an icebox that belonged to his mother.

Doyle argues that he had purchased "survival" food and placed it in a food-storage container on the Aurora Road property in 2010 and that the trial court should have awarded the food and storage container to him. Tonya confirmed that there had been food in a food-storage container buried on her property; however, she specifically testified that Doyle had removed the food from the storage container shortly before the hearing. Doyle himself

³Although Tonya also mentioned fuel tanks—the only other item that Doyle specifically identified in his proposed findings—Tonya characterized the fuel tanks as "ours." It was Doyle's burden to show that the fuel tanks were, in fact, premarital property, *McKinnis, supra*, and he did not mention them during his testimony or otherwise counter Tonya's assertion that they are marital property. Because they are in Tonya's possession, the trial court's catch-all provision dictates that the fuel tanks now belong to Tonya.

testified that most of the food was gone and that he had taken the rest. In other words, there was no food for the trial court to award to either party. Although Doyle accused Tonya of having stolen the food, the trial court was not required to believe him. As for the food-storage container itself, Doyle said that he had buried the container on the Aurora Road property in 2010, and the evidence shows that he then deeded the property to Tonya in 2013 without having first removed the container. The buried container appears to have conveyed with the property, and Doyle has failed to establish otherwise. To the extent that the trial court failed to specifically address the food-storage container, it falls within the catch-all provision of the divorce decree and now belongs to Tonya.

On appeal, Doyle does not specify which firearms he seeks that were erroneously awarded to Tonya. In the divorce decree, the trial court determined that each party shall retain the specific firearms that are currently in his or her possession. Tonya testified that she has a .357 pistol and a .380 pistol in her possession and that Doyle has in his possession a .357 pistol, a .45 pistol, and two .380 pistols. Tonya further testified that some of the guns had been destroyed in the fire at her residence on Aurora Road. Moreover, Doyle testified that a man was holding firearms for him, that certain firearms had been stolen from his residence, and that he had recovered a shotgun and a rifle belonging to him. Further, although they were not listed as premarital guns in his proposed findings, Doyle testified that he wanted an AK-47 and an AR-15 rifle that had been kept in the food-storage container referred to in the preceding paragraph. Doyle, however, indicated that those firearms were no longer in the food-storage container, and the testimony did not establish what had

happened to the weapons. The trial court addressed the division of the firearms to the extent possible given the testimony.

Affirmed as modified.

HIXSON and MURPHY, JJ., agree.

Gean, Gean & Gean, by: *Roy Gean III*, for appellant.

Walters, Allison, Parker & Estell, by: *Derick Allison*, for appellee.