

Cite as 2023 Ark. App. 155  
**ARKANSAS COURT OF APPEALS**  
DIVISION II  
No. CV-21-412

TRACY WILSON

APPELLANT

V.

JEFFERY WILSON

APPELLEE

Opinion Delivered March 15, 2023

APPEAL FROM THE BENTON  
COUNTY CIRCUIT COURT  
[NO. 04DR-20-1033]

HONORABLE JOHN R. SCOTT,  
JUDGE

REVERSED AND REMANDED

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**STEPHANIE POTTER BARRETT, Judge**

Appellant, Tracy Rogers, appeals the decree of divorce entered by the Benton County Circuit Court, arguing, among other things, that the court erred when it held (1) the retirement accounts held jointly by the parties were the separate property of Jeffery; (2) that she should have been awarded some benefit to the Washington County farm since marital funds were used to pay the debt or one-half ownership; and (3) that court erred in reducing her alimony to the point that it was insufficient to provide her the standard of living to which she was accustomed. Jeffery Wilson did not file an Appellee brief.

I. *Facts*

The parties were married on November 23, 2002, shortly after Jeffery was awarded a divorce from Martha Wilson on November 1, 2002. Tracy and Jeffery met when he hired her to manage an office for Central Pharmacy Services in Springdale. Tracy maintains she

was forced to resign from her job because of company policy that employees could not date. Tracy was office manager for a laser skin clinic after her marriage to Jeffery.

In the divorce from Martha, Jeffery received certain marital assets, which consisted of his 401(k) worth approximately \$156,000, a farm in Washington County, and stock options in Central Pharmacy Services where he was employed. Jeffery was also awarded one-half of the stock options he had acquired as part of his compensation at Central. Jeffery purchased Martha's one-half interest in the stock options acquired from Central for \$95,000. A \$171,000 line of credit was established by Jeffery, as the sole signatory, on December 24, 2002, using the Washington County farm as collateral.

Jeffery, Tracy, and Tracy's father did some remodeling to the farmhouse prior to their marriage. The parties lived in the farmhouse for approximately five years until the current marital home was purchased in 2007. When the Rogers marital home was purchased, Jeffery extended the line of credit from the original loan of \$171,000 to \$300,000 to provide a down payment on the marital home, remodeling, and for other incidentals for furnishing the home in 2007. There is approximately \$220,000 owing on this line-of-credit account. Tracy became pregnant with the parties' child after a couple of years of marriage. Tracy was a full-time mother by agreement of the parties until she left Jeffery and their child in 2017.

Central Pharmacy Services where Jeffery was employed was purchased by Cardinal Health shortly after the parties were married. Cardinal is a publicly held company. Cardinal agreed to recognize the Central employees' stock options as part of the buy-out agreement. The testimony shows that marital funds were used to pay monthly installments on the note

for Jeffery's purchase of the stock options. The stock options were exercised at various times during the marriage using marital funds, and the proceeds were placed in retirement accounts or annuities along with contributions of marital funds. There is currently a balance of \$8,000 on the stock-option loan.

The Washington County farm was owned as tenants by the entirety by Jeffery and Martha. Jeffery was awarded the property as his separate property during his divorce from Martha. Prior to their marriage, Jeffery, Tracy, Tracy's father, and others helped do some unspecified amount of work to remodel the home. After Tracy and Jeffery were married, the parties lived in the farmhouse for approximately five years. During the marriage, Jeffery constructed a storage building on the property and began to rent the property for approximately \$2,500 a year. Those rental funds were also deposited into joint marital accounts or into the retirement accounts. The farm is currently appraised at \$710,000 with approximately \$220,000 owed on the loan secured by a deed of trust.

In May 2017, Tracy separated from Jeffery and filed for separate maintenance. Tracy and Jeffery agreed to a separate maintenance decree in which Tracy would receive \$1,500 as monthly alimony, possession of the Tulsa condo, and certain personal property. Tracy agreed to give Jeffery custody of their child, who was twelve years old at the time, in the separate maintenance agreement. Their child is now sixteen years old and continues to reside with Jeffery. Jeffery was awarded custody by agreement in the divorce decree. Tracy was ordered to pay \$200 a month child support and was granted visitation rights.

Tracy lives in Tulsa, Oklahoma, in a condo purchased from joint retirement accounts. Jeffery cosigned the promissory note and mortgage to this property. The retirement accounts from which she took \$30,000 was funded from marital assets and stock sales, and it is undisputed marital property. In the divorce hearing, the circuit court granted Tracy the ownership of the condo with her to assume the outstanding indebtedness.

Tracy seeks either an unequal division of property or \$2,500 a month alimony for eight years because she testified that she doesn't live the lifestyle she was accustomed to when married to Jeffery. Tracy testifies that when she was married to Jeffery, she could go to the spa twice weekly and take vacations with Jeffery and their daughter. She testified she just wants to make memories with their daughter by taking her on vacations like they used to enjoy, so she needs Jeffery to fund these activities through alimony payments.

Tracy also testified that she does not have the earning capacity of Jeffery, who earns approximately \$160,000 annually, compared to her annual salary of approximately \$25,000. Tracy testified that she and Jeffery chose for her to be a full-time mother and homemaker, and she gave up her career to care for her child. The testimony shows she was gainfully employed after their marriage but before their daughter was born as an office manager at a laser skin treatment clinic. Tracy also says she has rheumatoid arthritis that has not impaired her ability to work but has been an issue at times and could be in the future. At the divorce hearing, the circuit court reduced her alimony payments to \$750 a month for four years. The court specifically noted that she was not a credible witness.

Tracy also seeks to be awarded one-half interest in the farm because she lived there for approximately five years after their marriage, marital funds were used to pay down the indebtedness, and she later worked together with Jeffery on building a storage building on the property.

The circuit court ruled from the bench as to the following issues: property division; alimony; granting of the divorce; custody and support of the parties' child; and approving the division of the property that was not in issue. The court ordered that the marital home in Rogers be sold and the equity be divided equally between the parties. The court found that the Washington County farm and the retirement accounts were Jeffery's separate property. The court awarded Tracy the condominium in Tulsa as her separate property with her to assume the indebtedness.

## II. *Standard of Review*

A circuit court's findings of fact with respect to division of property in domestic-relations cases will be affirmed unless clearly erroneous or clearly against the preponderance of the evidence. *Baker v. Baker*, 2013 Ark. App. 543, 429 S.W.3d 389. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that the circuit court has made a mistake. *Hunter v. Haunert*, 101 Ark. App. 93, 270 S.W.3d 339 (2007). In reviewing a circuit court's findings of fact, we give due deference to the circuit court's superior position to determine the credibility of witnesses and the weight to be accorded their testimony. *Fletcher v. Stewart*, 2015 Ark. App. 105, 465 S.W.3d 378.

It is a well-settled presumption that property placed in both spouses' names is held in tenancy by the entirety and is marital property. *McKay v. McKay*, 340 Ark. 171, 8 S.W.3d 525 (2000). Clear and convincing evidence is required to overcome this presumption. *Powell v. Powell*, 82 Ark. App. 17, 110 S.W.3d 290 (2003). Unless the presumption is overcome, the property shall be distributed one-half to each party. Ark. Code Ann. § 9-12-315(a) (Repl. 2020). When a husband and wife hold real property as tenants by the entirety, it is presumed that the spouse who furnished the consideration made a gift in favor of the other spouse, and this presumption must also be rebutted by clear and convincing evidence. *Collins v. Collins*, 2010 Ark. App. 506. All earnings or other property acquired by each spouse after marriage must be treated as marital property unless it falls into one of the statutory exemptions contained in Ark. Code Ann. § 9-12-315(b). *Wagoner v. Wagoner*, 294 Ark. 82, 740 S.W.2d 915 (1987). The burden is on the party who asserts an interest in the property to establish that it is, in fact, separate property. *Aldridge v. Aldridge*, 28 Ark. App. 175, 773 S.W.2d 103 (1989).

In an award of alimony, the court must consider the provisions of Ark. Code Ann. § 9-12-315(a)(1)(A) in making its determination of whether alimony should be awarded or in what amount.

### III. *Retirement and Annuity Accounts*

Tracy's first point of appeal is that the court erred in declaring the parties' joint retirement accounts as Jeffery's separate property. Jeffery acquired stock options from his employer, Central Pharmacy Services, as incentive benefits. In his divorce from Martha,

Martha was entitled to one-half the stock options acquired while they were married. Jeffery elected to buy her stock options in Central for \$95,000. On December 24, 2002, Jeffery obtained a \$95,000 line of credit to purchase Martha's stock options. This loan was obtained approximately one month after his marriage to Tracy. Shortly after their marriage, Cardinal Health, a publicly traded company, bought out Central Pharmacy Services, allowing its employees' stock options to be converted to options in Cardinal stock. Jeffery was able to exercise the stock options in Cardinal Health stock at various times during the marriage. The parties agreed that the funds from the sale of Cardinal stock were placed into joint retirement accounts, and marital funds were deposited as well into the accounts. Jeffery's 401(k) account was also rolled over and interspersed into the joint retirement accounts. Jeffery does not dispute that his separate moneys were comingled with marital funds. Neither party could explain to the circuit court what funds were marital funds and what funds were proceeds from the sale of stock.

The parties were married and lived together for fifteen years prior to their separation in May 2017. Their testimony clearly indicated that what might have been separate funds from the exercise of the stock options was commingled with marital funds. In this case, Jeffery failed to show that the funds maintained their separate character primarily because of the difficulty of tracing such funds over the course of a nineteen-year marriage at the time of the divorce. *See Canady v. Canady*, 290 Ark. 551, 721 S.W.2d 650 (1986). It is undisputed that the retirement accounts and annuities were jointly held. The law applicable to personal property held by the entirety, accounts in particular, was clarified in *Lofton v. Lofton*, 23

Ark. App. 203, 745 S.W.2d 635 (1988). In *Lofton*, funds were placed in certificates of deposit in the joint names of the parties much as the funds from the stock sale were placed into retirement accounts in joint names in this case. The court held that once property is placed in the names of persons who are husband and wife without specifying the manner in which they take, there is a strong presumption that the property is owned by the parties as tenants by the entirety. *Id.* at 209-10, 745 S.W.2d at 639. The court further stated that the presumption may be overcome only by clear and convincing evidence that the spouse did not intend to make a gift of one-half interest to the other spouse. *Id.* Clear and convincing evidence has been defined as evidence so clear, direct, weighty, and convincing as to enable the fact-finder to come to a clear conviction, without hesitation, of the matter asserted. *Id.*; see also *Glasgow v. Greenfield*, 9 Ark. App. 224, 657 S.W.2d 578 (1983); *Reed v. Reed*, 24 Ark. App. 85, 749 S.W.2d 335 (1988). Jeffery did not show by clear and convincing evidence that the moneys received from stock sales was his separate property at the time of the divorce hearing in this case. The burden is on the party who asserts an interest in the property to establish that it is, in fact, separate property not subject to division. *Gorchik v. Gorchik*, 10 Ark. App. 331, 663 S.W.2d 941 (1984). Since neither party could recall how much of these accounts were funded from stock sales or how much were from marital funds, tracing of funds would not be possible in this instance by their own testimony. In cases where 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. See *Jackson v. Jackson*, 298 Ark. 60, 765 S.W.2d 561 (1989); *Boggs*

*v. Boggs*, 26 Ark. App. 188, 761 S.W.2d 956 (1988). Depositing the stock proceeds and marital funds into retirement accounts as opposed to investment accounts is some proof of intent that the retirement accounts were for the benefit of both parties when it was time for them to retire. We review divorce cases de novo and reverse the court's findings only if they are clearly erroneous or clearly against the preponderance of the evidence. See *Cuzick v. Lesly*, 16 Ark. App. 237, 700 S.W.2d 63 (1985).

The undisputed testimony of both parties showed that the retirement accounts were jointly held as tenants by the entirety and were funded with both separate and marital funds that cannot be traced. The circuit court's findings were clearly erroneous and clearly against the preponderance of the evidence that Jeffery intended to maintain the stock-sale proceeds as his separate property. We reverse and remand on this issue.

#### IV. *Washington County Farm as Separate Property*

Jeffery was awarded the Washington County farm as his separate property per the divorce settlement agreement approved by the circuit court on November 1, 2002. On November 12, 2002, Jeffery, an unmarried man, executed a promissory note to borrow \$171,000 and executed a mortgage on the farm on the same date to secure payment of the note. The property was Jeffery's separate property prior to his marriage to Tracy. Jeffery maintained the property as his separate property throughout the marriage.

Tracy's next argument asserts that the court did not consider either the sweat equity she invested in the farm prior to marriage by helping in the remodel of the farmhouse or that marital funds were used to pay the indebtedness on the farm debt acquired by Jeffery.

Further, she argues that the value of the farm increased while they were married, and she should be entitled to that increase in value.

As shown, Jeffery retained the character of the farm as his separate property throughout the marriage. The increase in value of the property during a marriage is nonmarital property, without exception, and should be returned to the owning party. Ark. Code Ann. § 9-12-315(b)(5). However, some benefit must be considered to the separate property, such as increasing the equity by virtue of the payments having been marital funds. In *Bagwell v. Bagwell*, 282 Ark. 403, 668 S.W.2d 949 (1984), the court held that a nonowning spouse is entitled to some benefit by reason of marital funds having been used to pay off debts on the owning spouse's nonmarital property. See also *Fell v. Fell*, 2015 Ark. App. 590, 473 S.W.3d 578; *Poole v. Poole*, 2009 Ark. App. 860, 372 S.W.3d 420; *Box v. Box*, 312 Ark 550, 851 S.W.2d 437 (1993). In *Fell*, the court acknowledged that all nonmarital property shall be returned to the party who owned it prior to the marriage unless the court shall make some other division as it deems equitable. The court must consider that some benefit might have occurred and render an equitable division based on the facts shown at trial. The circuit court was correct in finding that the farm is Jeffery's separate property, but it did not conduct an analysis to determine if Tracy was entitled to some benefit from her contributions. The nonowning spouse is entitled to have the circuit court consider the contribution of marital funds to the reduction of the indebtedness on the property of the owning spouse when balancing the equities in the property division. See *Ransom v. Ransom*, 2009 Ark. App. 273, 309 S.W.3d 204; *Coatney v. Coatney*, 2010 Ark. App. 262, 377 S.W.3d 381. The circuit

court's failure to consider whether Tracy was entitled to some benefit from her contributions to the debt reduction was erroneous and against the preponderance of the evidence. We find that the circuit court's finding that the farm was Jeffery's separate property was not clearly erroneous. On remand, the court should make specific findings as to what, if any, benefit Tracy should receive for her contributions.

#### V. *Alimony Award*

Tracy's last point on appeal is that alimony is insufficient as awarded by the circuit court in the final divorce decree and was an abuse of discretion based on the unequal division of marital assets. The primary factors to consider in awarding alimony are the financial need of one spouse and the other spouse's ability to pay. Ark. Code Ann. § 9-12-315. The trial court awarded Tracy the sum of \$750 a month for a period of four years. Tracy has collected alimony for the past four years at the rate of \$1,500 a month. No appreciable efforts have been shown by her to obtain employment that would provide more earning capacity. Instead, Tracy works for her paramour at her current earning level and has not shown substantive efforts to leave that employment to obtain a better job. Rehabilitative alimony was not shown to be effective during the past three and a half years. The court specifically stated that Tracy was not a credible witness. The court may have considered that no clear efforts had been made by Tracy to rehabilitate her circumstances in making a determination as to an appropriate amount of alimony. *Gilliam v. Gilliam*, 2010 Ark. App. 137, 374 S.W.3d 108; see Ark. Code Ann. § 9-12-315(a)(1)(A).

The law is well settled that property division and alimony are complementary devices that a circuit court uses to make the dissolution of a marriage as equitable as possible. *Cole v. Cole*, 82 Ark. App. 47, 110 S.W.3d 310 (2003). Because we are reversing and remanding for the circuit court to revisit the issue of division of the party's retirement accounts and conduct a "some benefits" analysis on the Washington County farm, the issue of alimony should also be revisited based on an equitable division of the parties' marital assets. *Smith v. Smith*, 2022 Ark. App. 514, 656 S.W.3d 198. The circuit court shall consider the statutory factors regarding alimony on remand and make written findings.

#### VI. Conclusion

We hold that the circuit court's division of the party's assets was clearly erroneous and against the preponderance of the evidence. Since we have previously held that property division and alimony are complementary devices that a circuit court uses to make the dissolution of a marriage as equitable as possible, we also hold that the issue of alimony shall be reconsidered on remand.

Reversed and remanded.

HARRISON, C.J., and MURPHY, J., agree.

*Kezhaya Law PLC*, by: *Matthew A. Kezhaya*, for appellant.

One brief only.