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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2008-CA-000715-MR  
AND  
NO. 2008-CA-000716-MR

CAROLYN RICE

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM GREENUP CIRCUIT COURT  
v. HONORABLE JEFFREY L. PRESTON, JUDGE  
ACTION NO. 07-CI-00250

JACKIE RICE

APPELLEE/CROSS-APPELLANT

### OPINION AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; VANMETER, JUDGE; LAMBERT,<sup>1</sup>  
SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: In this dissolution of marriage and division of marital property proceeding, Appellant, Carolyn Rice, appeals from an order of the Greenup Circuit Court. At issue are two aspects of the trial court's division of

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

marital property and marital debt, and its decision concerning temporary possession of the marital residence. Discerning no abuse of discretion in the trial court's ruling, we affirm.

In 2007, Carolyn<sup>2</sup> sought dissolution of her long-time marriage to Jack. A significant factor contributing to the parties' breakup appears to have been Carolyn's discovery that, over the course of a four-year period, Jack had been supporting the parties' adult son in Florida, wiring him money and permitting him to accumulate significant credit card debt on accounts that Jack had opened for him or permitted him to open in Jack's name. The classification and allocation of this credit card debt, totaling about \$65,000, is the principal source of disagreement between the parties in this proceeding. The other issues raised on appeal concern the trial court's award to Jack of one-half of Carolyn's IRA and the trial court's decision to award Jack temporary possession of the marital residence until its sale.

Turning first to the credit card debt, the trial court deemed the debt "marital," and to pay this obligation the marital home was ordered sold with the remaining proceeds to be divided equally between the parties. This amounted to allocating one-half of the home equity and the debt to each party. Carolyn argues that the trial court abused its discretion by classifying the debt as "marital." She argues that the debt is Jack's individual debt for which she should have no responsibility.

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<sup>2</sup> Throughout this opinion we have referred to the parties by their given names. This is for the sake of clarity and with no disrespect whatsoever intended.

The Supreme Court of Kentucky has articulated four factors to guide the determination of whether a debt is marital or non-marital: 1) whether the debt was incurred purchasing marital assets; 2) whether it was necessary for maintenance and support of the family; 3) economic circumstances of the parties; and 4) extent of participation and receipt of benefits. *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001).

Here, the debt incurred was not for asset purchase. However, it was incurred to provide financial support for the couple's son and his family. Although this financial support was necessary for a period of time due to the son's financial difficulties arising from a hurricane, ultimately the son purchased luxury items and likely incurred some debt in excess of that which was necessary to support himself and his family. As to the third *Neidlinger* factor, the parties' economic circumstance was not affluent, and Jack's monthly income was approximately four times that of Carolyn's. And, while it is uncontroverted that Carolyn had no participation in incurring the debt, she and Jack received the same indirect benefit.

Jack's decision to incur the debt represented the exercise of personal discretion by a married person based on his perception of a need or a desirable expenditure. It is not the province of a court to analyze the wisdom of such expenditures made by persons during their marriage and retrospectively make financial adjustments based on hindsight. Courts should respect the spending decisions of parties to an intact marriage and not take on the role of retrospective arbiter of good judgment. If the debt in question arose from truly outrageous

expenditures by the son with the knowledge and participation of his father, a court could relieve Carolyn of the burden of the debt. But the trial court did not see this as such a case, and its decision to classify the debt as marital debt may not be deemed an abuse of discretion.

As the classification of the credit card debt as marital debt must stand, we must also review the decision to assign one-half of the debt to each of the parties. “As with issues pertaining to the assignment of marital property, issues pertaining to the assignment of debts incurred during the marriage are reviewed under an abuse of discretion standard.” *Id.* at 523. Joint allocation of the credit card debt was but a part of the overall scheme implemented by the trial court to achieve a fair and equitable division of marital property and debts. By way of a protective cross-appeal, Jack asserts that the trial court erroneously deemed the entire value of the marital residence to be marital property despite substantial evidence that he made a major contribution toward its construction with separate, inherited non-marital funds. While he does not seek reversal of this aspect of the trial court’s ruling, he does offer it as illustrative of the equitable nature of the trial court’s comprehensive decision.

Jack’s argues that allocation of a particular debt in a dissolution proceeding should not be viewed in a vacuum, but must be viewed in light of the overall division of property and debts. Although Jack claims to have contributed \$77,000 of his separate funds toward construction of the marital home, he points out that the entire \$200,000 value of the residence was deemed to be marital.

Furthermore, after considering the parties' income and individual assets, the trial court awarded Carolyn \$500 per month in maintenance. Therefore, upon a comprehensive review of the trial court's division of property and debt, we discern no abuse of discretion in its allocation of one-half of the credit card debt to each party.

The next issue presented is whether the trial court erred in awarding one-half of Carolyn's IRA to Jack. Carolyn first points out that the trial court did not expressly classify her IRA as marital or non-marital. However, the record reflects that the parties were married in 1966, and we may judicially notice that Individual Retirement Accounts did not come into legal existence until 1974 with the enactment of the Employee Retirement Income Security Act (ERISA). Therefore, all of Carolyn's IRA funds were acquired during her marriage to Jack and, consequently, are presumed to be marital funds.

With respect to equal division of her IRA, Carolyn argues that the trial court's award violated KRS 403.190(4), which states in part: "If the retirement benefits of one spouse are excepted from classification as marital property, or not considered as an economic circumstance during the division of marital property, then the retirement benefits of the other spouse shall also be excepted, or not considered, as the case may be." The record reveals that Jack receives retirement benefits of \$104.12 per month from Life Insurance of Georgia. Carolyn contends that the trial court's failure to award her any of Jack's benefits precludes any award to Jack of her benefits. Neither of the parties' retirement accounts is of the type

and kind excepted from classification as marital property. Accordingly, Carolyn is left only with the argument that Jack's benefits were not considered as an economic circumstance during the trial court's division of property and therefore, that her benefits should not have been considered.

The trial court's failure to award any of Jack's meager retirement benefits to Carolyn does not mean that it failed to consider the benefits in its overall scheme of division and distribution. In fact, on the third page of its order, the trial court summarized the sources and amounts of Jack's monthly income, including that "The Respondent receives an additional \$104.00 per month from Life of Georgia." Consequently, the trial court clearly considered Jack's benefits as an economic circumstance when dividing the marital property. Thus, the record refutes Carolyn's contention.

Finally, Carolyn argues that the trial court erred by allowing Jack to live in the marital residence until its sale. The record reveals that Carolyn is living with her father, but Jack does not have an alternative residence. Additionally, both the court and Jack offered for Carolyn to share the residence, but she refused. Therefore, the trial court did not err in fashioning this short-term living arrangement.

For the foregoing reasons, the trial court's judgment is affirmed in its entirety.

VANMETER, JUDGE, CONCURS.

OPINION.

COMBS, CHIEF JUDGE, DISSENTING: I vigorously dissent as to the issue of the division of debt in this case.

The disposition of the “marital debt” fails to satisfy *any one* of the four criteria set forth by *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001), which is the guiding precedent on this issue. The facts of this case compel a different result both as to the judgment of the trial court and as to the result reached in our majority opinion.

Highly pertinent facts have not been discussed or developed – the very facts that fall grossly short of satisfying the *Neidlinger* factors. To the extent that they are necessary, I shall recapitulate those facts in an abbreviated fashion.

Jack and Carolyn married in 1966. Over the next forty years, Jack controlled the couple’s finances. In November 2006, Carolyn learned that for approximately four years, Jack had been supporting their adult son, Darrin, by sending money by wire transfers and by supplying him with multiple credit cards. Darrin used his father’s credit cards liberally and irresponsibly, accumulating approximately \$65,000 of debt.

After learning of the extensive debt, Carolyn took over the finances in an effort to stave off collectors. However, despite Carolyn’s vigorous protests and threat to resort to divorce, Jack opened yet another credit card for Darrin’s use. In exasperation, Carolyn filed a petition for divorce as she had threatened to do.

After two separate hearings nearly one year apart, the Greenup Circuit Court issued an order on March 14, 2008, dividing the Rices' property. It found that the \$65,000 credit card debt was marital and ordered the Rices to sell the marital home to pay for it. Under the terms of the final version of the order, Jack was to remain in the home until the sale occurs. Additionally, it awarded half of Carolyn's IRA to Jack while Jack must pay maintenance of \$500 per month to Carolyn. This dissent is focused solely on the characterization of the \$65,000 as marital debt.

Carolyn contends that the trial court erred when it characterized the credit card debt as marital. I agree. Kentucky Revised Statute(s) (KRS) 403.190 creates a presumption that *property acquired* during a marriage is marital. However, no such presumption exists for *debt acquired* during a marriage. *Bodie v. Bodie*, 590 S.W.2d 895, 896 (Ky. App. 1979).

Our Supreme Court has provided a list of factors to determine whether debt is marital or non-marital: 1) whether the debt was incurred purchasing marital assets; 2) whether it was necessary for maintenance and support of the family; 3) economic circumstances of the parties; and 4) extent of participation and receipt of benefits. *Neidlinger, supra*.

In the case before us, the trial court made several assumptions concerning the \$65,000 credit card debt. It acknowledged that Carolyn did not want to be responsible for any of it and that Jack admitted that most of it had been incurred by Darrin. Nonetheless, despite findings that totally fail to comport with



*Neidlinger*, it ordered that Carolyn should be responsible for one-half of the amount.

An analysis of the *Neidlinger* factors clearly compels an opposite conclusion. The debt was not incurred in order to purchase marital assets. It was not necessary for maintenance and support of the family. All of the children are grown, and the credit card debt was not for Jack's and Carolyn's support. Even if the term "family" is applied expansively to Darrin in his adult capacity as extended family, the record shows that Darrin amassed the charges on luxury items – not necessities.

The trial court also noted that Jack's monthly income is approximately four times that of Carolyn's (before maintenance). Furthermore, Carolyn did not participate in or receive any benefit from the acquisition of the debt. For years, she was completely unaware that it even existed, and the only person who received benefit from it was Darrin. I am persuaded that burdening Carolyn with half of this credit card debt constitutes an abuse of discretion by the trial court.

Our failure to correct this error essentially enforces a state of economic peonage on a spouse – regardless of gender – who is the victim of devastating economic waste committed by the other spouse. I am convinced that it is error for us to sanction such an inequity that *Neidlinger* meticulously addressed and sought to prevent.

Accordingly, I would vacate the judgment of the Greenup Circuit Court on this one issue and remand for entry of a new judgment consistent with *Neidlinger*.

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