

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000315-MR

SABRINA BLAKE

APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE LINDA R. BRAMLAGE, JUDGE
ACTION NO. 00-CI-00071

CRAIG BLAKE

APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING
** ** * * * * *

BEFORE: COMBS, DYCHE, and KNOPF, Judges.

COMBS, JUDGE: Sabrina Blake appeals from a December 1, 2000, decree and a January 16, 2001, order dissolving her marriage to the appellee, Craig Blake. Sabrina contends that the trial court made several errors with respect to its characterization and disposition of the parties' property in awarding Craig interest on the judgment and in denying her request for attorney's fees. We affirm in part, vacate in part, and remand.

The Blakes married in 1986 and separated in 2000. At the time of the divorce, both parties worked at Fidelity Investments -- Craig as a retirement plan specialist and Sabrina as a supervisor of customer service employees. Both earned

approximately \$44,000 per year. Although the parties agreed upon some of the issues regarding the division of the marital estate, most matters were resolved by the trial court after a hearing. The trial court entered its Findings of Fact, Conclusions of Law, and Decree on December 1, 2000. The judgment was altered in several aspects by the trial court's order of January 16, 2001, granting Craig's post-judgment motion. Additional facts relevant to the issues that Sabrina has raised in her appeal will be related as needed.

Sabrina first alleges error in the trial court's award of 432 shares of Intel stock to Craig as his non-marital property. That stock, valued at \$17,955 at the time of dissolution, was the major asset in the Fidelity Ultra Account, a jointly owned fund opened during the marriage. The remaining portion of the fund, valued at \$4,280, was stipulated as marital property and was divided equally between them. Sabrina maintains that the trial court erred in failing to treat the entire fund, including the Intel stock, as marital property subject to division.

As a reviewing court, we must defer to the trial court's underlying findings of fact. CR¹ 52.01. We will not disturb the findings of a trial court in a dissolution matter unless those findings are clearly erroneous or are clearly contrary to the weight of the evidence. Clark v. Clark, Ky.App., 782 S.W.2d 56, 58 (1990); Reichle v. Reichle, Ky., 719 S.W.2d 442 (1986). In order to reverse the decision of a circuit court in a

¹Kentucky Rules of Civil Procedure.

dissolution of marriage action, it must be apparent either that the lower court's findings of fact were not supported by substantial evidence or that the circuit court abused its considerable discretion. Perrine v. Christine, Ky., 833 S.W.2d 825 (1992).

In order to refute Sabrina's contention that the shares of Intel stock constituted marital property, Craig presented evidence tracing his purchase of 54 shares of the stock in December 1996 to his non-marital funds. The following facts relevant to this issue were never in dispute: the parties purchased a house in Lexington in 1994, using \$10,000 from Craig's mother as a down payment; when the parties sold the residence in 1996, they received more than \$10,000 at the closing; the money obtained at closing was placed in a joint checking account, the balance of which was never reduced below \$10,000 prior to Craig's withdrawal of \$8,000 to purchase the stock; the 54 stocks increased in number and value solely because of stock splits and not because of any further investment by the parties - financial or otherwise.

The only factual dispute for the trial court's consideration was whether the gift of \$10,000 from Craig's mother used to purchase the house was intended as a gift to Craig alone (as he claimed) or whether - as Sabrina testified - it was intended to be a gift to both parties. Sabrina claimed that the trial court erred in finding that the gift was to Craig and not to both of them. She argued that Craig's mother did not come forward and substantiate his claim that the gift was to him

alone. She also assigns as error the trial court's allocation of \$10,000 of the \$10,754 realized from the sale as attributable to Craig's down payment instead of to the improvements made to the property during the two years in which they lived in the home. She also argues that when non-marital funds are co-mingled in a joint account, "the first amount taken from the account is the marital funds." She cites no authority in support of this contention. Finally, she contends that Craig failed to overcome the presumption that the increase in the value of the stock was marital property.

After reviewing the record and the relevant arguments, we have found no error. Thus, we cannot disturb the trial court's findings and its characterization of the shares of Intel stock. KRS² 403.190(2) provides,

- (2) For the purpose of this chapter, "marital property" means all property acquired by either spouse subsequent to the marriage except:
 - (a) Property acquired by gift, bequest, devise, or descent during the marriage and the income derived therefrom unless there are significant activities of either spouse which contributed to the increase in value of said property and the income earned therefrom;
 - (b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;

. . . .

²Kentucky Revised Statutes.

- (e) The increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during marriage.

In determining whether an item is a gift, the court must consider four factors: (1) the source of the gift; (2) the intent of the donor; (3) the status of the marital relationship at the time of the transfer; and (4) whether there was any valid agreement that the transferred property was to be excluded from the marital property. Clark v. Clark, Ky.App., 782 S.W.2d 56, 62, citing O'Neill v. O'Neill, Ky.App., 600 S.W.2d 493 (1980). Donative intent is the primary consideration. Id. at 63.

Sabrina argues that in applying these criteria to the facts of this case, the court is compelled to conclude that the gift of \$10,000 was intended for both parties. She points out that although the \$10,000 check was made out solely to Craig, his mother intended that it be used to purchase a house for the both of them; that the gift was used to benefit both of them at a time when they "were happily married to each other"; that when the house was sold, the money was deposited in a joint account; and that there was no contrary agreement that the money should be excluded from the marital estate.

In Ghali v. Ghali, Ky.App., 596 S.W.2d 31 (1980), this Court held that a trial court's determination concerning the gift or non-gift status of an item must be upheld unless it is clearly erroneous. We agree that the issue presented a close call. However, in Angel v. Angel, Ky.App., 562 S.W.2d 661, 665 (1978), the court rejected the notion that title alone to real property

is controlling. Gifts from a spouse's relative are deemed to be non-marital unless it is demonstrated to the satisfaction of the trial court that the other spouse was named as a grantee for reasons other than the status of the marriage alone. Id. Thus, we believe the evidence that Craig was the sole payee on the \$10,000 check, coupled with Craig's testimony that the gift was intended for him alone, is sufficient to support the trial court's finding that the \$10,000 investment in the Lexington property was his non-marital property.

Sabrina argues compellingly that by allowing Craig to recover his entire non-marital investment upon the sale of the real property, the trial court encumbered the marital estate for the costs of improvements made during the marriage and other costs – such as closing costs and realtor's fees. However, while Sabrina testified as to numerous improvements made to the realty, there was very little proof offered as to the cost of those improvements. No proof was presented to establish whether the improvements caused the value of the property to increase. Thus, we have no basis to conclude that the court abused its discretion.

Furthermore, we believe that Craig's testimony and the documents introduced pertaining to the sale of the house and the purchase of the Intel stock satisfy the tracing requirements outlined in Chenault v. Chenault, Ky., 799 S.W.2d 575 (1990). It was undisputed that the stocks increased in number and in value solely due to changes in the stock market rather than due to any joint efforts of the parties during the marriage. Thus, we find

no error of the court in awarding the increase in the value of this non-marital asset to Craig. See Travis v. Travis, Ky., 59 S.W.3d 904, 910 (2001), which reiterated the holding in Goderwis v. Goderwis, Ky., 780 S.W.2d 39 (1989), that the increase in non-marital property during the marriage "due to general economic conditions" is not marital property.

Sabrina next argues that the court erred in its division of the Fidelity IRA account. She argues that the source of these funds was disputed. She stipulated in the trial court that the IRA, which was held in Craig's name, was commenced with both joint marital and non-marital funds. Of the \$13,000 deposited in the fund, Craig established that he "rolled-over" \$5,216.32 from a pre-marital asset, which constituted approximately 37.5% of the fund. The trial court's finding with respect to the source of funds is not clearly erroneous.

Sabrina argues that the entire IRA should be considered marital property. We disagree with that contention; however, we do believe that the court erred in its division of the increase in the value of the fund (which had grown to \$120,699 by the time of dissolution). The trial court allocated the increase in the IRA during the marriage between the marital and nonmarital interests according to the percentage that each interest represented in the original \$13,000 used to establish the IRA. However, unlike the passive increase in value of the shares of Intel stock discussed above, the evidence revealed that this IRA was actively managed and was moved from one account to another by one or both of the parties and that numerous transactions took

place over the course of the marriage affecting the value of the account.

In Travis v. Travis, supra, the Kentucky Supreme Court discussed the evidence that must be provided and the considerations that the court must make in determining how to characterize the increase in an asset containing both marital and non-marital components.

An item of property will often consist of both nonmarital and marital components, and when this occurs, a trial court must determine the parties' separate nonmarital and marital shares or interests in the property on the basis of the evidence before the court. Kentucky courts have typically applied the "source of funds" rule to characterize property or to determine parties' nonmarital and marital interests in such property.

When the property acquired during the marriage includes an increase in the value of an asset containing both marital and nonmarital components, trial courts must determine from the evidence "why the increase in value occurred" because "where the value of [non-marital] property increases after marriage due to general economic conditions, such increase is not marital property, but the opposite is true when the increase in value is a result of the joint efforts of the parties." KRS 304.190(3), however, creates a presumption that any such increase in value is marital property, and, therefore, a party asserting that he or she should receive appreciation upon a nonmarital contribution as his or her nonmarital property carries the burden of proving the portion of the increase in value attributable to the nonmarital contribution. By virtue of the KRS 403.190(3) presumption, the failure to do so will result in the increase being characterized as marital property.

Id., at 59 S.W.3d 909-911.

The IRA account was invested in various ways during the marriage; the funds were not put into one account and then left unattended by the parties. Craig admits that he managed the account throughout its existence and used his expertise in investing these funds over the years. However, his argument overall tends to minimize the efforts made by the parties with respect to the account, a result that would tend to attribute its increased value to be the product of general economic conditions. He contends that "the only true transactions total 16 and are over the course of the parties['] 14 year marriage." Contrary to the formula of Travis, the trial court did not analyze from the evidence why the IRA had increased in value but instead made a pro-rata division of the increase based on the marital/non-marital interests that had represented the original source of the account.

We cannot find sufficient evidence in the record to overcome the statutory presumption that the increase in the value of this asset was attributable to anything other than the joint efforts of the parties and that it was, therefore, marital in character. Even if the court had undertaken the evaluation analysis outlined in Travis, there was no reliable evidence from which it could ascertain – without speculating – what portion of the increase was due to vagaries of the stock market or what portion was attributable to the parties' efforts and skill in choosing the various investments. Thus, on remand, the trial court should award Craig his original contribution (\$5,216.32) as

his non-marital property and should treat the remainder of the fund as marital property subject to division between the parties.

Next, Sabrina contends that the trial court erred with respect to their vehicles. First, she argues that the court erred in accepting the values for the vehicles provided by Craig, values which she alleges do not allow for a mileage adjustment. She also alleges error in the court's failure to award her the sum of \$3,000, the amount stipulated as her non-marital interest in her vehicle.

We find no error in the court's valuation of the two automobiles. Both parties submitted valuations based on competing "blue books." There was no error in the trial court's adoption of the values submitted by Craig.

We agree with Sabrina, however, that the court erred in failing to award her \$3,000 of the value of her vehicle as her non-marital property. It was stipulated that Sabrina invested \$3,000 of her own funds to purchase the Camry, which was owned by the parties at the time of the dissolution. The fact that the Camry decreased in value is not significant; regardless of whose values the trial court used, the vehicle was worth more than \$3,000 at the time of dissolution. Just as Craig received his \$10,000 non-marital interest in the proceeds of the sale of the marital residence, so should Sabrina have been awarded her non-marital interest in the vehicle without reduction for depreciation. Chenault, supra. Thus, on remand, the trial court is instructed to award Sabrina her non-marital interest and to

re-calculate the marital/non-marital portion of the value of the Camry.

Sabrina alleges error in the failure to require Craig to pay her half of \$3,925, the value of the automobile awarded to Craig. We agree with Sabrina that this appears to have been an oversight. In its original decree, the trial court determined the value of both cars to be very nearly the same and awarded each party his and her respective automobile. In its amended judgment, the court adjusted its finding concerning the marital interest in Sabrina's car and ordered that she pay half the marital equity to Craig. It did not otherwise alter its decree with respect to the marital portion of Craig's vehicle nor did it make a corresponding order that he pay Sabrina one-half the marital equity in his vehicle.

As Craig points out, the marital estate does not have to be divided equally. See Wood v. Wood, Ky.App., 720 S.W.2d 934 (1986). While we find no abuse of discretion in the trial court's overall division of the marital property, we would nonetheless direct the court to re-visit this portion of its judgment to ascertain whether this valuation was an oversight and to adjust the judgment accordingly or to determine whether it had intended this particular unequal but equitable division and to let it stand unaltered.

Sabrina has also questioned the award of interest on the liquidated portions of the judgment. However, we find no error. See KRS 360.040 and Cochran v. Cochran, Ky.App., 746 S.W.2d 568 (1988).

Sabrina argues that in calculating the parties' equity in the marital residence (of which she was ordered to pay Craig half), the trial court erred in failing to deduct \$1,400 owed for the carpeting in the house. While the court may have erred in concluding that the carpet debt was not a marital debt, it was not tantamount to a mortgage or lien which would affect the parties' equity in the home. Craig is correct in stating that the court has considerable discretion in the allocation of marital debts. Sabrina was allowed to remain in the marital home during the separation. Furthermore, she was given one year in which to re-finance the house before paying Craig his share of their equity. For these reasons, we find no abuse of the trial court's discretion in requiring that Sabrina be charged with the debt related to the carpeting. See, O'Neill, supra.

Finally, Sabrina contends that the trial court erred in failing to make an award for attorney's fees and in refusing to allow her to establish fault in determining her entitlement to those fees. She alleges that Craig was awarded more assets in the decree of dissolution and that his marital misconduct was the cause of her need for an attorney in the first instance.

This decision on appeal – particularly with respect to the Fidelity IRA fund – will leave the parties on an even more level financial footing. As we have noted, their incomes are nearly the same. Under these circumstances and considering that the allocation of attorney's fees is entirely within the discretion of the trial court, see Tucker v. Hill, Ky., App., 763 S.W.2d 144, 145 (1988), we are unable to discover any inequity in

the decision of the trial court to deny Sabrina's request for her attorney's fees. She has not cited any authority to substantiate her argument that she should be able to present proof of fault in the break-up of the marriage to establish entitlement to an attorney's fee. Thus, we will not disturb the decision of the trial court not to award Sabrina any amount for her attorney's fees.

The judgment of the Boone Circuit Court is affirmed in part, vacated in part, and the matter is remanded for entry of a new judgment consistent with this Opinion.

DYCHE, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: While I agree with most of the majority opinion, I do not agree with the portion of the opinion which reverses the trial court for its failure to award Sabrina her full \$3,000.00 non-marital contribution to the purchase of the 1996 Camry. As a general rule, vehicles depreciate in value. Just as an increase in value of non-marital property may be considered marital or non-marital depending upon the circumstances, I believe that the vehicle's depreciation is relevant to a determination of Sabrina's rights to recover her non-marital contribution. By allocating the depreciation proportionately to the marital and non-marital interests, the trial court attempted to divide fairly the respective interests in the Camry. In contrast, in restoring

to Sabrina her entire non-marital contribution without regard to depreciation, the majority effectively deems all of the depreciation to be marital. This result does not accurately reflect the parties' respective interests in the Camry.

Brandenburg v. Brandenburg,³ sets out the guidelines for apportionment between marital and non-marital property.⁴ The interests should be apportioned in the same percentages as their respective contributions to the total equity in the property. The relationships between the non-marital contribution and the total contribution, and between the marital contribution and the total contribution, are reduced to percentages and then multiplied by the equity in the property at the time of distribution to establish the value of the non-marital and marital properties.⁵ This formula is expressed as follows:

$$\frac{\text{Non-marital contribution (NMC)}}{\text{Total contribution (TC)}} \times \text{equity}(e) = \text{total non-marital property}$$
and

$$\frac{\text{Marital contribution (MC)}}{\text{Total contribution (TC)}} \times \text{equity}(e) = \text{total marital property}$$

Although the Brandenburg formula is typically used to allocate the increase in value of property containing both marital and non-marital interests, I find no authority which would preclude the formula being used to allocate the depreciation of such property. The record in this case shows that Sabrina purchased the Camry for approximately \$21,000.00,

³ Ky. App., 617 S.W.2d 871 (1981).

⁴ See also Newman v. Newman, Ky., 597 S.W.2d 137 (1980).

⁵ Id. at 872.

using a \$3,000.00 down-payment in non-marital funds and financing the balance. At the time of the dissolution, the trial court found that the Camry had depreciated to \$9,725.00. Sabrina used \$18,200.00 in marital funds to pay the loan, leaving a debt balance of \$2,800.00. This leaves a total equity of \$6,925.00. Using the Brandenburg formula, the trial court calculated the marital and non-marital interests as follows:

$$\frac{3,000.00 \text{ (NMC)}}{18,200.00 \text{ (TC)}} \times 6,925.00 \text{ (e)} = \$1,148.48 \text{ (Sabrina's non-marital property)}$$

and

$$\frac{15,200.00 \text{ (MC)}}{18,200.00 \text{ (TC)}} \times 6,925.00 \text{ (e)} = \$5,783.52 \text{ (Total marital property)}$$

I find no error in the trial court's use of this calculation. Accordingly, I would leave it undisturbed. However, I agree with the majority that the trial court appears to have overlooked its adjustment of Sabrina's non-marital interest in the Camry. In its initial order, the trial court valued Sabrina's Camry (less her unreduced non-marital interest) in the same amount as Craig's 1994 Geo Prism: \$3,925.00. Accordingly, the court awarded each vehicle to its respective owner without any offset in payment. In its amended order, the trial court adjusted its finding concerning the marital interest in the Camry, and it ordered her to pay half of the marital equity (\$2,891.50) to Craig. But in so doing, the trial court failed to offset the value of the Prism against Sabrina's equalizing payment.

As the majority correctly points out, the trial court's calculation does not evenly divide the marital interests in the vehicles. The total marital value of both vehicles is $(3,925.00 + 5,783.52 =)$ \$9,708.52. Half of this amount is \$4,854.26. To properly equalize the division of the vehicles, the trial court should have required Sabrina to pay Craig \$929.26, not \$2,891.50.⁶ Although the trial court was not required to equally divide these assets, the trial court's initial decision suggests that it intended an equal division, and the amended judgment does not indicate otherwise. Consequently, I agree with the majority that this issue should be remanded, but only to clarify whether it intended this unequal division of the vehicles.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Bernard J. Blau
Cold Spring, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

D. Anthony Brinker
Covington, Kentucky

⁶ The trial court allocated the Prism to Craig, leaving him with a deficit in the asset division of $(4,854.26 - 3,925.00 =)$ \$929.26. Likewise, the trial court allocated the Camry to Sabrina, leaving her with a surplus of $(4,854.26 - 5,783.52) = -$ \$929.26.