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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NOS. 2001-CA-001926-MR & 2001-CA-001946-MR

ARTHUR MARTIN APPELLANT/CROSS-APPELLEE

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 96-CI-04228

JULIA MARTIN APPELLEE/CROSS-APPELLANT

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

BEFORE: GUIDUGLI, HUDDLESTON, AND KNOPF, JUDGES.

KNOPF, JUDGE: Arthur Martin appeals and Julia Martin cross-appeals from a decree of the Fayette Circuit Court, entered July 19, 2001, dissolving their marriage, restoring their separate properties, and equitably dividing their marital estate. Arthur complains that the trial court awarded him too small a non-marital interest in the couple’s residence and awarded Julia too large a non-marital interest in a second piece of realty. Julia contends that the court should not have awarded yet a third piece of realty exclusively to Arthur, and that it should have included in the marital estate two other properties that Arthur allegedly dissipated. Most of these contentions have little merit and need

be addressed only briefly. We agree with Arthur, however, that his non-marital interest in the parties' residence was miscalculated, although not in the manner or to the extent he claims. We are obliged, therefore, to reverse the trial court's judgment in that one particular and to remand for an appropriate modification of the decree. In all other respects, we affirm.

We shall not attempt to summarize this litigation's long history. Suffice it to say that the couple married in July 1980 and separated near the end of 1996, Arthur petitioning for divorce in December of that year. Apparently there were no children born of the marriage. The marriage did generate, however, a series of real estate investments. Not only did the couple invest in their personal residence, as many couples do, but both parties also bought realty in the hope of generating income. Julia bought a duplex with her daughter from an earlier marriage and rented at least a portion of it. Arthur pursued what he refers to as a hobby of buying, refurbishing, and selling houses. Untangling the result of these transactions and assigning the various interests to the parties' marital and separate estates was the difficult task that fell to the trial court. Not surprisingly, perhaps, that task has not been easily accomplished. In October 1999, the trial court entered a decree dissolving the Martins' marriage and dividing their property. Julia successfully moved to have the property division reconsidered. Following additional discovery and a new trial, the court entered a second decree on July 19, 2001. It is from

that decree that both parties have appealed. We shall look first at the issues most readily resolved.

Julia contends that Arthur sometimes kept from her the proceeds of his house trading. In particular, she claims that he sold houses in June 1984 and July 1993 and dissipated what he received for them, *i.e.*, he devoted the proceeds, which were marital property, to non-marital purposes. The trial court erred, she contends, by refusing to include the sales prices of these houses in the marital estate and deeming the proceeds to have been received by Arthur as part of his share of that estate. We disagree.

Ordinarily, of course, the marital estate comprises whatever marital property the couple owns at the time of the first separation or dissolution decree.[1] Property disposed of before that time is simply no longer a part of the estate and is not subject to equitable division. Julia is correct, however, in her assertion that if one party to the marriage intentionally misappropriates or disposes of marital assets for non-marital purposes after separation or when separation is clearly contemplated, but before entry of a decree, the trial court may include those dissipated assets in the marital estate and charge them to the share of the dissipating party.[2] Here, however, Arthur's alleged dissipation took place long before the parties separated. Absent clear and convincing evidence that Arthur

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[1]KRS 403.190.

[2]Bratcher v. Bratcher, Ky. App., 26 S.W.3d 797 (2000); Brosick v. Brosick, Ky. App., 974 S.W.2d 498 (1998); Robinette v. Robinette, Ky. App., 736 S.W.2d 351 (1987).

even then intended to separate, his use of those assets must be deemed marital.[3] Julia presented no such evidence of Arthur's intent to separate at the time of these sales. The trial court did not err, therefore, by refusing to include in the marital estate assets that simply no longer existed.

Julia also contends that the trial court erred by deeming a house that Arthur purchased during the separation his non-marital property. Again, we disagree. In November 1997, as the parties were establishing separate households, Arthur purchased a house at 1135 Oakwood Drive in Lexington. He apparently borrowed the funds for the entire purchase price and soon thereafter repaid those obligations by obtaining a new loan secured by the house. The trial court assigned both the house and the debt to Arthur as his non-marital property. Julia correctly points out that all property, such as this house, acquired by either spouse after marriage and before a decree of separation or dissolution is presumed to be marital.[4] The presumption may be overcome, however, by a showing that the property was acquired after legal separation.[5] The trial court ruled, correctly we believe, that the debt by means of which Arthur obtained this house would be satisfied entirely with Arthur's post-separation funds and thus that the house was his separate property.

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[3] *Cf.* Brosick v. Brosick, *supra* (husband's use of marital funds to establish household with paramour provided sufficient evidence of his intent to end marriage).

[4] KRS 403.190(3).

[5] KRS 403.190(2)(c).

For his part, Arthur complains that the court erred by deeming another piece of realty Julia's and her daughter's property with no marital component. The court ruled that Julia and her daughter had acquired this property, a duplex at 384 Radcliffe Road in Lexington, in exchange for property Julia had inherited from her former husband. Arthur does not deny the inheritance. He contends, however, that Julia must have used marital property rather than inherited property to purchase the duplex because the sellers of the duplex signed the deed transferring it to Julia about a month before Julia's inherited funds became available. Julia testified, however, that the sellers lived in another state and conducted the transaction through an agent. Although they executed the deed and sent it to their agent before Julia had liquidated her inheritance, the agent did not deliver the deed to Julia until the closing, which took place immediately after the liquidation. The trial court did not clearly err by crediting Julia's account of this transaction and deeming the duplex hers and her daughter's with no marital component.[6]

We come then to Arthur's claim that he is entitled to a greater non-marital share of the couple's residence than the trial court assigned to him. Applying the so called Brandenburg[7]

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[6]Apparently Julia and her daughter financed about $10,000.00 of the duplex's purchase price and repaid this obligation with rental income. Arthur contends that the rental income was marital property and thus constituted a marital contribution to the acquisition of this asset. Whatever the merit of this argument, Arthur raised it for the first time in his reply brief on appeal. The issue was not properly preserved, and we decline to address it.

[7]Brandenburg v. Brandenburg, Ky. App., 617 S.W.2d 871 (1981).

formula to this property, a house and lot at 429 Dover Road in Lexington, the court determined that Arthur separately contributed 17% to its acquisition, that there had been an 83% marital contribution, and that the equity at the time of dissolution was $138,000.00. Accordingly,[8] the trial court awarded $23,460.00 to Arthur as his non-marital interest and divided the $114,540.00 marital interest evenly between the parties. Arthur takes issue with every aspect of this calculation. The trial court assigned too low a non-marital interest, he contends, too high a marital interest, and overvalued the equity at dissolution.

Arthur traced his non-marital interest in the Dover Road residence from his 1979 pre-marital investment in an unimproved lot on Blue Ridge Drive in Lexington. Arthur purchased the lot for $12,000.00 then borrowed $16,000.00 to construct a home on it. The parties married in July 1980. They moved into the home that fall and at about the same time

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[8]The Brandenburg formula assumes that the increase in value of an asset over time is non-marital property in proportion to the non-marital share of the principal investment. In cases where it was shown that the increase in value was due to the parties' efforts and not to general changes in the market, Brandenburg was held not to apply, and the increase in value was deemed to be marital. Goderwis v. Goderwis, Ky., 780 S.W.2d 39 (1989). In Travis v. Travis, Ky., 59 S.W.3d 904 (2001), our Supreme Court reversed this assumption. It ruled that all such increases in value should be presumed marital--i.e. that Brandenburg should not apply--unless the non-marital claimant shows that the increase in value was not due to the parties' efforts. Travis, in other words, makes Brandenburg (or any similar proportionality formula) the exception rather than the rule and places the burden of invoking the exception on the non-marital claimant. Relying on Travis, which appeared after the trial court's decision in this case, Julia argues in her reply brief that the trial court assigned too great a non-marital interest by assuming, under the Brandenburg rule, that the increase in value of the parties' residences was due to non-party factors. The presumption and burden-of-proof issues addressed in Travis were not raised in this case, however, and thus Travis may not bear on our decision. We shall rely instead on the old Brandenburg assumptions as the trial court, without objection from the parties, applied them.

refinanced it by replacing the $16,000.00 mortgage with one for $22,000.00. In other words, the asset had a total purchase price of $28,000.00, and after the refinancing there was a $6,000.00 non-marital contribution toward the purchase, the other half of Arthur's original investment having been withdrawn and devoted to marital purposes.

The couple sold the Blue Ridge residence in 1985 for $79,000.00. By that time, marital mortgage payments had reduced the purchase debt by another $942.00 to $21,058.00. According to Brandenburg, therefore, the ratio of non-marital contribution to total contribution was $6,000.00/$6,942.00 or 86.4% and the marital contribution was $942.00/$6,942.00 or 13.6%. Thus, of the $57,942.00 net proceeds from the sale,[9] 86.4%, or about $50,062.00, would be deemed non-marital under Brandenburg and 13.6% or about $7,880.00 would be deemed marital.

$48,150.00 of the sale proceeds were used to purchase the residence on Dover Road. If we assume, as did the parties and the trial court, that the non-marital and marital proportions remained the same, then the initial non-marital contribution was $41,602.00 (86.4% of $48,150.00), and the marital contribution was $6,548.00. Not long after they acquired the Dover Road home, the Martins invested an additional $11,000.00 of marital funds to improve it. The total purchase price thus became $59,150.00. Martin's non-marital contribution was $41,602.00/$59,150.00 or about 70.33%, and the marital contribution was $17,548.00/$59,150.00 or about 29.67%.

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[9] $79,000.00 minus the $21,058.00 outstanding mortgage.

Again the couple refinanced; they withdrew $43,000.00 of their investment to use for marital purposes and placed a mortgage in that amount on the property. At that point, they were left with a total contribution toward the asset price of $16,150.00.[10] Again assuming that non-marital and marital proportions remained the same, 70.33% of that amount--$11,358.00--was Martin's non-marital contribution and the remainder--$4,792.00 --the marital contribution. They eventually paid off the mortgage with marital funds. At the time of the decree, therefore, there was a total contribution of $59,150.00: Martin's non-marital contribution of $11,358.00, or about 19.2%, and a marital contribution of $47,792.00 or about 80.8%.

Based on an appraisal the parties stipulated to, the trial court found the value of the Dover Road house at the time of the decree to be $138,000.00. Soon after the hearing and before the trial court ruled, Martin sold the house for $124,000.00. The sale violated a standing order not to disturb the marital estate. Martin contends that the court erred by using the appraisal rather than the actual sale price as the house's value. Martin never moved, however, to supplement the record with evidence of the sale. In light of that failure, and in light of Martin's disregard for the court's order preserving the status quo, the trial court did not abuse its discretion by relying on the appraisal.

Thus, Martin's non-marital share of the Dover Road property was 19.2% of $138,000.00 or $26,496.00. The marital

[10] $59,150.00 minus $43,000.00.

share was the remaining $111,504.00, which the trial court divided evenly. Julia’s share of the Dover Road house, therefore, should have been $55,752.00 rather than the $57,270.00. the trial court awarded. On remand the trial court shall amend the decree accordingly.

In all other respects, for the reasons stated, we affirm the July 19, 2001, decree of the Fayette Circuit Court.

ALL CONCUR.

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