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# Commonwealth Of Kentucky

# Court of Appeals

NO. 2004-CA-000578-MR
AND
NO. 2004-CA-000599-MR

DARLENE GRIPSHOVER — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM BOONE CIRCUIT COURT
HONORABLE LINDA R. BRAMLAGE, JUDGE
ACTION NO. 02-CI-00044

GEORGE HENRY GRIPSHOVER — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; HENRY AND TACKETT, JUDGES

COMBS, CHIEF JUDGE: Darlene Gripshover appeals from the final judgment of the Boone Circuit Court, Family Division, entered on January 28, 2004, which dissolved her marriage to the appellee, George Gripshover. Darlene argues that the trial court erred in failing to award her any interest in real property that had been

transferred to an irrevocable family trust a few months prior to the dissolution. She also alleges that the trial court erred: (1) in characterizing a promissory note as primarily non-marital in nature, (2) in setting the amount and duration of maintenance, (3) in allowing George to deduct accelerated depreciation from his income in order to determine the appropriate amount of child support, and (4) in allowing George to claim both of their children as dependents in calculating his income taxes. George has filed a protective cross-appeal seeking reconsideration of the issue of maintenance if this Court should determine that Darlene is entitled to an enhanced award. After reviewing the record, we affirm the trial court's decision with respect to the promissory note. As to all other issues, we vacate and remand.

The Gripshovers were married in 1988. Darlene had two children from a previous marriage, who resided with the parties. Two children were born to George and Darlene in 1990 and 1995, respectively. Both were minors at the time of dissolution. Darlene was employed as a housekeeper during all but two years of the marriage. George worked with his brother, Camillus Gripshover (Charlie), in a farming operation in Boone County. George and Darlene separated in December 2001.

The primary contested issue in the dissolution concerned the proper disposition of the parties' interests (both

marital and non-marital) in real property. At the time of the marriage, George and Charlie each owned an undivided one-half interest in the farming business, which included more than 200 acres of land in Boone County. During the Gripshovers' marriage, the partnership's real estate holdings increased to more than 600 acres. The parties stipulated that this property was worth $3,124,500 at the time of their separation. In addition, the farming partnership owned other assets -- including equipment and livestock -- worth $1,128,170. It also held a promissory note in the principal amount of $1,021,925.

A few months prior to the parties' separation, George and Charlie consulted an attorney for estate planning purposes. At the brothers' direction, the attorney prepared several documents that were executed by both of the brothers and their wives in May 2001. The documents accomplished the transfer of nearly all of the property owned by the Gripshover families -- both real and personal -- into one of two entities: the Gripshover #1 Family Limited Partnership LTD and the Gripshover #2 Family Limited Partnership LTD.

The estate planning documents described Darlene and Barbara Gripshover, Charlie's wife, as limited partners, each having a 24% interest in the partnerships. George and Charlie were designated as both limited and general partners, possessing a 26% interest each. All four Gripshovers executed special

warranty deeds transferring their interests in the real property to Gripshover #1 partnership.

Acting in their roles as controlling and managing partners, George and Charlie assigned the partnership's rights in the real property to the George Gripshover Family Trust and the Camillus Gripshover Family Trust. Both trusts are irrevocable. George is the trustee of Charlie's trust, and Charlie is the trustee of George's trust. Although the trial court found that the parties' children are the beneficiaries of George's trust, the trust instrument itself provides that only George's children have a beneficial interest in the trust, excluding Darlene's two children from her previous marriage and leaving open the possibility of inclusion of children born to George in the future.

Each family signed documents transferring its interest in the farm equipment, crops, livestock, and the promissory note to Gripshover #2 Family partnership. The partnership then transferred all of this personal property to two revocable trusts, the George Gripshover Living Trust and a similar trust for Charlie. Each brother designated the other as the trustee of his trust, naming his children as the beneficiaries of the trust.

The trusts do not pay income to the beneficiaries. In their role as trustees of the reciprocal trust or as the

controlling partners of the two family partnerships, George and Charlie have complete control over the real property and the equipment used in the family farming business. The income derived by the partnership pays all of their living expenses and provides the men with a monthly allowance.

After filing her petition for dissolution, Darlene asked that the trusts be declared invalid. She alleged that she did not knowingly convey her interest in the real property. Alternatively, she argued that the trusts constituted a sham and that the brothers failed to transfer the property properly in order to establish a valid trust. Finally, if the trusts were determined to be valid, she contended that since George and Charlie were looking after their own best interests rather than those of the beneficiaries, they should be removed as the trustees.

The trial court bifurcated the proceedings. In January 2003, it conducted an evidentiary hearing pertaining solely to the estate planning scheme created in May 2001. Darlene has completed only ten years of education, and she was enrolled in special education classes for eight of those ten years. She testified that on several occasions throughout the marriage, George had directed her to sign documents without explaining to her what she was signing. She also testified that George had not consulted with her about estate planning prior to

his meeting with the attorney and that she was not informed about the May 2001 meeting with his lawyer until the night before it occurred. She noted that she did not understand the significance of the numerous documents which she signed at that time.

George denied Darlene's claim that the trusts were created to deprive her of her share of marital property. Rather, he testified that he and his brother were concerned about shielding their property from creditors and that they wanted to insure that the property would be passed on to their children at their deaths with minimal tax consequences.

The attorney who prepared the documents testified that he spent two to three hours with the four Gripshovers at the May 2001 meeting. He believed that Darlene understood the overall plan. Nevertheless, he also acknowledged that there was no discussion of the plan's implications with respect to the parties' respective rights to the property in the event of a dissolution of marriage.

On February 3, 2003, the trial court entered an interlocutory order with respect to the real property. It concluded that the land was no longer a marital asset subject to division in the dissolution action. The court found: (1) that Darlene had not been fraudulently induced into signing the documents transferring her interest in the property to the

partnership; (2) that Darlene had ample opportunity to read the documents, to ask questions, or to seek outside legal representation if she desired; and (3) that there was no evidence of "unlawful self dealing" by either of the trustees. It overruled Darlene's motion to terminate the trusts or to set aside the trustees.

Additional evidence was presented to the court at a hearing conducted on November 24, 2003. Following this hearing, the trial court entered a final decree resolving all of the remaining issues. It found that many of the items of farm equipment transferred to Gripshover #2 partnership had been owned by George prior to the marriage and thus constituted his non-marital property. The marital portion of the personal property was determined to be worth $163,565 and was encumbered with $37,129 in debt. George was permitted to retain possession of the property and was allocated the debt; Darlene was awarded cash equal to one-half of the equity in the property.

The trial court also found that George had a non-marital interest in the promissory note. The note was given as partial consideration for the sale of real property owned (in part) by George and Charlie prior to the parties' marriage. Darlene was awarded $92,999, representing one-half of $185,998, which was the portion found by the court as constituting the parties' marital interest in the note. She was also awarded her

vehicle and some furniture. In total, Darlene received property and cash worth $160,892.

George was also ordered to pay maintenance to Darlene in the amount of $600 per month for five years and to pay $199.32 weekly for the support of the two children during the nine months of the year that they reside with Darlene. No child support was ordered during the summer months when the children reside with George.

On appeal, Darlene first argues that the trial court erred in excluding the property from the marital estate and in failing to terminate the real estate trust. She also contends that the estate planning documents, prepared just a few months before her separation from George, constituted a sham. Citing, Siter v. Hall, 294 S.W. 767 (1927), she observes that George has not sufficiently relinquished control over the property as required by Kentucky law in order to create a valid *inter vivos* gift of the property to the trust. This reasoning is based on undisputed facts: that George and Charlie continue to use the property in their farming operation -- rent free -- as they did prior to the creation of the family trusts; that they continue to retain complete control and dominion over the property; that they alone receive the income generated by the use of the trusts' property.

George responds that the parties made a complete transfer of the property because the documents which they executed created an irrevocable trust.

> The fact that George and Charlie continue to farm the trust property in order to make a living for themselves and their children does not defeat the trust, nor does it make George's control unfettered. . . The trustee is governed by the terms of the trust, and the beneficial interest has been irrevocably transferred to the parties' children. Since the trust is irrevocable, [George] has lost the ability to defeat the transfer by any subsequent disposition.

(Appellee's brief at p. 5.)

After reviewing the record, we agree that the trial court's findings which address the creation of the trusts are supported by the evidence and that they are not clearly erroneous. Reichle v. Reichle, 719 S.W.2d 444 (Ky., 1986). However, given the circumstances of the transfer, we conclude that the trial court erred as a matter of law in determining that the transfer of title to the property extinguished Darlene's rights to an equitable share of the property as provided by KRS[1] 403.190, which provides as follows:

> (1) In a proceeding for dissolution of the marriage . . . the court shall assign each spouse's property to him. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors . . .

[1] Kentucky Revised Statutes.

> (2) For the purpose of this chapter, "marital property" means all property acquired by either spouse subsequent to the marriage . . .

The evidence is undisputed that at the time the trust was created, a divorce was not contemplated by either George or Darlene. All the witnesses agreed that there was no discussion of marital dissolution by the attorney. The documents themselves do not mention or contemplate dissolution. Darlene did not impliedly or expressly waive her equitable rights that were created by KRS 403.190. Rather, in conveying their respective interests in the property to the partnership #1, the parties intended to continue to enjoy the income generated by the property throughout their lives. However, ever since the dissolution, George alone has had the use of the property; he alone will derive the income generated by its use; and only his children will enjoy the beneficial interests in the trust.

The court's ruling to exclude the property from the marital estate has resulted in a highly disproportionate and inequitable division of property. The fact that legal title to the property was assigned to a family trust does not eliminate Darlene's equitable share of the property. In Kentucky, a spouse is entitled to an equitable share of the property accumulated through **joint efforts** -- regardless of how the property is titled, categorized, or characterized. See,

Goderwis v. Goderwis, 780 S.W.2d 39 (Ky. 1989); Sexton v. Sexton, 125 S.W.3d 258 (Ky., 2004). The pertinent statute provides unequivocal language in defining marital property, creating a presumption that property acquired after marriage but before a legal separation is deemed to be marital:

> All property acquired by either spouse **after** the marriage and **before** a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. (Emphasis added.)

KRS 403.190(3). We agree that the trial court erred in failing to fashion a remedy to award Darlene the portion of this property to which she is clearly entitled. Therefore, we vacate the judgment and remand on this issue.

There is no question that George has a non-marital interest in some portion of the real estate transferred to his family trust. On remand, he may present evidence to establish his non-marital interest in the property. The law dictates that during the time of the marriage, the joint efforts of the parties caused George's one-half undivided interest in the property to increase in value. Darlene is entitled to an equitable share of that increase -- as well as to a share of the increase in the equity attributable to a reduction of the

mortgages on the property paid with marital funds. Brandenburg v. Brandenburg, 617 S.W.2d 871 (Ky., 1981).

Because we conclude that Darlene is entitled to a share of the property pursuant to KRS 403.190, it is not necessary to address Darlene's argument that the trust should be declared a sham pursuant to the reciprocal trust doctrine. The trial court is not required to terminate the trust in order to make an equitable division of the property.

Darlene next argues that the trial court erred in calculating the marital portion of the $1,021,925 promissory note. There is no dispute that the note was given as consideration for 283 acres of property known as the "Richwood Farm." The property was purchased in 1982 -- six years prior to the marriage -- for $347,201 ($1,225 per acre) by George, his father, Charlie, and two other siblings.

The property was the subject of numerous transactions both before and after the Gripshovers married in 1988. In 1984, George's father died, leaving his one-fifth interest to all nine of his children. Both before and after the marriage, George and Charlie acquired the interests of all their siblings either by purchase, inheritance, or gift. They later sold the farm in three separate transactions: in 1989, 60 acres were sold for $210,000 ($3,500 per acre); in 1995, 99.75 acres were sold for $480,000 ($4,812 per acre); in 1996, the remaining 104.8 acres

were conveyed for $1,916,925 ($18,191 per acre). Some of the proceeds of the last sale were used for an exchange of property in Mason County. The remaining amount due ($1,021,925) was the subject of a promissory note payable to George and Charlie.

Two payments were made on the outstanding mortgage indebtedness against Richwood Farm during the marriage. One payment, which was made two or three days after the marriage, was determined by the trial court to have been made with non-marital funds –- sums earned by George prior to the marriage. The court's finding regarding this payment is supported by the evidence and will not be disturbed. Reichle, supra.

The court determined that the second payment was made with marital funds. Pursuant to the formula in Brandenburg, supra, the court concluded that a small portion of the farm (about 2%) constituted marital property based on this reduction in the mortgage. With the exception of these two payments, there was no evidence that any other reduction in the principal indebtedness on Richwood Farm was made with marital funds. George and Charlie used the proceeds from the various sales of the property to reduce the principal.

The trial court also found that one-third of the parties' interest (the portion of Richwood Farm purchased from George's sister, Kathy) was purchased with marital funds. In all, the court determined that the parties' one-half interest in

Richwood Farm -- and ultimately the note -- was 36% marital and 65% non-marital. Darlene was awarded $92,999, one-half of the marital portion (18%). We can find no error in the trial court's analysis of the facts or in its application of the law with respect to George's claim that the note was (in major part) obtained in exchange for his non-marital property.

However, Darlene contends that the parties' one-half interest in Richwood Farm was entirely marital in nature. Her argument is based on the theory that the property had decreased in value from the time that it was purchased in 1982 until 1988, the year of the marriage, extinguishing any equity in the property and eliminating George's claim to a non-marital component. Some of George's siblings had gratuitously transferred their interests to him and to Charlie near the time of the marriage. Therefore, Darlene believes that the property was worth no more than the amount of the mortgage indebtedness then in existence and that such a finding was both substantiated and compelled.

We disagree that the trial court's findings are clearly erroneous. The gifts of the property made by George's siblings did not necessarily warrant a finding that there was no equity in the property at the time of the marriage. The siblings who gave their interests to George and Charlie possessed only a very small interest in the property -– a 1/45$^{th}$

share inherited from their father. They were not engaged in the business of farming. We have reviewed the undisputed evidence of the amount for which the property was purchased and the amounts paid for the various parcels when sold. We conclude that the trial court was justified in finding that the property steadily increased in value -– an increase that was triggered by economic factors alone according to the evidence.

Darlene next challenges both the amount and the duration of the maintenance award. Because of our remand as to an equitable division of the marital estate, the trial court will also need to re-assess its award of maintenance. In deciding the amount and duration of maintenance, a trial court is required to consider all of the relevant factors contained in KRS 403.200(1). A court is accorded a great deal of discretion in making an award of maintenance, and its decision will be reversed only upon a showing that it abused its discretion or that it relied on findings that are clearly erroneous. Combs v. Combs, 622 S.W.2d 679 (Ky.App., 1981); Perrine v. Christine, 833 S.W.2d 825 (Ky. 1992).

With respect to the maintenance issue upon remand, we agree with Darlene's argument that there is no evidence to support the court's finding that she has "an average gross potential weekly income of $360.00" -- a sum that amounts to $18,720 per year. On the contrary, the record reveals that

Darlene currently earns less than $150 per week. She is more than fifty years of age. She has some health problems and a tenth-grade education; she possesses no tangible marketable skills. Her employment history has consisted entirely of cleaning other people's houses.

The highest income that Darlene ever earned in a single year was $13,000 when she was much younger. In the last several years of the marriage, she earned about one-half of that sum. At the time of dissolution, she was living in Mason County. As the evidence of record reveals, there are fewer potential clients for her services in largely rural Mason County than there would be in a more heavily populated area.

George is somewhat younger than Darlene and is in good health. His farming operation grosses more than $300,000 per year. His taxable earnings exceed $64,000 annually. In light of these disparities, we conclude that the trial court abused its discretion in improperly imputing income to Darlene for which there is no evidentiary basis and in limiting the duration of the award to five years. On remand, the trial court should assess the evidence concerning Darlene's abilities to meet her own needs without requiring that she exhaust her property in order to determine an award more reflective of the financial realities of their respective situations.

Darlene also argues that the trial court erred in calculating George's income for purposes of setting child support. Specifically, she contends that the court erred as a matter of law in allowing George to reduce his income by utilizing the accelerated depreciation provision of 26 U.S.C.A. § 179, a provision of the federal tax code. We agree.

KRS 403.212(c), the applicable portion of the child support statute, provides:

> For income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, "gross income" means gross receipts minus ordinary and necessary expenses required for self-employment or business operation. **Straight-line depreciation, using Internal Revenue Service (IRS) guidelines, shall be the only allowable method of calculating depreciation expense in determining gross income.** Specifically excluded from ordinary and necessary expenses for purposes of this guideline shall be investment tax credits or any other business expenses inappropriate for determining gross income for purposes of calculating child support. Income and expenses from self-employment or operation of a business shall be carefully reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support obligation. In most cases, this amount will differ from a determination of business income for tax purposes. . . . (Emphasis added.)

The deduction allowed by § 179 is not the straight-line depreciation discussed in the statute. The court, however, reasoned that § 179 does not relate to depreciation of any kind. We believe that it erred in failing to recognize that § 179 is essentially a provision allowing for accelerated depreciation relating to "tangible property . . . which is acquired by purchase for use in the active conduct of a trade or business." § 179(a) provides as follows:

> A taxpayer may elect to treat the cost of any section 179 property as an expense which is not chargeable to capital account. Any cost so treated shall be allowed as a deduction for the taxable year in which the section 179 property is placed in service.

Without the election allowed under § 179, George would be limited to recovering the cost of the property purchased for use in his farming business by treating it as a capital expenditure and depreciating it over a period of years. The deduction from income calculated on the basis of straight-line depreciation would be significantly less than the deduction possible under § 179. The deduction allowed by § 179 is precisely the type that Kentucky's statute has prohibited from being used to calculate an obligor's income in determining the proper amount of child support. Thus, the trial court erred in allowing George to utilize the accelerated depreciation formula.

Darlene also argues that the trial court erred in allowing George to claim both children as dependents for income tax purposes. In general, a trial court must allocate the tax exemptions so as to maximize the amount of support available to care for the children. Hart v. Hart, 774 S.W.2d 455, 457 (Ky.App., 1989). Such a savings is not always achieved by granting the exemption to the parent with the greater income. On remand, after revising its awards of maintenance and child support as indicated earlier, the trial court is directed to reconsider and to allocate the tax exemptions after a determination of how to effectuate the greater overall tax advantage.

The judgment of the Boone Circuit Court is affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

| BRIEF FOR APPELLANT/CROSS-APPELLEE: | BRIEF FOR APPELLEE/CROSS-APPELLANT: |
| --- | --- |
| D. Anthony Brinker<br>Covington, Kentucky | David A. Koenig<br>Florence, Kentucky |