

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2001-CA-002524-MR

MARGO RENEE JUETT

APPELLANT

v. APPEAL FROM OWEN CIRCUIT COURT  
HONORABLE STEPHEN L. BATES, JUDGE  
ACTION NO. 00-CI-00154

KIMBERLY RAY JUETT

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, McANULTY, and SCHRODER, Judges.

McANULTY, JUDGE. Margo Renee Juett appeals from the Owen Circuit Court's judgment and decree of dissolution of marriage with respect to various issues including child custody, property division, and attorneys fees. After reviewing the record, the applicable law and the arguments of counsel, we affirm.

The parties were married in 1981 and separated in November, 2000. They had two children during the marriage: Morgan, born in November 1985; and Joshua, born in October 1987.

Throughout the marriage Kimberly (Kim) was a self-employed farmer in partnership with his parents in a beef cattle operation. Margo has had several jobs but was employed as a caseworker for the Commonwealth's Cabinet for Families and Children during the last ten years of the marriage. The couple used Kim's income primarily for family expenses and Margo was allowed to spend her income as she pleased. In addition, Kim's relatives provided financial assistance especially in purchasing the family residence and farm property.

On October 23, 2001, the trial court entered its findings of fact, conclusions of law, and decree of dissolution. Generally, the court found that a large portion of the couple's residential and farm realty consisted of non-marital property belonging to Kim and awarded him both subject to his assumption of the debt associated with them and division of the marital portion. It held that each party should retain their own vehicles, bank accounts, retirement account, IRA account, life insurance, equipment, livestock, and furniture currently in their possession. The court ordered equal division of the marital property, which amounted to a total of \$162,563.78 or \$81,281.89 each. After deducting her retirement, deferred compensation, and money from a joint bank account, Margo was to receive a cash payment from Kim of \$67,752.89 as the balance of her share of the marital property. The court also granted the

parties joint custody of the two children with Kim serving as primary residential custodian and Margo paying child support of \$79.56 per week. The court ordered Kim to pay Margo maintenance of \$50.00 per week for three years or until she remarries. Finally, the court denied Margo's request for attorneys fees.

Margo raises numerous issues with respect to the trial court's judgment including child custody, property division, maintenance, and attorneys fees. Although she does not strenuously oppose joint custody of the children, Margo contends the court abused its discretion by designating Kim as the primary residential custodian, requiring her to pay child support, and prohibiting visitation when she is in the company of an acquaintance named Sterling Ford. Margo argues that Kim is a physically abusive, violent individual that abuses alcohol and recreational drugs. She points especially to an incident that occurred on November 24, 2000, where Kim was arrested and charged with assault in the fourth degree, resisting arrest, and terroristic threatening, after he allegedly verbally abused Margo and the couple's teenage daughter and shoved Margo several times. She also states that Kim hit her several other times and locked her out of the house when he was drunk. She also presented some testimony that Kim had used cocaine.

Under KRS 403.270(2), the trial court shall determine custody based on the best interests of the child. Factors

relevant to this determination include, inter alia, the wishes of the parents, the wishes of the child, the interaction of the child with his parents and siblings, the child's adjustment to his home, school, and community, and information and evidence of domestic violence. See KRS 403.270(2)(a), (b), (c), (d), and (f). "The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child. If domestic violence and abuse is alleged, the court shall determine the extent to which the domestic violence and abuse has affected the child and the child's relationship to both parents." KRS 403.270(3). See also Powell v. Powell, Ky., 665 S.W.2d 312 (1984).

As a general rule, the trial court has broad discretion in determining the best interests of children when awarding child custody. Krug v. Krug, Ky., 647 S.W.2d 790, 793 (1983); Squires v. Squires, Ky., 854 S.W.2d 765, 769 (1993). In reviewing a child custody determination, the appellate court reviews the trial court's factual findings for clear error. Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986); Basham v. Wilkins, Ky. App., 851 S.W.2d 491, 493 (1993). Findings of fact are clearly erroneous if they are manifestly against the weight of the evidence or not supported by substantial evidence. Wells v. Wells, Ky., 412 S.W.2d 568, 571 (1967); Poe v. Poe, Ky. App., 711 S.W.2d 849, 852 (1986). In addition, a trial court's

decision on the type of custody, i.e., sole or joint, should not be disturbed absent an abuse of discretion. Squires, 854 S.W.2d at 770; Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982).

Abuse of discretion implies arbitrary or capricious action under circumstances that result in an unreasonable and unfair decision. See Sherfrey v. Sherfrey, Ky. App., 74 S.W.3d 777, 783 (2002)( citing Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994)). More specifically, a trial court's designation of the primary residential custodian is a factual issue that should not be overturned if supported by substantial evidence. See Aton v. Aton, Ky. App., 911 S.W.2d 612, 615-16 (1995).

"Substantial evidence' is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people." Sherfrey, 74 S.W.2d at 782.

While Margo emphasizes Kim's abusive behavior toward her and alleged drug use, it is unclear how the children were directly affected by this behavior other than the November 24, 2000 incident. However, there was some evidence that Margo also demonstrated violent episodes and alcohol abuse. The trial court referred to various facts in support of its child custody decision including the proximity of the grandparents' farm, which the children visited often; the age of the children, both of whom are teenagers; the desire of the children to live with the father; and the life-long residency of the children in the

marital home where Kim continues to reside. Margo challenges the trial court's finding on the children's desire to live with their father, but the evidence indicated that since the summer of 2001, both children had eschewed an alternating living arrangement in favor of staying with their father. In addition, Margo had developed a close, romantic relationship with Sterling Ford, who has been convicted and imprisoned for drug trafficking and engaging in organized crime. The children had expressed some trepidation toward Ford and his presence influenced the daughter's preference for living with her father. It is clear the trial court thoroughly considered the various factors delineated in KRS 403.270. Based on the evidence as a whole, we cannot say the court's factual findings with respect to the children were clearly erroneous or that it abused its discretion in awarding joint custody with Kim as the primary residential custodian.

Margo contests the trial court's visitation restriction involving Sterling Ford. The court granted her liberal visitation, but stated it could not occur in the company of Sterling Ford. As indicated above, even though they did not testify at the hearing, the children had attempted to avoid contact with Ford. Under KRS 403.320, a non-custodial parent is entitled to "reasonable visitation" with the trial court empowered to issue orders on the frequency, timing, duration,

conditions, and method of scheduling. Generally, an appellate court should not reverse a trial court's determinations on visitation absent a manifest abuse of discretion or clear error in light of the facts of the case. Drury v. Drury, Ky. App., 32 S.W.3d 521, 525 (2000). In this case, the trial court awarded liberal visitation with a restriction based on the best interests of the children. Its restriction concerning Sterling Ford was supported by the evidence and was not unreasonable, and thus was not an abuse of its discretion.

Margo also challenges the trial court's property distribution. Her major complaint concerns the court's designation of the non-marital component of the marital residence and the 287-acre farm, which Kim worked partly in partnership with his father. The financial maneuvers associated with the transfers of these properties are somewhat complicated and were designed to avoid unfavorable tax consequences.

The marital home was transferred by Mark Juett, Kim's older brother, and his wife to Margo by deed dated September 18, 1982, for a stated sum of \$66,000. A few weeks later, the property was transferred to Kim and Margo as joint tenants through a straw-man transaction involving a trustee. The \$66,000 paid to Mark consisted of \$65,000 borrowed from Kim's maternal grandfather, Orville Rose, and \$1,000 in cash paid by Kim. In conjunction with the loan from his grandfather, Kim

executed a promissory note on September 30, 1982, payable to Orville Rose for \$65,000. When Orville Rose died in 1990, his wife, Frances Rose, inherited the bulk of his estate including the note. Dorothy Juett, the Roses' daughter and Kim's mother, subsequently inherited the note on Frances's death in 1997. Kim testified that the parties made no payments on the note and Dorothy testified that she does not expect any payments on the note. In addition, in July 1998, Kim borrowed \$50,000 from his parents to finance improvements in the house and executed a promissory note to Dorothy in that amount.

The farm property was transferred to Kim from Frances Rose by deed dated August 7, 1997, for a stated consideration of \$250,000. In order to avoid application toward the estate tax exemption, Kim executed a promissory note payable to Frances for \$250,000 at 7% interest. As with the above-described house note, when Frances died in September 1997, Dorothy Juett inherited the promissory note. Dorothy then decided to use the \$250,000 obligation to benefit her two sons, Mark and Kim, by giving them each ownership interest in half of the note with Kim to receive yearly gift credits of \$10,000 on his half of the note and his paying Mark \$125,000 in yearly installments of \$10,000 for Mark's half of the note. Consistent with this plan, Kim made three yearly \$10,000 payments (totaling \$30,000) to Mark in 1998, 1999 and 2000, out of a checking account in his

name. Kim also assigned to Mark his interest in several other certificates of deposit he inherited as co-owner with Frances Rose in the amount of \$36,500. Also, Dorothy credited Kim with \$40,000 or \$10,000 for each of the years of 1998, 1999, 2000, and 2001 as gifts. As further evidence of Kim's obligation to Mark, Kim executed a promissory note to Mark in August 1998 for \$88,500.00 representing the remaining balance owed to Mark (plus interest) on his half of the original note payable in yearly \$10,000 installments.

In its judgment, the trial court found the marital residence had a fair market value at the time of the divorce of \$145,000 based on the parties' appraisals<sup>1</sup> with an equity amount at the time of dissolution of \$95,000 (\$145,000 minus the \$50,000 debt to Dorothy). The court apportioned the non-marital and marital portions of the equity, 98.5% and 1.5%, respectively, under the formula set out in Brandenburg v. Brandenburg, Ky. App., 617 S.W.2d 871 (1981), based on its finding that only the \$1,000 cash down payment was made with marital funds resulting in \$1,425 of the equity constituting marital property. The court awarded Kim the residential property, assigned him the \$50,000 promissory note to Dorothy, and found the forgiveness of the \$65,000 note was a gift to Kim from his grandfather and/or mother.

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<sup>1</sup> Kim's and Margo's experts appraised the residential property at \$138,000 and \$145,000, respectively.

As for the farm realty, the trial court found that a current fair market value of \$477,000 based on the parties appraisals<sup>2</sup> with an equity basis at the time of dissolution of \$324,551 after subtracting \$67,449 (\$125,000 minus \$57,551 in payments) owed to Mark Juett and \$85,000 (\$125,000 minus \$40,000 in forgiven credits) owed to Dorothy Juett from the original \$250,000 promissory note to Frances Rose. It found that of the \$97,551 (\$36,500 plus \$21,051 plus \$40,000) in total contributions made to reduce the original purchase price and used to arrive at the equity amount, \$76,500 (\$97,551 minus the \$21,051 payments of principal to Mark) came from non-marital funds resulting in 78% of the total contributions being non-marital and 22% marital, so applying these percentages, \$71,401.22 (22% of 342,551) of the equity at the time of dissolution constituted marital property.

Margo questions the trial court's marital/non-marital classifications and its findings concerning which amounts constituted gift proceeds with respect to both pieces of realty. She also challenges the court's equal division of the marital property. Generally, a trial court is not required to divide marital property equally, but has discretion as long as the division is in just proportions considering the relevant factors. See Brosnick v. Brosnick, Ky. App. 974 S.W.2d 498, 503

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<sup>2</sup> Kim's and Margo's experts appraised the farm property at \$463,000 and \$491,000, respectively.

(1998); Russell v. Russell, Ky. App., 878 S.W.2d 24, 25 (1994). A trial court's designation or characterization of property as marital or non-marital also should not be disturbed unless it is clearly erroneous. See, e.g., Underwood v. Underwood, Ky. App., 836 S.W.2d 439 (1992); Calloway v. Calloway, Ky. App., 832 S.W.2d 890 (1992). The trial court's decision, however, is guided by certain statutory dictates that create evidentiary presumptions. For instance, KRS 403.190(3) provides that "[a]ll property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property . . ." This presumption has been held to include the increase or appreciation in property. See Travis v. Travis, Ky., 59 S.W.3d 904 (2001). This presumption may be rebutted or overcome by reasonably persuasive evidence that the property was acquired, inter alia, by gift, and with respect to any appreciation was not due to the efforts of the parties.<sup>3</sup> See KRS 403.190(2)(a) and (3); Travis, supra. This exception to the marital property presumption extends to gifts constituting forgiveness of debt by a creditor. Underwood, supra. Whether an item is a gift is a factual issue with the donor's intent

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<sup>3</sup> The court in Underwood indicated case law suggested a "clear and convincing" standard of proof, but the court criticized this heightened standard. See Underwood, 836 S.W.2d at 441-42 n.1. Although not specifically rejecting the higher standard, the Supreme Court in Travis utilized language suggesting a lower "reasonableness" standard of proof for rebutting the presumption consistent with the Underwood court's critique. See Travis, 59 S.W.3d at 912-13.

being the primary factor, but other factors include the source of the money used to purchase the item and the status of the marriage at the time of the transfer. Calloway, 832 S.W.2d at 892 (citing O'Neill v. O'Neill, Ky. App., 600 S.W.2d 493 (1980)). Gifts to an individual spouse are considered non-marital property to be assigned to the donee; whereas, gifts to both spouses by a third party are considered marital property subject to division based on the factors in KRS 403.190(1)(a)-(d). Id.

In the current case, the trial court characterized \$1,425 (2%) of the total equity of the residential realty and \$71,401.22 (22%) of the total equity of the farm realty as marital property and then included those amounts within its award of equal (50%) distribution of marital property between the parties. The initial characterizations were based largely on the court's findings that various contributions to the purchase of these properties involved gifts through forgiveness of debt. Margo admits that Kim presented sufficient evidence of the debts associated with the purchase of these properties through various promissory notes, but she argues the evidence was insufficient to show an intent by Kim's family to make gifts solely to Kim of either land or personality.

Despite Margo's attempt to attack the court's finding of donative intent by characterizing the Juett family's actions

as merely attempts to avoid taxation, we believe the trial court's findings are supported by sufficient evidence. The promissory notes obligated Kim alone and did not include Margo. It is undisputed that neither party made any payments on the \$65,000 note associated with the residential realty and that it was executed shortly after the parties were married and before there was any close relationship between Margo and Orville Rose. Dorothy Juett, who inherited rights to the note, also testified that she did not expect payment of this note. Similarly, the evidence showed that Dorothy had cancelled \$40,000 of the debt on the \$250,000 farm realty note. C.f. Underwood, supra (upholding trial court's finding of a gift to both spouses by forgiveness of debt for money borrowed by the couple from husband's father to purchase residence). In addition, the trial court's application of the Brandenburg formula to the appreciated value of the farm realty was proper given the evidence that Margo had made no contributions to the increased value through monetary infusion or improvement activities, so-called "sweat equity," and expert evidence that the general appreciation rate for real estate was 6% per year. Dorothy testified that her plan to forgive half of the \$250,000 note in yearly \$10,000 increments and have Kim pay Mark on the other half was intended to transfer ownership in the farm to Kim while treating the two siblings equally. As the trial court noted,

the purchase price of the farm in 1997 was understated to such an extent as to indicate a donative intent and constitute a tracing of the appreciated value to the gift. We believe Kim presented sufficient evidence to rebut the presumption that the appreciated value of the farm was marital property. Further, the equal division of the marital property was not an abuse of discretion especially considering the contribution of each spouse to its acquisition. See, e.g., KRS 403.190(1)(a).

Margo objects to the trial court's failure to include as marital property proceeds from the sale of cattle and the tobacco crop, and the value of living cattle on the farm. The court included half of the value of six bulls as marital property but found that the living cattle and proceeds from the sale of other cattle were encumbered by debt. It also found that the proceeds from the sale of the tobacco had been used for marital expenses. There was evidence that the farm partnership had an on-going line-of-credit evidenced by a \$25,849.88 note with Citizens Bank, another \$10,199.35 note with First Farmers Bank, and a \$15,000 note to Dorothy Juett related to operating expenses of the farm. Kim testified that he applied proceeds from the sale of cattle and tobacco for general operating expenses of the farm. He also provided bank records showing payments for farm expenses, such as feed and cattle purchases. Margo argues that the debt was incurred after the date of

separation and should not affect the determination of marital property as of that date. The record indicates, however, that the farm note to Dorothy Juett was incurred in June 2000, and the Citizens Bank line-of-credit note involved charges prior to separation. We believe there was sufficient evidence to support the trial court's finding that the proceeds from the sale of cattle and tobacco and the value of the live cattle were offset by debt and operating expenses.

Finally, Margo contests the trial court's award of maintenance and failure to award her attorneys fees. Under KRS 403.200(1), the trial court has discretion to award maintenance where a spouse lacks sufficient property, including marital property apportioned to her, for her reasonable needs, and is unable to support herself through appropriate employment. Factors relevant to this determination include the financial resources of the party seeking maintenance, the time necessary to acquire education and training to find employment, the standard of living established during the marriage, the duration of the marriage, the age and physical and emotional condition of the spouse seeking maintenance, and the ability of the paying spouse to meet his/her needs. KRS 403.200(2). A trial court has broad discretion in deciding whether to award maintenance in the first instance, as well as in determining the amount and duration of a maintenance award. Leveridge v. Leveridge, Ky.

App., 997 S.W.2d 1, 2 (1999); Gentry v. Gentry, Ky., 798 S.W.2d 928, 937 (1990).

The trial court found that Kim had a gross yearly income of approximately \$45,000 and Margo earned \$24,556 per year. Margo was apportioned \$81,281.89 in marital property with a net amount of approximately \$60,000 minus debts. She has been employed for several years but lacks a college education or special training. The parties were married for nineteen years and enjoyed a comfortable, but not extravagant lifestyle. While Kim was awarded assets of approximately \$700,000, much of it was non-marital farm and residential property with limited profit earning potential. Under the circumstances we cannot say the trial court's award of \$50 per week for three years to Margo was an abuse of discretion.

Under KRS 403.220, a trial court may order one party to pay a "reasonable amount" for the attorneys fees of the other party if there is a disparity in the financial resources of the parties. Even if a disparity exists, however, whether to order such payment is within the sound discretion of the trial judge. Neidlinger v. Neidlinger, Ky., 52 S.W.3d 513, 519 (2001)(listing cases); Underwood, supra. Under the decree, the marital property was divided equally, and a large portion of the property awarded Kim was real property. The court also assigned Kim most of the debt. As indicated earlier, Margo is employed

and will receive over \$60,000 in cash from the asset division.  
Margo has not shown that the trial court's failure to award her attorneys fees constituted an abuse of discretion.

The judgment of the Owen Circuit Court is affirmed.

SCHRODER, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, CONCURS IN RESULT ONLY.

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