

RENDERED: March 28, 2003; 2:00 p.m.

NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-002533-MR

AND

CROSS-APPEAL NO. 2001-CA-002604-MR

MELISSA FAYE WHITE AND  
JACK W. FLYNN

APPELLANTS

MELISSA FAYE WHITE

CROSS-APPELLEE

v. APPEALS FROM FRANKLIN FAMILY COURT  
HONORABLE REED RHORER, JUDGE  
ACTION NO. 99-CI-01456

ANTHONY ALLEN WHITE

APPELLEE/CROSS-APPELLANT

OPINION  
AFFIRMING

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BEFORE: JOHNSON, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: Melissa White appeals and Anthony (Tony) White cross-appeals from a decree of the Franklin Family Court dissolving their marriage. Melissa contends that the trial court awarded Tony too much non-marital property and awarded her too small an attorney fee; Tony maintains that he was unfairly saddled with a mortgage debt. Persuaded that the property and

fee awards and the debt assignment were all within the trial court's discretion, we affirm.

In 1991 an automobile accident left Tony partially paralyzed. His claims for damages were still outstanding in July 1993, when he and Melissa married. At the time of the marriage, Melissa was about twenty-four years old and Tony was about twenty-three. The couple's child, Tony, Jr., was born in 1994. In 1995 Tony settled his injury claims and received net awards of approximately \$300,000.00. Apparently this money was initially lodged in certificates of deposit (cds), but in short order the couple purchased a three-unit apartment, a residence, and various furnishings. Thereafter, until they separated in August 1999, they met their expenses with income from Tony's part-time work, interest on the cds, Tony's disability benefits, rental income from the apartments (which Melissa managed), and Melissa's income from baby-sitting and office cleaning. They also borrowed about \$50,000.00 against the equity in the residence. Their expenditures during that period included the purchase of two cars.

Melissa petitioned for dissolution of the marriage in August 1999. The trial court ruled that Tony's settlement was his non-marital property and that likewise those assets traceable to the settlement, primarily the cds and the realty, were his. It awarded Melissa her car and half of the marital

equity in the residence (according to the trial court's calculation only about \$600.00). The court also awarded custody of Tony, Jr., to Melissa and ruled that, as a sort of quasi-maintenance, she could live in the residence until Tony, Jr., turned eighteen, provided she made the mortgage payment and maintained the property.

Melissa contends that the realty the couple purchased should have been deemed marital property and divided equally. In support of this contention, she argues that Tony's settlement, at least a portion of it, should be deemed marital as compensation for lost marital income. She concedes that in Weakley v. Weakley<sup>1</sup> our Supreme Court ruled to the contrary. The Court there held that personal injury awards for pre-marital injuries are non-marital property regardless of how the damages are characterized and regardless of when the award is received. Although Melissa would have us overrule Weakley as unwise, this Court has no authority to disregard, much less to overrule, decisions by our Supreme Court.<sup>2</sup> Therefore, we have no authority to change the law as requested by Melissa.

Melissa next argues that even if Tony's settlement was initially his non-marital property, the realty at least should be deemed marital, as it was Tony's gift to the marriage. This

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<sup>1</sup> Ky., 731 S.W.2d 243 (1987).

<sup>2</sup> SCR 1.030(8)(a).

argument is based on the fact that the cds and realty were purchased in both parties' names with right of survivorship. Also, the couple apparently considered a pre-nuptial agreement disavowing any claim by Melissa to Tony's settlement, but then did not execute such an agreement. Melissa claims that their decision not to enter an agreement evidences Tony's intention to give her an interest in the settlement. The trial court refused to make that leap, however, and ruled instead that Tony's intention had only been for Melissa to have the property if he predeceased her during the marriage. We agree.

Record title, of course, does not establish whether property is to be deemed marital or non-marital.<sup>3</sup> The court must make that determination upon consideration of all the factors listed in KRS 403.190. Gifts from one spouse to the other or from one spouse to the marriage are possible,<sup>4</sup> but as with any purported gift, the donative intent and the delivery of a marital gift should appear with reasonable certainty.<sup>5</sup> Although it is clear in this case that Tony intended to use his settlement for the benefit of his family, it does not follow that he intended to give it away. He testified that he did not intend such a gift, and it would be surprising if he had. One

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<sup>3</sup> KRS 403.190(3); Angle v. Angle, Ky. App., 562 S.W.2d 661 (1978).

<sup>4</sup> Ghali v. Ghali, Ky. App., 596 S.W.2d 31 (1980).

<sup>5</sup> O'Neill v. O'Neill, Ky. App., 600 S.W.2d 493 (1980).

does not ordinarily give away one's livelihood. At any rate, the trial court did not clearly err by ruling that Tony's settlement and the realty purchased with it remained his non-marital property notwithstanding the provision in the deeds for his wife's right of survivorship.

Finally, Melissa contends that Tony should be made to pay more of her nearly \$7,000.00 attorney fees than the \$750.00 the court awarded. Tony has more income than she does—about \$1,600.00 per month to \$850.00, she claims—and he has substantially more property. Although it is true that a disparity in the parties' resources permits an award of attorney fees,<sup>6</sup> any such award and its size are matters left, according to our Supreme Court, "entirely within the discretion of the [trial] court."<sup>7</sup> Here the trial court felt that a portion of Melissa's legal costs was the result of Tony's intransigence, and it ordered Tony to pay that portion. Otherwise, the court abided by the general American rule that each party to litigation shall be responsible for her own representation.<sup>8</sup> Melissa's and Tony's resources are not so disparate as to make

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<sup>6</sup> KRS 403.220; Neidlinger v. Neidlinger, Ky., 52 S.W.3d 513 (2001); Glidewell v. Glidewell, Ky. App., 859 S.W.2d 675 (1993).

<sup>7</sup> Neidlinger v. Neidlinger, 52 S.W.3d at 519 (quoting Wilhoit v. Wilhoit, Ky., 521 S.W.2d 512 (1975)).

<sup>8</sup> Louisville v. Slack, Ky., 39 S.W.3d 809 (2001) (citing Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975)).

application of the general rule an abuse of the court's broad discretion.

In his cross-appeal, Tony contends that the almost \$50,000.00 mortgage debt on the residence, which was incurred for marital purposes including the purchase of Melissa's car, should have been divided evenly. Instead, the court assigned the entire debt to Tony. Tony is correct, of course, that debts are often assigned on the basis of whether they were incurred to purchase marital property and the extent to which the parties participated in undertaking them. Another important factor, however, "is the economic circumstances of the parties bearing on their respective abilities to assume the indebtedness."<sup>9</sup> The court need not divide marital debts evenly.<sup>10</sup> The court's goal must be, in addition to fairness, the economic viability of both new households emerging from the marriage. Here, the trial court obviously gave great weight to the fact that Tony, with his larger income and substantial assets, was in a much better position than was Melissa to shoulder responsibility for this marital debt. We are persuaded that this assignment, though somewhat burdensome to Tony, was not an abuse of the trial court's discretion.

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<sup>9</sup> Neidlinger v. Neidlinger, 52 S.W.3d at 523.

<sup>10</sup> *Id.*

In sum, neither the appeal nor the cross-appeal identifies grounds for relief. The family court's assignment and division of property and debt satisfied neither party's hopes, but it managed, we believe, to be both fair enough and practical enough. Accordingly, we affirm the August 21, 2001, decree of the Franklin Family Court.

ALL CONCUR.

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