

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000920-MR

VINAYAK P. BHAVALKAR

APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RON JOHNSON, JUDGE
ACTION NO. 99-CI-00375

AXIE JEAN BHAVALKAR

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment in a domestic case finding that the majority of certain retirement accounts of the parties were marital property. Upon review of the record, we affirm the trial court's finding that appellant failed to sufficiently trace nonmarital assets into the retirement accounts.

Appellant, Vinayak Bhavalkar, and appellee, Axie Jean Bhavalkar, were married on July 18, 1985. One child was born of the marriage on February 28, 1986, Ashley Bhavalkar, who was

emancipated at the time of the judgment at issue. During the marriage, Vinayak, an orthopedic surgeon, worked in various hospitals and, for some periods of time, had his own practice. Axie Jean has a Bachelor of Science degree in nursing and worked as a nurse for fourteen years of the marriage. The parties separated on June 25, 1999, and Axie Jean filed for divorce on June 30, 1999. The bifurcated decree of dissolution was entered on June 1, 2001, reserving, among other matters, issues of division of property. The hearing before the domestic relations commissioner was held on March 14, 2002. On March 18, 2004, the commissioner filed his report. Vinayak filed exceptions to the report as to the commissioner's finding that the majority of the parties' retirement accounts were marital and as to assignment of responsibility for an IRS debt. After a hearing on the exceptions, the trial court granted the exceptions as to responsibility for the IRS debt, but denied the exceptions as to the division of the retirement accounts. This appeal by Vinayak followed.

On appeal, Vinayak argues that he sufficiently traced his nonmarital interest in the retirement accounts. The retirement accounts consisted of three HSBC accounts totaling \$210,074.08, two Dreyfuss accounts totaling \$99,911.27, a Fidelity Investments account valued at \$86,493.69, and a Vanguard Group account valued at \$103,391.27.

Under KRS 403.190(3), there is a presumption that all property acquired during the marriage is marital. "This presumption must be rebutted by clear and convincing evidence." Brosick v. Brosick, 974 S.W.2d 498, 502 (Ky.App. 1998) (citing Browning v. Browning, 551 S.W.2d 823, 825 (Ky.App. 1977)). To rebut this presumption and show that certain property was acquired in exchange for property acquired before the marriage (KRS 403.190(2)(b)), the party must trace the property owned prior to the marriage into assets owned at the time of dissolution. Chenault v. Chenault, 799 S.W.2d 575 (Ky. 1990). Although the Court in Chenault relaxed some of the "draconian requirements" for tracing imposed in prior cases, the Court nevertheless retained the tracing requirement. Id. at 579.

At the hearing, Vinayak introduced a statement dated April 25, 1985, from the HSBC accounts which covered the period from January 1, 1984, through December 31, 1984. The statement showed deposits in the amount of \$118,022.46, contributions in the amount of \$11,563.98 and withdrawals in the amount of \$64,810.56, with an ending balance of \$64,775.88. The lower court found, and Axie Jean does not dispute, that the \$64,775.88 was Vinayak's nonmarital property. The lower court adjudged that \$31,372.00 in interest income in the accounts was marital under Mercer v. Mercer, 836 S.W.2d 897 (Ky. 1992), and that

Vinayak did not trace, by clear and convincing evidence, nonmarital property into the remainder of the HSBC funds.

Vinayak argues that he is entitled to the total amount of his deposits and contributions as of the date of the above statement, \$129,586.44, as his nonmarital property because the statement was sufficient proof he had this amount before the marriage. KRS 403.190(2). We do not agree. The statement clearly shows that \$64,810.56 was withdrawn from these accounts, and there is no evidence in the record of where this money went - whether it was reinvested or consumed. Accordingly, the \$64,810.56 was not sufficiently traced into assets owned at the time of dissolution.

As for interest earned on the HSBC accounts during the marriage, Vinayak argues that the lower court erred in adjudging these monies to be marital property under Mercer v. Mercer, 836 S.W.2d 897 (Ky. 1992). In Mercer, it was held that interest earned on nonmarital funds (from an inheritance) deposited in a savings account is income constituting marital property to be divided between the parties. In response to Mercer, the Legislature amended KRS 403.190 in 1996 to except the income derived from a gift, bequest, devise, or descent from the definition of "marital property". KRS 403.190(2)(a). It is Vinayak's position that the exception in KRS 403.190(2)(a) likewise applies to income from funds acquired prior to the

marriage, as well as income from inherited funds. Contrary to Vinayak's assertion, premarital property and inherited property are not interchangeable. KRS 403.190(2)(a) applies only to "[p]roperty acquired by gift, bequest, devise, or descent during the marriage and the income derived therefrom," and makes no mention of property obtained before the marriage. KRS 403.190(2)(e) excepts "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." And the Court in Mercer was quick to distinguish the increase in value of property from interest earned on property which the Court adjudged was income to be divided as marital property. Accordingly, the lower court in the instant case properly found the interest earned on the HSBC accounts to be marital property.

Vinayak also argues that he sufficiently proved that the vast majority of HSBC funds were deposited into the accounts prior to the marriage through introduction of his tax returns for eight out of the sixteen years of marriage. Indeed the tax returns for these years show no contributions to the HSBC accounts. However, the record does not contain the tax returns for the years 1990, 1991, 1992, 1998, and 1999. Vinayak further testified that he worked for hospitals for most of the marriage and could only make significant contributions to the HSBC

accounts when he was in private practice, which was prior to the marriage.

Axie Jean testified that Vinayak took care of all the parties' financial matters - bookkeeping, paying bills, and decisions regarding the retirement accounts. She testified that she worked fourteen years of the marriage, most years earning around \$32,000 a year and four years earning around \$58,000 a year. According to Axie Jean, all of her earnings over the years (estimated to be approximately \$500,000) were deposited into the parties' joint checking account. She testified that the parties lived very frugally and put most of their money away for retirement. She stated that it was her understanding that the HSBC retirement accounts were funded from the joint checking account.

A trial court's findings of fact in domestic matters will not be overturned unless they are clearly erroneous. Ghali v. Ghali, 596 S.W.2d 31 (Ky.App. 1980). In our view, the lower court did not err in finding that Vinayak's self-serving testimony and his selective set of tax returns were not clear and convincing evidence tracing his nonmarital contributions to the HSBC accounts, in light of Axie Jean's testimony regarding her financial contributions during the marriage and her understanding of the funding of the HSBC accounts. Accordingly,

the lower court properly adjudged all but the \$64,775.88 in the HSBC accounts to be marital property.

Vinayak also argues that he sufficiently proved that he sold five houses that he owned prior to the marriage and deposited the proceeds into the remaining accounts - the Dreyfuss, Vanguard and Fidelity accounts. Vinayak offered into evidence the deeds (one from 1977 for a Pennsylvania property, one from 1980 for a New York property, and one from 1980 for a different Pennsylvania property) evidencing his purchases of three of the five homes before the marriage. He further submitted a copy of the purchase contract (from 1980 for New York property) for another of the properties. However, Vinayak did not offer into evidence copies of any of the deeds demonstrating the sale of the properties during the marriage. The only purported documentary evidence of these sales in the record are copies of two checks from the same attorney trust account to Vinayak Bhavalkar, both dated July 24, 1998. One check in the amount of \$42,311.54 states that it is "FOR 526 Fulton St., Waverly, NY", and the other check in the amount of \$12,012.49 states that it is "FOR 311 Harrison Street, Sayre PA." The addresses on the two checks do appear to match up with the addresses on the 1980 Pennsylvania deed and the 1980 New York purchase contract.

During the hearing, Vinayak testified that he owned seven houses, four in New York and three in Pennsylvania, prior to the marriage and sold all seven during the marriage. According to Vinayak, the proceeds from these sales first went into the parties' joint checking account. At one point in the hearing, Vinayak testified that the sales proceeds ultimately went into the money market accounts; at another point, he testified that the sales proceeds rolled over into one of the Dreyfuss accounts.

There was no evidence of the sales price of these properties other than the copies of the two checks in question. Although these checks had the addresses of properties he owned listed on them, there was no proof that they represented the actual sales of the properties other than Vinayak's testimony. As noted above, copies of the deeds evidencing the sales of the properties, which would have been the best evidence of the sales and easy to obtain, were noticeably absent from the record. Further, while Axie Jean did not dispute that Vinayak purchased properties in New York and Pennsylvania before the marriage and sold them during the marriage, she testified that the mortgages on these properties were paid out of the parties' joint checking account during the marriage. Axie Jean stated that she had no idea what the amounts of the mortgages on the properties were or the ultimate sales prices of the properties. In our view, while

Vinayak did show that he purchased properties prior to the marriage, without documentary evidence as to the down payments, how much was paid on the mortgages during the marriage, how much (if any) of the increase in value of the property was due to general economic conditions and the amounts for which he sold the properties, the court didn't have sufficient information to apply the formula set out in Brandenburg v. Brandenburg, 617 S.W.2d 871 (Ky.App. 1981), to assign him his nonmarital share. Accordingly, the trial court did not err in finding that Vinayak failed to sufficiently trace his nonmarital interest in these properties.

For the reasons stated above, the judgment of the Harlan Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Russell D. Alred
Harlan, Kentucky

BRIEF FOR APPELLEE:

V. Katie Gilliam
London, Kentucky