No. 23263 - Nancy H. Mayhew v. Robert E. Mayhew

Workman, J., dissenting:

I dissent from the majority because of its failure to thoroughly or properly analyze the facts and the applicable law in upholding the lower court's award of twenty-four shares of stock to the Appellee as his separate property and in its unjust and confusing decision regarding alimony.

I. SEPARATE V. MARITAL PROPERTY

In determining that the stock in the dealership was separate property, the majority neglects to give any real analysis to the Appellant's contention that the stock given to the Appellee during the course of the marriage by his father was done so in lieu of compensation for marital efforts on behalf of the business. The majority also fails to give any real analysis to the Appellant's argument that the Appellee transmuted his separate property to marital property. Finally, the majority further fails to give any real consideration to the issue of the extent to which the marital efforts of the wife helped create the appreciation of the corporate assets.

A. COMPENSATION THEORY

The record presents a strong case that because the Appellee spent the majority of his time at the dealership, his father compensated him with corporate stock in lieu of additional salary. This was particularly obvious with regard to the Appellee's receipt of the last sixteen shares of stock which were transferred to the Appellee's name in 1988, 1989, and 1990, after he returned to Mayhew Chevrolet from working for a competitor dealership in Virginia. The evidence introduced by the Appellant demonstrated that the gifts of stock given to the Appellant in these years were part of an overall compensation package designed by the Appellee's father to entice him not to return to the competition. Moreover, evidence that the stock was, in reality, compensation was even more powerful in light of the fact that the Appellee's brother received only a Chevrolet Corvette from his father prior to 1988 to equalize the gift of stock to the Appellant. The testimony established, however, that the Chevrolet Corvette would not begin to equal the value of the shares of stock. This issue was given only cursory attention by the lower court.

There was also some testimony from the Appellee's father that he gave the Appellee's brother money, but the Appellee's father was extremely vague about how much money was given to his other son.

Similarly, the majority neglects any real dissertation of the law on this issue by giving only lip-service to the Appellant's argument that the twenty-four shares of stock were given to the Appellee as compensation for his work at the dealership and fails to engage in any legal analysis whatsoever of the law as it applied to the facts below. This is evident when the majority states:

> Although the evidence relating to Robert E. Mayhew's salary was conflicting and potentially could have supported a finding that the shares were not in fact gift shares, the family law master and the circuit court adopted the finding that evidence did in fact show that they were intended as gift shares . . ."

Clearly absent from the above-mentioned determination is any consideration of the law in this area. Furthermore, the majority ignores the following fundamental principles of the law of equitable distribution that we reaffirmed in Whiting v. Whiting, 183 W. Va. 451, 396 S.E.2d 413 (1990):

> We have recognized the concept of marriage as a partnership or shared enterprise. In Dyer v. Tsapis, 162 W. Va. 289, 291-92, 249 S.E.2d 509, 511 (1978), we stated: "The law which once saw marriage as a sacrament now conceptualizes it as roughly analogous to a business partnership." (Footnote omitted). In LaRue v. LaRue, ___ W. Va. ___, 304 S.E.2d 312 (1983), we confirmed this characterization of marriage by concluding that contributions of traditional domestic services were as worthy of consideration in the distribution of the marital estate as monetary contributions. The equitable distribution provisions adopted by the legislature in 1984 following our decision in LaRue incorporated this partnership concept of marriage into our statutory divorce law.

183 W. Va. at ___, 396 S.E.2d at 420; see John DeWitt Gregory, The law of Equitable Distribution ¶ 1.06 (1989).

Consequently, "[a]s a general rule, W. Va. Code, 48-2-1(e)(1) (1992), provides that property acquired by either spouse after the marriage but prior to separation of the parties or dissolution of the marriage is presumed marital property regardless of how title is actually held." Burnside v. Burnside, 194 W. Va. 263, ___, 460 S.E.2d 264, 267 (1995). Moreover, we have concluded that "the Legislature 'express[ed] a marked preference for characterizing the property of the parties as marital property[,]'" as indicated in its definitions of marital and separate property found in West Virginia Code § 48-2-1 (19__). 194 W. Va. at ___, 460 S.E.2d at 268 (quoting Whiting, 183 W. Va. at 459, 396 S.E.2d at 421). Thus, where as here there are serious and consequential arguments to support the contention that property is marital, such contentions should at least receive some serious attention and analysis.

Keeping in mind these principles and presumptions of equitable distribution, the Supreme Court of Virginia's decision in Lambert v. Lambert, 367 S.E.2d 184 (Va. 1988), a case analogous to the instant one, is helpful in analyzing whether equity in a company is marital or separate property under a compensation theory. In Lambert, three years after the parties were married, the husband, a pharmacist, and his father, organized a partnership to operate a business known as Lambert Pharmacy. Over the years the

partnership flourished, and ultimately, the father gave to the husband the father's entire interest in the partnership. Id. at 186. Upon the break-up of the marriage, the husband claimed that the partnership was his separate property. Even though the partnership's balance sheets showed that the husband made an initial capital investment of $373.45, which the husband failed to remember making, the lower court concluded that the husband's interest in the partnership was a gift from his father and, therefore, the husband's separate property. Id. at 187.

The Virginia Supreme Court, however, viewed the situation differently in reversing the lower court's decision. The court noted that

> [t]he evidence suggests that in addition to monetary consideration, the husband also may have provided further consideration for the partnership interest in the form of his services to the partnership. . . . [T]he record reflects that the husband devoted his full time and attention to the business. thus, the ongoing success and growth of the business were entirely the product of the active efforts of the husband, who also served the business as a licensed pharmacist. Although the husband received a salary from Lambert Pharmacy, the record does not establish the amount of that salary in relation to his duties as pharmacist and sole manager of the enterprise and does not negate the inference that the profits, . . . were earned by the husband as additional consideration for his in kind services to the partnership.

The husband's father's initial capital investment was $19,296.60. Lambert, 367 S.E.2d at 187.

Id. at 188. Accordingly, the Lambert court concluded that "[t]o the extent the husband's' partnership interest was received in exchange for consideration which he provided, whether monetary or otherwise, it cannot be defined as a gift, and does not qualify for treatment as separate property . . . ." Id. (citation omitted).

Similarly, in the instant case, to the extent that the shares of stock were acquired in exchange for all the time and work expended by the Appellee (marital efforts) on behalf of the dealership, the stock shares should have been treated as marital property. Such a determination would have upheld this Court's preference for treating property received during the course of a marriage as marital property. Most importantly, the lower court and this court should have at least engaged in some legal analysis, rather than the mindless knee-jerk reaction that "that is his, and it stays his."

B. TRANSMUTATION THEORY

The Appellant also contended that the Appellee transmuted his separate property, the twenty-four shares of stock, into marital property when he combined all of his

---

We most recently defined the transmutation doctrine in Burnside, we stated that "[t]ransmutation is the conversion of separate property into marital property during the marriage by express or implied acts. Courts have held that transmutation can occur by title, by express or implied

separate stock with marital stock and reissued it in one stock certificate. While the majority rejects the Appellant's argument that a transmutation occurred, it does so by focusing almost exclusively on whether the Appellee intended to make a gift of the stock shares to the marriage, without any consideration of other factors.

Completely absent from the majority opinion is any discussion of Burnside, our most recent decision in this area. In Burnside, the wife appealed the lower court's determination that contribution she had made with separate funds to pay off the mortgage on the marital home transmuted those separate funds into marital property. We held that there was a marital gift presumption that "is rebuttable only by clear, cogent, and convincing evidence that a gift was not intended or that the transaction under scrutiny was the result of coercion, duress, or deception." 194 W. Va. at ___, 460 S.E.2d at 270. As the Illinois Appellate Court noted in In re Marriage of Brown, 443 N.E.2d 11 (Ill. App. Ct. 1982),

> [p]resuming transmutation of non-marital property gives further recognition to the equal partnership theory of the Act and to the contribution of the homemaker. Further, the court found that transmutation promotes the statutory preference for classifying property as marital which, even when the contribution of the spouse is insignificant, allows for more equitable distribution of property because the pool of marital property is greater.

---

agreement, by commingling of funds, or by interspousal gift." 194 W. Va. at __, 460 S.E.2d at 267 n. 3.

Id. at 13-14; accord Lambert, 367 S.E.2d at 190.

We further engaged in a lengthy discussion of what type of evidence could rebut the marital gift presumption. We stated that "evidence that a gift is made for the purposes of avoiding taxes or other adverse consequences associated with estate planning does not refute the fact that a gift was made in the first instance." Id. at ___, 460 S.E.2d at 271. Moreover, titling of the gift is also insufficient to overcome the presumption. Id. We ultimately concluded that

> the presumption of a gift to the marital estate may not be rebutted by evidence that merely reflects the motivation for making the gift or an uncommunicated and subjective state of mind of the transferring spouse or that, when viewed alone, can be considered inconsistent with the intent to maintain the property as separate. Rather, more substantial evidence is required that clearly is indicative of a lack of donative intent. . . . [While] there are no bright-line rules in determining what type of evidence is sufficient to rebut the presumption[,] [i]t appears that circumstances existing at the time of the transfer indicative of the owner's intention are considered crucial by the courts in determining whether a gift was made to the marital estate.

Id. at ___ 460 S.E.2d at 272-73 (footnotes omitted).

Thus, while the intent of the donor may be important, we certainly did not limit our analysis of these issues solely to intent. Other courts have indicated that "[t]he doctrine of transmutation is premised upon the principle that no one factor, such as the

source of the funds used to acquire property or the name in which property is titled, is determinative of the issue of whether, for purposes of division of property . . . the property is separate or marital." Dunlap v. Dunlap, Nos. C-94-0033, C-940050, slip op. at 5 (Ohio Ct. App. March 27, 1996). Other factors that the Ohio Court of Appeals found necessary to consider were outlined in syllabus point two of Kuehn v. Kuehn, 564 N.E.2d 97 (Ohio Ct. App. 1988):

> When considering an alleged transmutation the trial court, within its sound discretion, should consider (1) the expressed intent of the parties insofar as it can be reliably ascertained; (2) the source of funds, if any, used to acquire the property; (3) the circumstances surrounding the acquisition of the property; (4) the dates of the marriage, the acquisition of the property, the claimed transmutation, and the breakup of the marriage; (5) the inducement for and/or purposed of the transaction which gave rise to the claimed transmutation; and (6) the value of the property and its significance to the parties.

Id. at 98.

Upon examination of the majority decision, it is evident that the majority gave short shrift to its examination of other factors relevant to a determination of whether the Appellee transmuted his separate property into marital property, rather choosing to take

---

In Whiting, we stated in syllabus point six that "[t]he source of funds doctrine is ordinarily not available to characterize as separate property that property which has been transferred to joint title during the marriage." 183 W. Va. at __, 396 S.E.2d at 415.

the easy way out by focusing solely on the his intent. (It really is a man's world, isn't it?) The majority should have recognized that factors other than the husband's intent should be considered on the issue of transmutation.

C. WIFE'S MARITAL EFFORTS

In order to fully appreciate the extent of the Appellant's marital efforts in aiding the Appellee in his work at the dealership, it is helpful to examine these facts: During the parties' marriage, the Appellee worked at the car dealership every day from early in the morning until 7:00 p.m. or 8:00 p.m. at night. In addition, he worked every Saturday until at least 3:00 p.m. or 4:00 p.m. The Appellant would often prepare the Appellee's dinner and take it, together with their two daughters, to the dealership so they would have an opportunity to visit with their father for a short period of time during the weekdays, and so that he (as well as other employees on some occasions) could have dinner without interrupting their work. The Appellee also was very active in community organizations as an aid to his business and the Appellant assisted in that respect as well. The Appellant helped her husband directly in many ways in the business, including actually working there without compensation before the children were born. On weekends, the family participated in social or civic activities for the purpose of becoming more visible in the community to increase the sale of new and used cars from the dealership. The wife did virtually all the household/child care duties, including mowing six-plus acres

and tending to sheep, cattle, chickens and other farm animals. It is impossible not to conclude that the wife's efforts doing virtually all of the domestic work in this marriage, as well as the other efforts she made not only to work directly for the business but also to free her husband up to work in the business, helped this business appreciate.

West Virginia Code § 48-2-1(e) includes in the definition of marital property: "(2) The amount of any increase in value in the separate property of either of the parties to a marriage, which increase results from . . . work performed by either or both of the parties during the marriage." Id. The majority adds a an extra phrase that does not appear in the statute in characterizing this factor as work performed "in the business." The statute expresses no such limitation. Rather the statutory intent is that any work performed by either party that causes an increase in value of separate property is marital property. Since marriage is a partnership, the efforts of a stay-at-home spouse to free the working spouse of domestic obligations in order that his business can grow and prosper should have value and should have been considered.

A fair and realistic view of these people's lives and work must reflect some legitimate expectation by the wife that she was also building something, because it was her efforts on the home front (as well as for the business) that afforded her husband the opportunity to devote the significant amount of time he did to the dealership. Surely the majority does not believe that a woman who does the bulk of the homemaking and child-rearing duties, giving her husband almost total freedom to build his business should not be entitled to some investment for her life as well. This is especially so where as here he decided she had outlived her usefulness, which brings us to the second major issue--alimony

II. ALIMONY

We have consistently held that the first primary consideration in determining alimony is the economic situations of the parties and the need of the obligee. As we stated in F.C. v. I.V.C., 171 W. Va. 458, 300 S.E.2d 99 (1982), "[c]oncrete financial realities of the parties must be a court's primary inquiry in any alimony award." Id. at 460, 300 S.E.2d at 101; see Hickman v. Earness, 191 W.Va. 725, __, 448 S.E.2d 156, 157 (1994). The statute sets forth a number of other factors.

West Virginia Code § 48-2-16 (b) (1995) provides, in pertinent part:

> The court shall consider the following factors in determining the amount of alimony . . . if any, to be ordered . . . :
>
> (1) The length of time the parties were married;
>
> (2) The period of time during the marriage

when the parties actually lived together as husband and wife;

(3) The present employment income and other recurring earnings of each party from any source;

(4) The income-earning abilities of each of the parties, based upon such factors as educational background, training, employment skills, work experience, length of absence from the job market and custodial responsibilities for children;

(5) The distribution of marital property to be made under the terms of a separation agreement or by the court under the provision of . . . [§ 48-2-32] of this article, insofar as the distribution affects or will affect the earnings of the parties and their ability to pay or their need to receive alimony, child support or separate maintenance;

(6) The ages and the physical, mental and emotional condition of each party;

(7) The educational qualifications of each party;

(8) The likelihood that the party seeking alimony, child support or separate maintenance can substantially increase his or er income-earning abilities within a reasonable time by acquiring additional education or training;

(9) The anticipated expense of obtaining the education and training described in subdivision (8) above;

We also have recognized that fault should be considered in the award of alimony. See Syl. Pt. 1, Charlton v. Charlton, 186 W. Va. 670, 413 S.E.2d 911 (1991). Then in syllabus point one of Rexroad v. Rexroad, 186 W. Va. 696, 414 S.E.2d 457 (1992), we discussed the exact role that fault has in alimony determinations:

> (10) The costs of educating minor children;
>
> (11) The costs of providing health care for each of the parties and their minor children;
>
> (12) The tax consequences to each party;
>
> (13) The extent to which it would be inappropriate for a party, because said party will be the custodian of a minor child or children, to seek employment outside the home;
>
> (14) The financial need of each party;
>
> (15) The legal obligations of each party to support himself or herself and to support any other person; and
>
> (16) Such other factors as the court deems necessary or appropriate to consider in order to arrive at a fair and equitable grant of alimony . . . .

> W. Va. Code, 48-2-15(l) (1991), bars a person from alimony in only three instances: (1) where the party has committed adultery; (2) where, subsequent to the marriage, the party has been convicted of a felony, which conviction is final; and (3) where the party has actually abandoned or deserted the other spouse for six months. In those other situations where fault is considered in awarding alimony under W. Va. Code, 48-2-15(l), the court or family law master shall consider and compare fault or misconduct of either or both of the parties and the effect of such fault or misconduct as a contributing factor to the deterioration of the marital relationship.

Finally, we have recently reemphasized the role of the factor of fault plays in determining alimony. In syllabus point four of Rogers v. Rogers, No. 23075, __ W. Va __, __ S.E.2d __ (July 11, 1996) we stated that:

> In appropriate circumstances, an enhancement of an award of

> maintenance/alimony based on the degree of fault is justified. Enhancement of a maintenance/alimony award by a fault premium may be awarded when additional support is required to reimburse the injured spouse for expenses directly related to the fault or to assure that the injured spouse continues to have the standard of living enjoyed during the marriage. A fault premium may also be applied to discourage the fault or behavior that contributed to the dissolution of the marriage. In determining an award of maintenance/alimony enhanced by a fault premium, the circuit court must consider the concrete financial realities of the parties.

Here the record reflects that the husband sought a divorce because of a relationship with another woman and because he no longer wanted the strictures on his freedom imposed by marriage.

The question of rehabilitative versus permanent alimony has been discussed on prior occasions, and a number of factors have been

identified in determining when permanent as opposed to rehabilitative alimony is justified. In syllabus point three of Molnar v. Molnar, __ W. Va. __, 314 S.E.2d 73 (1984) we stated:

> There are three broad inquiries that need to be consider in regard to rehabilitative alimony: (1) whether in view of the length of the marriage and the age, health, and skills of the dependent spouse, it should be granted; (2) if it is feasible, then the amount and duration of rehabilitative alimony must be determined; and (3) consideration should be given to continuing jurisdiction to reconsider the amount and duration of rehabilitative alimony.

We placed the following caveats on the imposition of rehabilitative alimony in syllabus points six and seven of Wyant v. Wyant, __ W. Va. __, 400 S.E.2d 869 (1990):

> In cases in which the supporting spouse has an income and earning capacity substantially

greater than that which the dependent spouse could realistically achieve under even the best of circumstances, rehabilitative alimony may not be sufficient if the defendant spouse is the primary caretaker of minor children and did not intend to join the work force on a full time basis prior to the dissolution of the marriage.

A court should not relieve a spouse from the duty to maintain the dependent spouse and children by providing only rehabilitative alimony simply because the dependent spouse may have the skills necessary to facilitate a return to the job market. Instead, the court should consider the following factors before opting for rehabilitative alimony over permanent alimony: (1) the dependent spouse's position in the home at the time of the divorce; (2) the age of the children; (3) the parties' income at the time of the divorce and their potential income in the future; and (4) the benefit, where economics permit, of the dependent spouse remaining in the home to care for the children.

The husband owns all of the stock in Mayhew Chevrolet, which the family law master found to be worth $648,586.00. Appellee earns a salary of $53,000.00 per year, and the corporate tax returns indicate he could have been paid much more.

The Appellant has no income, and although she is in court reporter training, she has no guarantee of a job, especially in a rural area such as Hampshire County.

When the Appellee decided he wanted to end the marriage, it seems patently unfair that his wife of fifteen years should be required to start from scratch, as she approached middle age and have no support at all while her ex-husband flourishes financially.

Lastly, the majority in addition to botching the legal analysis surrounding the Appellant's contention regarding permanent alimony, also botches its apparent remand of the alimony determination to the trial court. A remand generally indicates that this Court is not resolving the issue. The majority, however, states that while it is remanding "the entire issue of alimony," "[t]he judgment below is affirmed with respect to the denial of permanent alimony[.]" Simply stated, it has to be one or the other. Unfortunately, the language concerning the remand issue of the alimony award is so confusing that the lower court may have a difficult time figuring out what it is directed to do.

On remand the lower court should heed the portion of the majority's opinion that indicated that the entire issue of alimony should be examined, for despite the murky, confusing language, that in my opinion was the intent of the majority, although such is not clearly reflected in the written opinion.

III. ATTORNEY FEES/EXPERT WITNESS FEES

Similarly, I dissent from the majority's failure to reverse on the lower court's refusal to order the Appellant attorney fees and expert witness fees be paid by Appellee.

In Banker v. Banker, No. 22166, __ W. Va. __, __ S.E.2d __ (May 17, 1996), we recently held that attorney fees and expert witness fees should be paid by the party whose fault in the dissolution of the marriage caused the other party to have to incur such fees.

IV. SUPPORT AS A DEDUCTION AGAINST EQUITABLE DISTRIBUTION

As the majority acknowledges in the introduction to its opinion it (but never addresses in any fashion), the Appellant also contends that the lower court erred in deducting certain expenditures made by the Appellee for mortgage and automobile payments from her equitable distribution share. Pursuant to an October 13, 1994, temporary order, the Appellee was required to make monthly

payments of $402.01 for the mortgage and $142.17 for the car payment. He did so. The lower court then reduced the Appellant's share in equitable distribution by those amounts, essentially crediting him for payments he was required to make in the form of support anyway.

We recently encountered a similar misapprehension of whether support can be used as a credit against equitable distribution in Smith v. Smith, No. _____ , __ W. Va. __, __ S.E.2d __ (July __, 1996). In that case, the family law master initially ordered the husband to make the remaining payments on a family van. Upon the husband's payment of the remaining amount owed, the family law master valued the van at a higher price for purposes of equitable distribution,

thereby returning to the husband as equitable distribution a significant portion of the amount he had been ordered to pay as support. We found error in that resolution and remanded for proper valuation of the van for purposes of equitable distribution. Smith, Slip. op at ___, ___ W. Va. at ___, ___ S.E.2d at ___.

The result in the present case effectively divested the Appellant of a portion of the money which was to be paid by the Appellee for car and mortgage payments. Why the majority would permit such absurdity is unfathomable. Absent an indication in the order that payments were to be considered as installments for the distribution of marital property, payments are deemed alimony, pursuant to the pertinent portion of West Virginia Code § 48-2-15(b)(4) (1991), emphasis added:

> The court may require payments to third parties in the form of home loan installments, land contract payments, rent, payments for utility services, property taxes, insurance coverage, or other expenses or charges reasonably necessary for the use and occupancy of the marital domicile. Payments made to a third party pursuant to this subdivision for the benefit of the other party shall be deemed to be alimony, child support or installment payments for the distribution of marital property, ... **Provided, That if the court does not set forth in the order that a portion of such payments is to be deemed child support or installment payments for the distribution of marital property, then all such payments ... shall be deemed to be alimony.**

See Sly v. Sly, 187 W. Va. 172, 416 S.E.2d 486 (1992).

For the foregoing reasons, I dissent.

JUSTICE RECHT joins in Part II of the dissent.