

PEGGY IRENE BREECE,)	
)	
Plaintiff/Appellant,)	
)	Hickman Chancery
)	No. 9411148
VS.)	
)	Appeal No.
)	01-A-01-9509-CH-00419
HOWARD THOMAS BREECE,)	
)	
Defendant/Appellee.)	

<p>FILED</p> <p>March 13, 1996</p> <p>Cecil W. Crowson Appellate Court Clerk</p>

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT OF HICKMAN COUNTY
AT CENTERVILLE, TENNESSEE

HONORABLE DONALD P. HARRIS, JUDGE

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AFFIRMED AND REMANDED

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:
SAMUEL L. LEWIS, JUDGE
WILLIAM C. KOCH, JR., JUDGE

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O P I N I O N

The plaintiff-wife has appealed from a judgment awarding her a divorce, but making an unsatisfactory division of property and expenses.

Plaintiff presents two issues as follows:

1. Whether the trial court erred in awarding husband \$22,500 of the marital estate as his separate property when said property was conveyed as a gift to both parties.
2. Whether the trial court erred in assessing wife \$5,610 for attorney's fees already paid by her; \$10,000 of jewelry which she gave to the parties' daughter one year prior to filing for divorce; and \$3,700 for a detective's fee.

Defendant-husband presents three additional issues as follows:

3. Whether the trial court erred in requiring Mr. Breece to pay Mrs. Breece's attorney's fee in the amount of \$8,730.00.
4. Whether the court erred in charging Mr. Breece with \$5,844.00 in proceeds of cattle sold in 1993.
5. Whether the court erred in undervaluing the jewelry disposed of by Mrs. Breece.

The parties were married 42 years. Their children are adults. Both have retired after many years of employment, and receive both Social Security and retirement benefits. Their joint estate includes real estate, farm equipment, and several valuable investments.

The Judgment of the Trial Court awarded to the husband cash, investments and equipment valued at \$428,379 and to the wife, cash investments and equipment valued at \$408,298.50. In addition, four items were awarded to the wife listed as follows:

- | | | |
|-----|------------------------------|---------------|
| 42. | Wife's Jewelry | \$ 10,000.00 |
| 43. | Detective fees paid by wife | 3,700.00 |
| 44. | Attorney's fees paid by wife | 5,610.00 |
| 45. | Judgment in favor of wife | <u>730.50</u> |
| | | \$ 15,040.50 |

If the four items listed above were properly counted as part of the wife's share of the marital estate, her share would total \$423,608.50 which is comparable to the \$428,379 awarded to the husband.

The real estate was ordered to be sold and the proceeds divided equally except that \$22,500 was ordered to be paid to the husband before division "for his parents' interest in farm gifted to parties."

If the \$22,500 "gifted" interest in the realty was properly considered separate property of the husband, then the award of that amount to him out of the proceeds was correct and would not affect the approximate equality of division of other property.

The wife's pension was \$20,936 per year (value not shown) and the husband's pension was \$29,245 per year (value not shown).

No complaint is made as to the disposition of pension rights.

As indicated in her first issue above, the wife insists that, since the gift of part of the real estate was to the parties jointly, the "gifted portion" of the real estate should have been considered part of the marital estate and divided accordingly.

The annual exclusion from federal gift tax is \$10,000 per donee. U.S. Revenue Code §2503(b). The exclusion of a gift to two joint donees would require a bona fide intent to convey an equal interest to each donee. This factor is a strong circumstance indicating equal ownership of the “gifted” interest in part of the property. Moreover, there is no evidence that the gift was intended to take effect otherwise.

T.C.A. Section 36-4-121 has been carefully searched without discovering any expression therein indicating that property received in the joint names of spouses from a relative of one of the spouses is to be treated differently from other marital property.

This Court respectfully disagrees with the holding of the Trial Court that the “gifted interest” should be awarded to the husband as his separate property.

As a result, it must be considered that, exclusive of the net proceeds of the sale of the real estate, the wife received \$423,608.50 and the husband received \$450,879.

The wife’s second issue, above, first complains that the Trial Court included in her portion of the marital estate \$10,000 as the value of jewelry given by her to her daughter a year before the divorce. There is no evidence that the jewelry in question was joint property. It is referred to in the wife’s briefs and the record as “her,” or “my” or “the wife’s jewelry.” Absent evidence otherwise, jewelry is personal rather than joint property. There is evidence that part of the jewelry was bought by the wife, but no evidence is cited or found that she used joint funds to make the purchase. No evidence is cited or found which would support a finding that the jewelry which the wife gave her daughter was a part of the jointly owned marital estate. Accordingly, the Trial Court was not justified in including in her distribution of the marital estate, jewelry which was hers.

The wife also complains of the inclusion of \$5,610 in the distribution to her because she paid this amount to her attorney, and \$3,700 paid by her to a detective. No evidence is cited or found that this amount was paid out of joint funds, or that it constituted a wrongful dissipation of the joint estate.

The wife insists that the attorney fee and detective fee should be separately awarded to her as costs of litigation, but such awards lie within the sound discretion of the Trial Court. *Koch v. Koch*, Tenn. App. 1993, 874 S.W.2d 571.

Generally, fees are not allowed to a party where that party has ample funds available to pay the fees of that party's counsel. *Shackleford v. Shackleford*, Tenn. App. 1980, 611 S.W.2d 598.

The total of the three items, the jewelry, the attorney's fee and the detective fee, is \$19,310. The removal of this amount from the total received by the wife would reduce the value of her share of the marital property to \$407,298.50. The evidence shows that the real estate is worth \$300,000 or more, including \$275,000 estimated proceeds of the sale of the real estate. It appears the total joint marital estate was approximately \$1,132,677.50, of which the husband will realize \$587,879 and the wife will receive \$544,798.50. The difference in percentage is minimal, less than 5%.

A Trial Court's distribution of marital property in a divorce action does not need to be exactly equal in order to be equitable. *Thompson v. Thompson*, Tenn. App. 1990, 797 S.W.2d 599.

There is uncontradicted evidence that the husband worked longer hours and contributed more earnings to the joint estate than did the wife. This fact would justify the minimal inequality in the distribution to the parties.

The husband complains that he was required to pay a \$8,730 fee for the wife's attorney. An award of attorney's fee is treated as alimony. *Gilliam v. Gilliam*, Tenn. App. 1988, 776 S.W.2d 81. The Trial Court has wide discretion as to allowance of attorneys' fees in divorce actions. *Loyd v. Wendall*, Tenn. App. 1993, 860 S.W.2d 409.

Under the peculiar circumstances of the present case, the judgment of the Trial Court in regard to attorney's fee does not require revision.

The husband also complains that the Trial Court charged him with \$5,844 for proceeds of cattle sold in 1993. There is evidence that the cattle were joint property and that \$5,844 received by the husband was not placed with the joint funds of the parties as it should have been. Under these circumstances, it was equitable to require the husband to be responsible for this missing joint property.

The husband further complains that the Trial Court undervalued her jewelry which she gave her daughter. Since this Court has heretofore held that the jewelry was not shown to be marital property or procured by use of marital funds, the value of the jewelry is irrelevant to the issues on appeal.

As a result of the foregoing reasoning, the judgment of the Trial Court is affirmed, at the cost of the plaintiff-appellant. The cause is remanded to the Trial Court for further necessary proceedings.

Affirmed and Remanded.

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

SAMUEL L. LEWIS, JUDGE

WILLIAM C. KOCH, JR., JUDGE