

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001628-MR
NO. 1997-CA-001700-MR

MARGARET L. IGERT

APPELLANT/
CROSS-APPELLEE

v. APPEAL FROM BALLARD CIRCUIT COURT
HONORABLE WILLIAM L. SHADOAN, JUDGE
ACTION NO. 94-CI-23

LOUIS H. IGERT, III

APPELLEE/
CROSS-APPELLANT

OPINION
AFFIRMING
** ** * * * * *

BEFORE: EMBERTON, GARDNER AND MILLER, JUDGES.

GARDNER, JUDGE: Margaret L. Igert (Margaret) has appealed from a judgment of the Ballard Circuit Court dissolving her marriage to Louis H. Igert, III (Louis). On appeal, she contends that the circuit court erred by not awarding her certain alleged nonmarital property and that the court awarded her an inadequate amount of maintenance. Louis has cross-appealed, contending that Margaret should not have been awarded any maintenance and that the circuit court erred by not concluding that certain corporate

stock was Louis's nonmarital property. After reviewing the record below and the applicable law, this Court affirms.

Louis and Margaret were married in 1965. The marriage produced one daughter. Margaret did not work outside the home during the marriage. Louis operated businesses associated with the river industry in Paducah, Kentucky. These businesses had been in his family for at least two generations. Louis's businesses reached their height in 1985, with Louis earning \$250,000 annually and having a net worth of \$3,000,000. During this period, based upon the advice of his attorneys and accountants, he began estate planning. He conveyed the parties' marital residence which had been purchased jointly in 1976 solely to Margaret. He also conveyed the stock in some of the corporations solely to Margaret. A few years later, Louis personally and on behalf of five other corporations filed for bankruptcy.

In 1994, Louis filed a petition for dissolution of marriage in circuit court. The court by a decree in July 1994 dissolved the marriage. In a May 20, 1996 order, the circuit court awarded each party his or her nonmarital property. The court concluded that the parties' residence was marital property and awarded it to Margaret. The court also concluded that sixty percent of the stock that the parties held in River Towing, Incorporated, which had formerly belonged to Louis's father was marital property and awarded that amount to Louis. The court also found that a blue diamond ring valued at over \$200,000 was marital property and ordered the parties to deliver the diamond

to a jeweler for appraisal and subsequent sale. The court directed that the remaining assets be sold or divided to effectuate a fifty/fifty split of marital property.

The court in a final decree of June 1997 concluded that Margaret lacked sufficient property from which she could support herself and was unable to support herself through appropriate employment. The court awarded her \$1,500 per month in maintenance for a period of ten years. The court addressed many other issues which are not before us in this appeal. Margaret has now appealed, and Louis has cross-appealed from the circuit court's judgment.

Margaret in her appeal first argues that the circuit court erred by not finding that certain items were nonmarital property. She alleges that the items had been given to her by Louis. Specifically, she maintains that she should have been awarded as nonmarital property the parties' residence and certain business assets as well as a blue diamond ring that she contends was a gift to her from Louis. She argues that gifts to a spouse pursuant to an estate plan qualify as gifts under Kentucky Revised Statute (KRS) 403.190. This Court has uncovered no error by the circuit court regarding this issue.

KRS 403.190(2) provides,

(2) For the purpose of this chapter, 'marital property' means all property acquired by either spouse subsequent to the marriage except:

(a) Property acquired by gift, bequest, devise, or descent during the marriage and the income derived therefrom unless there are significant activities of either spouse which contributed to

the increase in value of said property and the income earned therefrom;
(b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
(c) Property acquired by a spouse after a decree of legal separation;
(d) Property excluded by valid agreement of the parties; and
(e) 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.

A trial court's determination concerning the gift or nongift status of an item must be upheld unless it committed clear error. Clark v. Clark, Ky. App., 782 S.W.2d 56, 62 (1990), citing Ghali v. Ghali, Ky. App., 596 S.W.2d 31 (1980). A court must consider four factors in deciding whether an item was a gift: (1) the source of the money with which the item was purchased, (2) the intent of the donor at that time as to the intended use of the property, (3) the status of the marriage relationship at the time of the transfer, and (4) whether there was any valid agreement that the transferred property was to be excluded from the marital property. Clark v. Clark, 782 S.W.2d 62, citing O'Neill v. O'Neill, Ky. App., 600 S.W.2d 493 (1980). Donative intent remains the primary factor. Id., at 63. A determination must be made based upon the pertinent facts of each case. O'Neill v. O'Neill, 600 S.W.2d at 495. Under KRS 403.190, a court must start with the premise that all property acquired by either spouse subsequent to the marriage by either spouse is marital property. Id. Under KRS 403.190(3), marital property is divided without regard to record title. Angel v. Angel, Ky.

App., 562 S.W.2d 661, 665 (1978). In assigning each spouse's property pursuant to KRS 403.190(1), record title should not be controlling. Id.

We decline to disturb the trial court's findings regarding the items in question. There was evidence presented from Louis and his estate planning experts that the parties' house, certain corporate shares and other assets were deeded to Margaret or put in her name for estate planning purposes in order to avoid paying substantial taxes. Substantial evidence existed that Louis did not intend to give the house and the other items to Margaret as a gift but rather was done for the above purposes, thus keeping them within the category of marital property. Louis continued to live in the house and used his earned funds to maintain it. He also testified that he conveyed three corporations into her name for estate planning purposes. This case is distinguishable from Rakhman v. Zusstone, Ky., 957 S.W.2d 241 (1997). There was also substantial evidence presented from which the trial court could decide that the blue diamond ring was an investment rather than a gift from Louis to Margaret. It was the trial court's prerogative to consider conflicting testimony and render a finding. This case is not unlike O'Neill v. O'Neill, supra, where jewelry was found to be an investment.

Margaret next argues that the circuit court erred by awarding her \$1,500 per month for ten years as maintenance. She maintains that her monthly expenses exceed this amount and that Louis has the ability to pay a greater amount. Louis on the other hand contends that Margaret was not entitled to receive any

maintenance because she received sufficient income producing property to provide for her needs. We have found no clear error or abuse of discretion in setting maintenance. Thus, we affirm on this issue.

Under KRS 403.200,

(1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

(a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and

(b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including;

(a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(c) The standard of living established during the marriage;

(d) The duration of the marriage;

(e) The age, and the physical and emotional condition of the spouse seeking maintenance; and

(f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

See Casper v. Casper, Ky., 510 S.W.2d 253 (1974); Lampton v. Lampton, Ky. App., 721 S.W.2d 736 (1986). The fixing of maintenance is within the discretion of the trial court. Combs v. Combs, Ky. App., 622 S.W.2d 679, 680 (1981). The amount can be set aside only if it is deemed clearly erroneous. Casper v. Casper, 510 S.W.2d at 255. See also Perrine v. Christine, Ky., 833 S.W.2d 825 (1992). This disparity of financial positions is one factor to consider. Combs v. Combs, 622 S.W.2d at 680. The fact that one spouse can eke out a living is not a sufficient reason for denying maintenance. Id.

This Court declines to disturb the trial court's ruling regarding maintenance. We do not believe Margaret has shown error in the amount of maintenance. There was evidence in the record to show that Margaret's monthly expenses were between \$1,500 and \$1,800. She was the recipient under a trust established by her parents for her benefit. Under the trust, there were certain properties containing timber. The record shows that Margaret could receive a one time sum from the sale of timber; however, the bulk of the amounts from the sales of timber would occur many years in the future. Louis's contention that she could receive some amount for the future value of the timber is not supported by ample authority. There is no showing that a sale of the properties under the trust would be advantageous based upon the future value of the timber or that such a sale is possible under the terms of the trust. The record reflects that Margaret has never worked outside the home, has some health problems and has no tangible marketable skills. The record also

reflects that during a good deal of the marriage, the parties enjoyed a high standard of living, with Margaret receiving from \$4,000 to \$6,000 per month with which to run the household. Based upon all of these factors, this Court cannot conclude that the circuit court's rulings on maintenance were clearly erroneous or an abuse of discretion.

Louis on cross-appeal argues that the trial court's finding that the stock in River Tower, Inc. was not Louis's nonmarital property was clearly erroneous. Once again, this Court has not uncovered clear error or an abuse of discretion and declines to disturb the trial court's ruling.

KRS 403.190(1) and (2) address the assigning of marital and nonmarital property and the division of assets. All property acquired by either spouse after the marriage is presumed to be marital in the absence of a clear showing that it is not. Calloway v. Calloway, Ky. App., 832 S.W.2d 890, 892 (1992). In the instant case, Louis's father originally owned the shares in River Towing, Inc. Over the years, he gave various shares of stock in the corporation to Louis, Margaret and the parties' daughter, Connie. Louis maintained that his father intended all of the shares to go to him but had to give shares to Margaret and Connie because of the gift tax laws and for estate planning purposes. An exhibit in the record shows that Louis had fifty-two shares of the stock after gifts, Margaret had 109 shares after the gifts and Connie had 111 shares. The source of some of the shares for the parties before the "gifts" was not clearly explained. The court concluded that the donative intent was to

give the shares to both parties. While we might have found differently, based upon the exhibits and evidence or lack of it in the record, we decline to disturb the trial court's ruling on this matter.

For the foregoing reasons, this Court affirms the judgment of the Ballard Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
APPELLEE:

John T. Reed
Paducah, Kentucky

BRIEF FOR APPELLEE/CROSS-
APPELLANT:

Natalie S. Wilson
Lexington, Kentucky