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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000490-MR
AND
NO. 2011-CA-000540-MR

SHERRI GAIL CLARK (PUCKETT) APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 08-CI-00616

WILLIAM THOMAS CLARK APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND VANMETER, JUDGES.

CAPERTON, JUDGE: Sherri Gail Clark (now Puckett) appeals from the trial court's order of February 24, 2011, whereby the court entered supplemental findings of fact, conclusions of law, and a decree of dissolution of marriage. On appeal Sherri argues that the trial court erred in its division of the 8.5 acres of

property on Highway 58. After a thorough review of the parties' arguments, the record, and the applicable law, we find no error in the trial court's division of the property and accordingly, affirm.[1]

This is the parties' second dissolution of marriage. The parties were first married on October 1, 2000, and were later divorced by decree entered April 22, 2002. Thereafter, William Thomas Clark (hereinafter "Thomas") purchased the 8.5 acre tract, now in contention, from Sherri's parents for $45,000. Thomas paid the purchase price by borrowing on his other nonmarital real estate. The deed, executed July 2, 2003, for this property was titled in both Thomas's and Sherri's name as joint tenants.

In October of 2004, the parties remarried but continued to live separately. Sherri lived in a mobile home on the 8.5 acres and Thomas lived in his nonmarital residence. Thomas then began to build a house on the 8.5 acres. He removed $34,280.00 from his Edward Jones nonmarital account and borrowed an

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[1] Additionally, William Thomas Clark in his appeal and cross-appeal essentially argues that Sherri's current appellate counsel is wrongfully representing her on appeal as he testified at trial on her behalf. This Court entered a show cause order to dismiss this matter as improperly taken. We have reviewed this matter and conclude that Thomas has not appealed a final judgment and instead seeks to challenge the trial court's ruling conforming to a Kentucky Bar Association ethics hotline opinion permitting Sherri's counsel to represent her on appeal if certain criteria are met.

Moreover, this Court is perplexed as to the exact remedy that Thomas desires. We note that Thomas does not seek a writ of mandamus nor specifies what action this Court should undertake. As noted in *Brown v. Barkley*, 628 S.W.2d 616, (Ky. 1982), "appeals are taken from judgments, not from unfavorable rulings as such. A party must be aggrieved by a judgment in order to appeal from it." *Brown* at 618, citing *Cf. Miller v. Miller*, 335 S.W.2d 884, 886 (Ky. 1960); *Civil Service Comm. v. Tankersley*, 330 S.W.2d 392, 393 (Ky. 1959). After reviewing the record and the parties' arguments, we hereby dismiss Thomas's appeal and cross-appeal concerning Sherri's appellate counsel because it is not taken from an issue decided by a final judgment.

additional $15,400 from James Tackett to finance the construction and performed the work himself.[2]

In March of 2007, Thomas made a memorandum that he would gift the property to Sherri. On March 13, 2007, he deeded his half of the property to Sherri, thus conveying all title of the real estate to her.[3] Thomas testified that he put Sherri's name on the property originally because they were re-marrying. After the parties experienced additional marital problems, Thomas continued to work on the construction of the house in order to save his marriage. Thomas testified that he planned to live in the house with Sherri.

Based on the evidence presented by the parties,[4] the trial court concluded that at the time the property was originally purchased, Thomas made a completed gift to Sherri of one-half undivided interest in the property as Thomas and Sherri were not married and the property was deeded to the parties jointly. The trial court then concluded after the parties were re-married the character of their relationship changed. Looking at the factors to be considered, the trial court concluded that Thomas did not intend to gift Sherri the complete property and house.[5] The court noted that there was no agreement to exclude the transferred

[2] At the time of the hearing regarding the property the parties had differing accounts of how much work remained to be finished on the house.

[3] Sherri testified that while she did not contribute either finances or labor to the construction of the house, but she did provide conjugal relations with Thomas and felt that she had fully invested in the house.

[4] We note that Sherri's attorney, who prepared the deed transferring the title to Sherri, testified before the trial court as well.

[5] The financial information submitted establishes that the alleged gift would have been approximately $95,000, plus the sweat equity in the house.

property from the marital estate and that the status of the parties' marriage at the time of the transfer was "somewhat bizarre". Moreover, the source of the funds for the property and house were all nonmarital property of Thomas's. The sweat equity in the house was the result of Thomas's endeavors. Last, the trial court was convinced by Thomas's testimony that he planned on living in the house with Sherri.[6]

Based on this evidence, the court ordered that the property be sold and that the costs of the sale be recouped first, that the debt to James Tackett plus accrued interests be paid, that up to a total of $45,000 be divided equally between the parties, that Thomas then recover $34,280.00, and that any remaining funds be divided equally between the parties. It is from this that Sherri now appeals.

On appeal, Sherri presents one argument, namely, that the trial court erred in its division of the 8.5 acres of property on Highway 58 because the property constituted a gift to Sherri. With this argument in mind we turn to our applicable jurisprudence.

We note that in dividing marital property and debt equitably, a trial court has wide latitude, and absent an abuse of discretion we shall not disturb the trial court's ruling. *See Smith v. Smith*, 235 S.W.3d 1 (Ky.App. 2006), and *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001). Abuse of discretion is that which is arbitrary or capricious, or at least an unreasonable and unfair decision. *See Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004). However, the trial court's

[6] The court noted that while the house was small the plans called for three bedrooms.

conclusions of law are reviewed *de novo*. *Stipp v. St. Charles*, 291 S.W.3d 720, 723 (Ky.App. 2009).

The disposition of the parties' property in a dissolution-of-marriage action is governed by KRS 403.190,[7] and neither record title nor the form in which it is held is controlling or determinative. *Sexton* at 264 (internal citations omitted).

[7] KRS 403.190 states:

> (1) In a proceeding for dissolution of the marriage or for legal separation, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's property to him. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:
> (a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
> (b) Value of the property set apart to each spouse;
> (c) Duration of the marriage; and
> (d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.
> (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.
> (3) All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section.
> (4) If the retirement benefits of one spouse are excepted from classification as marital property, or not considered as an economic circumstance during the division of marital property, then the retirement benefits of the other spouse shall also be excepted, or not considered, as the case may be. However, the level of exception provided to the spouse with the greater retirement benefit shall not exceed the level of exception provided to the other spouse. Retirement benefits, for the purposes of this subsection shall include retirement or disability allowances, accumulated contributions, or any other benefit of a retirement system or plan regulated by the Employees Retirement Income Security Act of

Thus, our courts have applied the 'source of funds' rule to characterize property; *i.e.*, to determine parties' nonmarital and marital interests in such property. *Id.* at 265 (internal citations omitted). "The 'source of funds rule' simply means that the character of the property; *i.e.*, whether it is marital, nonmarital, or both, is determined by the source of the funds used to acquire the property." *Sexton* at 265 (internal citations omitted).

The presumption that property acquired during the marriage is marital property arises from KRS 403.190(3). KRS 403.190(2) sets out exceptions, such as gifts, from the presumption that property acquired during the course of marriage be deemed marital property. As stated in *Hunter v. Hunter*, 127 S.W.3d 656, 659-60 (Ky.App. 2003), "The trial court's division of property involves a three-step process: (1) characterizing each item of property as marital or nonmarital; (2) assigning each party's nonmarital property to that party; and (3) equitably dividing the marital property between the parties." (internal citations omitted). The party claiming the property as nonmarital has the burden of proof and must establish this by clear and convincing evidence. *See Travis v. Travis*, 59 S.W.3d 904 (Ky. 2001). "Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (1934).

1974, or of a public retirement system administered by an agency of a state or local government, including deferred compensation plans created pursuant to KRS 18A.230 to 18A.275 or defined contribution or money purchase plans qualified under Section 401(a) of the Internal Revenue Code of 19542, as amended.

When determining whether a transfer of property is a gift, the trial court is not bound by how the property is titled. *Angel v. Angel*, 562 S.W.2d 661, 665 (Ky.App. 1978) and KRS 403.190(3). The court will look at the relevant factors to determine if the property was a gift, including the source of the money used to purchase the property, the surrounding circumstances and, most importantly, the intent of the donor. *See O'Neill v. O'Neill*, 600 S.W.2d 493 (Ky.App. 1980), and *Clark v. Clark*, 782 S.W.2d 56, 63 (Ky.App. 1990). In *Sexton,* the court undertook a learned analysis on determining whether property constituted a gift:

> In *O'Neill v. O'Neill*, a case involving a gift between spouses, the Court of Appeals set forth four (4) factors that trial courts should consider in determining if a transfer was a gift and thus a spouse's nonmarital property: one, "the source of the money with which the 'gift' was purchased," two, "the intent of the donor at that time as to intended use of the property," three, "status of the marriage relationship at the time of the transfer," and four, "whether there was any valid agreement that the transferred property was to be excluded from the marital property." When the gift is from a third party, we would add a fifth factor: whether the purported donor received compensation for the transfer. And, even though title is not determinative of whether a transfer to a party is a gift, nevertheless, it is evidence for the trial court to consider. Clearly, the donor's intent is the primary factor in determining whether a transfer of property is a gift, and we likewise hold that the donor's intent is also the primary factor in determining whether a gift is made jointly to spouses or individually to one spouse. The donor's testimony is highly relevant of the donor's intent; however, the intention of the donor may not only be "expressed in words, actions, or a combination thereof," but "may be inferred from the surrounding facts and circumstances,

> including the relationship of the parties [,]" as well as "the conduct of the parties [.]" The determination of whether a gift was jointly or individually made is a factual issue, and therefore, subject to the CR 52.01's clearly erroneous standard of review.

Sexton at 268-69 (internal citations omitted).

As noted by the *Sexton* court, the determination of whether the property transferred was a gift is a factual issue subject to the clearly erroneous standard of review; thus, under CR 52.01 "findings of fact shall not be set aside unless clearly erroneous"; means that factual findings supported by substantial evidence will not be set aside. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998), and *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 117 (Ky. 1991). Substantial evidence is that which has sufficient probative value to induce conviction in the mind of a reasonable person. *Golightly*, 976 S.W.2d at 414.

Sub judice, Sherri argues that the deed and memorandum conveying the property to her should be controlling and irrefutable evidence of Thomas's intention to gift her over $95,000 in property. We cannot agree with this conclusion in light of aforementioned jurisprudence. The trial court was presented evidence of the circumstances surrounding the transfer of title, including the status of their relationship, the source of the funds having come solely from Thomas's nonmarital accounts or from loans, his intention to reside with her in the house, and the lack of agreement excluding the property from the marital estate.

The trial court determined that the evidence presented did not express an intention on Thomas's behalf to gift the property to Sherri. Based on the record, the trial court was not clearly erroneous in determining that the property in question did not constitute a gift and instead was a part of the marital estate. Likewise, based on the record, the trial court did not abuse its discretion in dividing the property in issue as a part of the marital estate.

Finding no error, we affirm.

ALL CONCUR.

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