RENDERED: July 18, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-0863-MR (DIRECT)
AND NO. 96-CA-1025-MR (CROSS)

AUZIE GAIL LAMB — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM McLEAN CIRCUIT COURT
HONORABLE DAN CORNETTE, JUDGE
ACTION NO. 93-CI-0110

FAIRY VENEA LAMB — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

* * *

BEFORE: GUIDUGLI, JOHNSON AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal and cross-appeal from a judgment in a dissolution action in McLean Circuit Court. Appellant/cross-appellee, Auzie Gail Lamb (Gail), the former husband, raises six issues on appeal, and appellee/cross-appellant, Fairy Venea Lamb (Venea), the former wife, raises two.

Gail and Venea were married on December 1, 1977. The marriage produced two daughters, Cristen and Rachel, both minors at the time of the dissolution. Throughout the marriage, both husband and wife worked for A & S Fabricating Company, Inc., a company run by Venea's father, Henry Sonner. The couple

separated on or about July 25, 1993. Venea filed a petition for dissolution on September 17, 1993, along with a stipulation and agreement prepared by Venea's attorney and executed by Gail and Venea, purporting to resolve all custody, visitation, support, maintenance and property issues between the parties.

Gail subsequently obtained legal counsel, conducted discovery and moved to set aside the agreement. After an evidentiary hearing, the court found the agreement unconscionable. The marriage was dissolved on February 14, 1995. The court awarded temporary custody to Venea, and ordered Gail to pay temporary child support in the amount of $300.00 a month.

After extensive additional discovery, trial was held November 14, 1995. The court entered findings of fact and conclusions of law on January 19, 1996. On March 11, 1996, the court entered judgment, incorporating by reference the earlier findings of fact and conclusions of law and reiterating its conclusions. The court, inter alia: (1) granted permanent custody of the children to Venea, with Gail to have liberal visitation rights; (2) ordered Gail to pay $68.00 per week in child support, finding Venea could reasonably anticipate an annual income of $70,000.00 and Gail $20,000.00; (3) denied Gail's request for maintenance, aside from the requirement that Venea provide health insurance for the children; (4) held the increase in the value of Venea's non-marital stock in A & S Fabricating was non-marital; (5) held the retained earnings of A & S Fabricating non-marital; (6) awarded Gail half of the

$25,000.00 in a lockbox maintained by Venea; and (7) awarded Gail $355.00 in copying costs associated with discovery, but no attorney's fees. The court also divided the marital property between the parties. This appeal and cross-appeal followed.

Three of the issues raised by Gail involve Venea's stock. First, Gail contends that the increase in value of Venea's stock during the couple's marriage is divisible as marital property. Venea received eight shares of stock in her father's company, A & S Fabricating, before marrying Gail, and seven shares after the marriage, both times as gifts. The parties agree that the value of the stock increased substantially during the relevant period, although they disagree as to how much. The circuit court framed the issue in terms of whether the increase in the value of the stock was the result of the joint efforts of the parties to the marriage.

As to Gail's first contention, that the increase in stock value is marital property, the court heard testimony from Gail, Venea, Venea's father, Henry Sonner, and other employees of A & S on this issue. Mr. Sonner employed not only Venea and her husband, but his other two daughters and their husbands. Neither Gail nor Venea had any special training for their positions, and there was evidence that Gail was frequently absent to attend to his race car enterprise. In its findings of fact and conclusions of law, the court found that "[b]oth Gail and Venea could have been replaced at A & S at a lesser cost to the company," and concluded that any increase in the value of the stock did not

result from the joint efforts of the parties. The court's division will not be overturned unless it has abused its discretion. Herron v. Herron, Ky, 573 S.W.2d 342 (1978).

We agree with the trial court. Under KRS 403.190(2)(o), marital property includes all property acquired by either spouse subsequent to the marriage except 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 the marriage. Only when the increase in value is a result of the joint efforts of the parties can the increase in value of nonmarital property be considered marital. Goderwis v. Goderwis, Ky., 780 S.W.2d 39 (1989).

In Goderwis, the husband had built up a business during the marriage which was the couple's principal source of income, while the wife contributed as a homemaker. The Supreme Court of Kentucky held that the increased value of the business was marital. In the case sub judice, neither spouse contributed to the increased value of the stocks.

Gail argues alternatively that, if the increase in value in Venea's stock is ruled nonmarital, the undistributed earnings attributable to Venea's 15% ownership interest are marital property. The parties presented conflicting expert testimony on the amount of earnings A & S retained. A & S Fabricating, the business run by Venea's father, was, beginning in 1987, a Subchapter "S" corporation under the federal tax code. 26 U.S.C. § 1361, et. seq. (1996). As such, the corporation

itself pays no tax, but its shareholders are taxed based upon their ownership interest. Gail attempts to treat A & S Subchapter S income reported on the couple's tax returns the same as income actually received by Venea. Gail reasons that since they paid tax on the undistributed income on a joint return, the undistributed income should be considered marital property.

Venea responds that, as a 15% shareholder, she has no power to force A & S to distribute earnings, and is only entitled to her share of dividend distributions. She is taxed on 15% of the company's earnings, whether or not she actually receives them.

The parties do not dispute that all of Venea's shareholder interest in A & S is nonmarital. Under the statute in force at the time this case was decided, income from a spouse's nonmarital property was marital. Dotson v. Dotson, Ky., 864 S.W.2d 900, 902 (1993).[1] The only issue is whether undistributed earnings of a Subchapter "S" corporation are income. The circuit court requested briefs on this issue. Finding no Kentucky case on point, the court adopted the reasoning of Thomas v. Thomas, 738 S.W.2d 342 (Tex. App. 1987), and found the retained earnings nonmarital.

Thomas is remarkably similar to this case. The husband acquired 16% of the stock in a Subchapter "S" corporation by gift and inheritance, the couple paid taxes on the husband's

[1] Effective July 15, 1996, income from nonmarital property is nonmarital. KRS 403.190(2)(a).

proportionate share of the company's earnings, and the parties agreed the company retained earnings. The Thomas Court noted that Subchapter S status does not affect ownership of corporate earnings, but merely determined how they were taxed. The Court of Appeals of Texas held that the retained earnings remained the company's assets, and were not subject to division upon dissolution of a shareholder's marriage. Id. at 345. We agree with the circuit court on this issue and adopt the holding in Thomas, supra.

Gail also complains that the circuit court did not properly estimate Venea's income in establishing the amount of child support. In particular, he asserts that the court should have included Venea's share of A & S Fabricating's undistributed earnings, as shown on the couple's tax returns.

The determination of child support is governed by KRS 403.212, and will not be reversed absent an abuse of discretion. "Income and expenses from self-employment or operation of a business shall be carefully reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support obligation. In most cases, this amount will differ from a determination of business income for tax purposes." KRS 403.212(2)(c). In 1994, Venea paid taxes based upon shareholders' income from A & S Fabricating of $112,547.00, in addition to her salary and bonus from A & S of approximately $38,000.00. Gail tendered a child support calculation using $153,957.00 as Venea's gross income, which would have obligated

him to pay $37.20 per week, instead of the $68.00 found by the court.

The circuit court arrived at a figure of $70,000.00 for Venea's income. Based upon evidence in the record, Venea's income from wages and dividend distributions for the years immediately preceding the dissolution came to approximately $70,000.00/year. The undistributed earnings of A & S, while taxable to Venea, were not "available" to her. The court found Gail's income to be $20,000.00, and that finding was not challenged on appeal. The circuit court did not abuse its discretion in determining Venea's income for purposes of child support, and correctly calculated Gail's child support obligation under the guidelines.

Gail's next point of error is that the circuit court denied his request for maintenance. An award of maintenance is a matter within the discretion of the trial court, and will not be set aside unless clearly erroneous. Browning v. Browning, Ky. App., 551 S.W.2d 823 (1977); Newman v. Newman, Ky., 597 S.W.2d 137 (1980). An award of maintenance is only proper where the requesting spouse lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs and is unable to support himself through appropriate employment. KRS 403.200(1).

By the court's division of marital property, Gail received $61,889.00 in cash, his retirement account at A & S valued at $33,530.00, a pickup valued at $3750.00, $12,500.00

from the lockbox, and a share of a trust. Gail testified at trial that he was willing and able to work. We find no abuse of discretion in the circuit court's ruling.

Gail also contends that the circuit court erred in awarding custody of the couple's minor children to Venea. The court shall determine custody in accordance with the best interests of the child. KRS 403.270. In reviewing a decision in a child custody case, the test is whether the findings of the trial court were clearly erroneous or the court abused its discretion. Eviston v. Eviston, Ky., 507 S.W.2d 153 (1974).

The agreement signed by the parties called for joint custody, with the children to reside primarily with Venea but with liberal visitation rights for Gail. After the court set aside the agreement, Venea moved for temporary custody and child support. The court granted temporary custody to Venea, and specified Gail's visitation terms. Before trial, Gail moved for permanent custody of the children. At trial, the court heard testimony from Gail, Venea, and Venea's two sisters on this issue. Gail testified that, for some time after their separation, Venea's boyfriend had been living with Venea and the children. Venea and her sisters testified about Venea's care of the children and the children's activities in which Venea participated. Venea and the daughters remained in the family home after the separation and dissolution. Gail moved in with his mother.

The circuit court found that both parties had been good

parents, but decided that "Venea is in the better position to raise the girls at this point in their lives," and that granting her custody would be in the best interest of the children. The circuit court did not abuse its discretion in awarding custody to Venea.

Finally, Gail argues that the circuit court abused its discretion by denying his request for attorney's fees. The allocation of court costs and attorneys fees are entirely within the discretion of the trial court. Wilhoit v. Wilhoit, Ky., 521 S.W.2d 512 (1975). An allowance of attorneys fees is authorized only where there is an imbalance in the financial resources of the parties. Lampton v. Lampton, Ky. App., 721 S.W.2d 736 (1986); KRS 403.220.

This case involved a great deal of discovery, mostly concerning Venea's assets and her alleged failure to disclose. Finding that Venea was "less than forthcoming during the discovery process," the circuit court ordered Venea to pay Gail $355.00 in copying costs for bank records. It is true that Venea's income in the form of salary, dividends, and bonuses from her father's company is considerably higher than what Gail can expect to receive. In view of Gail's financial resources after the division of marital property, however, we find no abuse of discretion.

By cross-appeal, Venea protests the circuit court's decision to award Gail $12,500.00 in cash from a lockbox. Venea contends that the cash actually belonged to Henry Sonner, her

father, and that she and Gail only borrowed from it. The testimony indicated the lockbox was set up in 1983, well into the couple's marriage. Mr. Sonner testified that the money was his, placed there in an effort to avoid inheritance taxes. He had similar arrangements with his other daughters. Gail and Venea testified that they withdrew money from the lockbox for various purposes, including a down payment on a house and the purchase of a race car. No one, including Mr. Sonner, presented any documentary proof of how much was in the lockbox initially, how much was withdrawn, or how much was replaced. Mr. Sonner's name did not appear on the lockbox, and he did not personally make any deposits or withdrawals. The court set the value at $25,000.00 based on Venea's testimony, and this finding has not been challenged on appeal.

The parties discuss this issue in terms of marital property, and the presumption under KRS 403.190(3). In its findings of fact and conclusions of law, however, the circuit court found that the cash in the lockbox was a gift to both Gail and Venea, and granted half to Gail. Gifts during marriage from third parties to both spouses shall be treated as marital property upon dissolution. Calloway v Calloway, Ky. App., 832 S.W.2d 890, 892 (1992). To constitute a gift, there must be donative intent, delivery and acceptance. 38 Am. Jur. 2d Gifts § 18. Intent can be shown by acts, or inferred from the relation of the parties and the surrounding facts and circumstances. Gifts, § 17. The record supports the conclusion that, by placing

the money completely out of his control, Mr. Sonner made a gift of the cash to his daughter, Venea. Venea, in turn, allowed Gail to use the money, and the two of them replenished it with marital funds. We find no abuse of discretion in the circuit court's decision to divide the lockbox contents equally as marital property.

Venea next contends that the circuit court abused its discretion by not enforcing the stipulation and agreement signed by the parties and filed on September 17, 1993, with the petition for dissolution. The agreement purported to resolve all custody, visitation, support, maintenance and property issues between the parties. KRS 403.180(2) provides:

> In a proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement, **except those providing for the custody, support, and visitation of children,** are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable. (Emphasis added.)

The party challenging the agreement as unconscionable has the burden of proof, and an agreement is not unconscionable unless it is unfair, inequitable, or the result of fraud, undue influence or overreaching. Peterson v. Peterson, Ky. App., 583 S.W.2d 707, 711-712 (1979). See also, Shraberg v. Shraberg, Ky., 939 S.W.2d 330 (1997).

After retaining counsel, Gail moved to have the agreement set aside, alleging that Venea had not fully disclosed

her assets. By order dated March 10, 1994, the court placed the burden on Gail to present proof that the agreement was unconscionable, and that Venea withheld disclosure of assets. After the parties conducted discovery, the circuit court held an evidentiary hearing on February 14, 1995. Gail testified on his behalf and was cross-examined. The court then stopped the proceedings. In its written order entered February 16, 1995, the court found:

> 1. The agreement of September 16, 1993 is not fair and equitable. That the agreement did not provide for Gail to provide any support for his children is compelling reason enough not to approve the agreement, and additionally the financial situation of the parties is so complex that there is no way to determine what is fair and equitable without a trial de novo.

More discovery followed, and trial was held November 14, 1995. The court entered findings of fact and conclusions of law on January 19, 1996, and judgment on March 11, 1996, including a division of property.

Under KRS 403.180, the circuit court was not bound by the parties' agreement, as it related to child support, custody and visitation. Thus, the failure to provide for child support was not, by itself, sufficient grounds to find the agreement unconscionable. It also appears from the record that, at the time the court halted the hearing on this matter, the court had not determined that the agreement was unconscionable because of lack of disclosure on Venea's part. A court need not explicitly use the term, "unconscionable," if it can be determined that the

court's actions substantially comply with the requirements of KRS 403.180. Jackson v. Jackson, Ky. App., 571 S.W.2d 90, 92-93 (1978). Also, the court's ruling on the agreement need not be set aside unless failure to do so would be inconsistent with substantial justice. CR 61.01. A comparison of the agreement and the court's ultimate judgment is necessary to address these concerns.

In its division of property, the circuit court listed the couple's marital assets and their values, divided by two, and ordered Venea to pay Gail the difference in cash between the value of the property assigned to her and that assigned to Gail. Leaving aside the lockbox, the resulting distribution differed from the agreement signed by the parties in two respects: the court ordered Venea to pay Gail $61,889.00 while the agreement called for $55,000.00, and the court ordered that Gail receive a sum of money representing one-half the marital interest in a trust. The "Henry Sonner Trust," set up by Venea's father, was funded by Venea and her two sisters. The agreement did not mention the trust, and Gail testified he knew nothing about it when he signed the agreement. The court found $13,030.00 of the cash value of the trust to be non-marital. The judgment required the parties to determine the cash surrender value of the trust as of the date of dissolution, deduct the non-marital $13,030.00, with Venea to pay Gail one-half of her one-third interest of the balance.

The record indicates that the trust had a cash

surrender value of approximately $32,000.00 as of October, 1994. Applying the circuit court's calculations to that figure, Gail would be entitled to receive approximately $3200.00 as his interest in the trust. Thus, in terms of property alone, Gail came out approximately $10,000.00 ahead, comparing the agreement to the court's judgment.

The other differences between the agreement and the judgment relate to the children. The agreement required Gail to maintain their health insurance, and the court placed that responsibility on Venea as a form of "maintenance." The agreement did not call for child support, while the court ordered Gail to pay $68.00 per week. The agreement provided for joint custody, with the children residing with Venea, but the court granted custody to Venea.

Gail received more money under the court's judgment, but the additional $10,000.00 represents less than 5% of the total marital estate, and does not reflect a large adjustment due to the parties' economic circumstances. The undisclosed assets were Venea's 1/3 interest in the Henry Sonner Trust and the $25,000.00 in the lockbox. However, the fact that the court's de novo division of property was quite similar to the parties' agreement does not mean that the trial court erred in not enforcing the agreement.

For the foregoing reasons, we affirm the judgment of the McLean Circuit Court on appeal and cross-appeal.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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