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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 1997-CA-001478-MR
NO. 1997-CA-001528-MR

HAROLD TRAVIS — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL
FROM MCCRACKEN CIRCUIT COURT
HONORABLE JAMES R. DANIELS, JUDGE
CIVIL ACTION NO. 95-CI-001000

PEGGY TRAVIS — APPELLEE/CROSS-APPELLANT

OPINION

AFFIRMING

** ** ** ** ** ** **

BEFORE: BUCKINGHAM, EMBERTON and HUDDLESTON, Judges.

HUDDLESTON, Judge. Harold Travis appeals and Peggy Travis cross-appeals from a final decree that resolved issues concerning the value and ownership of certain real property owned by the parties when their marriage was dissolved.

Harold and Peggy were married on June 28, 1989. Harold is a real estate investor and is also employed at Westvaco in plant maintenance. Peggy is employed as a deputy clerk in the McCracken County Clerk's office.

Before Harold and Peggy married, Harold contributed $24,250.00 toward the purchase of a lot located at 145 Forest View

Cove Drive in Paducah upon which was built the parties' marital residence. Title was held by Harold and Peggy as joint tenants with right of survivorship. Soon after Harold and Peggy married, title to a twelve-apartment complex located at 2336 Hovekamp Road and a rental house at 5437 Stevin Drive were transferred to and subsequently held by Harold and Peggy as joint tenants with right of survivorship.

Harold and Peggy separated on November 10, 1995, and their marriage was dissolved on January 14, 1997. In a June 3, 1997, order, McCracken Circuit Court found that Harold had gifted an undivided one-half interest in the marital residence property at 145 Forest View Cove Drive to Peggy, but that the transfer of the property located at 2336 Hovekamp Road and 5437 Stevin Drive to Peggy did not amount to a gift because Harold lacked donative intent.

On appeal, Harold claims that the court erred in finding that the transfer of property located at 145 Forest View Cove Drive to Peggy had been intended as a gift. Property acquired by a spouse during the marriage is presumed to be marital. Ky. Rev. Stat. (KRS) 403.190(3). However, property obtained by "gift, bequest, devise, or descent" is excepted by KRS 403.190(2)(a). The Supreme Court addressed this issue in Rakhman v. Zusstone, Ky., 957 S.W.2d 241 (1997), which, like this case, involved a dispute as to whether the transfer of a residence amounted to a gift or whether a resulting trust should be imposed. The parties had cohabitated for some thirteen years and had two children. Rakhman asserted

that the house, which was titled in her name alone, was a gift to her from Zusstone after the birth of their second child. Zusstone, on the other hand, asserted that Rakhman merely held the property in trust for his benefit.

To determine whether the house was a gift, the Supreme Court looked at the relationship between Zusstone, the payor, and Rakhman, the transferee. The Court said that if the transferee was the natural object of the payor's bounty then it is inferred that the payor intended to make a gift to the transferee. Relying on the Restatement (Second) of Trusts §442 cmt. a (1959), the court said that:

> It is rather a question of whether the transferee stands in such a relationship to the payor that it is probable that the payor intends to make a gift to the transferee. It is inferred that he does intend to make a gift if the transferee is by virtue of the relationship a natural object of his bounty.

Id. at 244. If the transferee is within the class of persons who would be the natural object of the payor's bounty, there is a rebuttable presumption of a gift. The payor must overcome the presumption by producing "the same quantum of evidence as is required to overcome any other rebuttable presumption." Id. at 245.[1] Once the payor has overcome the presumption, the transferee

[1] Ky. R. Evid. (KRE) 301 provides that:

> In all civil actions and proceedings when not otherwise (continued...)

bears the "risk of nonpersuasion." Id. "This burden can also be described as the 'preponderance of the evidence' or 'more probably true than not.'" Id. In the instant case, Peggy and Harold had the necessary relationship--as husband and wife--for Peggy to be considered the natural object of Harold's bounty.

The next consideration is the circumstances surrounding the transfer of the property. Peggy testified that Harold placed the deed in joint names because of their impending marriage and because they had "decided to build a house together." (The parties later mortgaged the property to obtain funds to construct the marital residence.) Peggy also testified that Harold never objected to the conveyance until after the marriage was dissolved and that there was not an agreement that she would hold title in trust for him. Peggy's evidence is sufficient to invoke the presumption that the transfer of the property was intended as a gift.

Harold, on the other hand, testified that he did not intend for Peggy to have half of the property. He insists that its transfer was simply a way for him to get "peace and quiet." The circuit court made the following pertinent findings regarding the martial residence property:

(...continued)

> provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

> Harold contributed $24,250.00 of his non-marital funds which was used to purchase the lot. (Peggy claims to have contributed to the purchase price; however, she was unable to trace any contribution towards the purchase price). Harold chose, however, to have this property deeded to him jointly with Peggy with right of survivorship. This occurred before the marriage. Peggy claims that this constituted a gift to her of one-half of the value of the lot. Once again, the Court has considered the source of the money with which the proposed gift was purchased, the intent of the donor at the time as to the intended use of the property, the status of the marriage relationship at the time of the transfer, and whether there was any valid agreement that the transferred property was to be excluded from the marital property. The Court is persuaded and so finds that Harold intended to make a gift to Peggy of one-half of the value of the lot. After the gift, the parties jointly owned one-half of the lot. The parties then married and obtained a construction loan to build their residence . . . .

In such matters we cannot substitute our judgment for that of the trial court unless its findings are clearly erroneous, that is, are unsupported by probative evidence. Ky. R. Civ. Proc.(CR) 52.01; Schott v. Citizens Fidelity Bank & Trust, Ky. App., 692 S.W.2d 810 (1985). It is within the exclusive province of the trier of fact

to pass on the credibility of witnesses and to determine what weight is to be given to the evidence presented at trial. Ironton Fire Brick Company v. Burchett, Ky., 288 S.W.2d 47 (1956). With these considerations in mind, we hold there is sufficient evidence to support the trial court's finding that Harold intended to give an undivided one-half interest in the marital residence property to Peggy.

Peggy's cross-appeal concerns the circuit court's finding that the two rental properties, held by Harold and Peggy as joint tenants with joint right of survivorship, were not gifts. Peggy contends that the properties were presumed gifts since she was the natural of Harold's bounty and that, as a matter of law, Harold failed to present sufficient evidence to rebut the presumption. In determining whether property is a gift, consideration is given to the intent of the donor at the time as to the intended use of the property. O'Neill v. O'Neill, Ky. App.,600 S.W.2d 492 (1980). Harold testified that he received the rental properties in a previous divorce and never intended for these properties to become a gift to Peggy. He also testified, as before, that its transfer was a way for him to get "peace and quiet." While the evidence is conflicting, there was sufficient evidence to support the circuit court's finding that Harold never intended to give the rental property to Peggy. Clearly, the use of the property was a pertinent factor.

Returning to the direct appeal, Harold argues that the circuit court erred in determining the value of (1) a rental duplex

located at 2327 Hovekamp Road; (2) an investment lot located at 2334 Hovekamp Road; (3) a 12-unit apartment complex at 2336 Hovekamp Road; (4) an investment lot at 2346 Hovekamp Road; (5) a single family residence rental property located at 5437 Stevin Drive; (6) a single family residence at 615 Valley Street; and (7) an investment lot at 916 Lake View Drive. He contends that the circuit court should have used the McCracken Property Valuation Administrator's (PVA's) records instead of relying on the testimony of Peggy's expert witness, Donnie Roberts, a real estate agent.

In Robinson v. Robinson, Ky. App., 569 S.W.2d 178 (1978), this Court addressed the issue of whether PVA records, in the absence of tetimony from the PVA or one of his deputies, may be relied on to fix the value of property at issue:

> The only other evidence given in this case was an exhibit filed by the appellant purporting to list the assessed value of this property according to the Property Valuation Administrator. The PVA did not testify, did not give any basis for such valuation, was not subject to examination by the parties or the court, and was not subject to cross-examination. Basically, his evidence was without probative value. As stated in the case of Commonwealth v. Rankin, [Ky. App., 346 S.W.2d 714, 717 (1978)], "[i]n determining the value of land . . . assessed value, though not conclusive, can be considered in connection with other evidence of value of property." In this case there was no other evidence concerning the

> value of the property. The evidence offered by the appellant will just simply not suffice, and it was manifest error for the court to place a value on the property without more. If the attorneys practicing domestic relations law do not give the court adequate tools with which to work, they can hardly complain of inequitable results.

Id. at 180 (original emphasis). In the instant case, as in Robinson, Harold did not introduce any evidence other than the PVA records to establish the value of the properties. His proof on this issue lacked probative value.

As a general rule, a trial court's valuation in a divorce action will not be disturbed unless it is clearly contrary to the evidence. Underwood v. Underwood, Ky. App., 836 S.W.2d 439 (1992). Donnie Roberts testified concerning the fair market value of the property. The determination of credibility and weight to be given Robert's testimony was a peculiar function of the trier of fact. Singer v. Singer, Ky., 440 S.W.2d 783 (1969). The circuit court's determination of market value based upon Robert's testimony was not clearly erroneous.

The decree is affirmed.

All CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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