

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002420-MR
AND
NO. 2002-CA-002462-MR

CLARENCE MICHAEL GIVENS

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 95-CI-00597

BETSY GRAY GIVENS

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, VACATING IN PART,
REVERSING IN PART AND REMANDING

** ** * * *

BEFORE: JOHNSON, MINTON AND TACKETT, JUDGES.

JOHNSON, JUDGE: Clarence Michael Givens has appealed and his former wife, Betsy Gray Givens, has cross-appealed from the findings of fact, conclusions of law, and decree of dissolution of marriage entered by the Fayette Circuit Court on October 23, 2002. Having concluded that the trial court failed to make sufficient findings concerning its decision to award Clarence, as part of his share of the marital estate, sole possession of a

sailboat and several hundred thousand dollars in marital funds that were unaccounted for at the time of the dissolution, we vacate in part and remand for additional findings. Having further concluded that the trial court was clearly erroneous in finding that the settlement proceeds Clarence received from a legal malpractice action were his non-marital property, we reverse in part and remand. Finally, having concluded that the trial court did not err or abuse its discretion with respect to the other rulings challenged in this appeal, we affirm in part.

Clarence and Betsy were married in Hopkinsville, Christian County, Kentucky, on November 22, 1973. The marriage produced three children, all of whom were over the age of 18 years at the time of the divorce. Throughout the course of the marriage, the family moved back and forth between Hopkinsville and Lexington, Kentucky. In 1975 Clarence received a one-third interest in 18 separate tracts of real property located in Christian County as a gift from his father. Clarence's brother, James Givens, and his sister, Susan Miles, each received a one-third interest in the property as well. The three siblings held title to the property through a partnership named Skyline Enterprises.¹ In 1983 Skyline Enterprises hired Givens Construction Company to build a grocery store on a portion of the property owned by the partnership. At the time, Givens

¹ The property was held in a trust prior to 1975, at which time the property was transferred to Clarence, James and Susan.

Construction was owned and operated by Clarence and Betsy.² Givens Construction received 5% of the gross construction proceeds on the project.

In January 1993 Clarence and his siblings entered into a settlement agreement whereby Clarence agreed to sell his interest in the partnership to his brother and sister for approximately \$2,260,000.00.³ Clarence deposited the proceeds from the sale in an account under his name at the Bank of the Bluegrass. Shortly thereafter, Clarence transferred approximately \$2,260,269.00 from the account at the Bank of the Bluegrass to an account at the Bank of Harlan.⁴

In 1994 Clarence presented Betsy with a cashier's check for \$500,000.00 and told her he wanted her to use the money to purchase the stock he owned in Skyline Motel II Corporation.⁵ According to Betsy, Clarence informed her that he wanted to place the stock in her name and that he "want[ed] [her] to have the stock." Consequently, Betsy deposited the cashier's check in her individual account at Bank One, after which she obtained a cashier's check payable to Clarence in the

² Clarence was the president of the company and Betsy was the treasurer.

³ The record does not disclose the exact dollar amount Clarence received for his interest in the partnership.

⁴ Clarence did not consult Betsy prior to transferring the funds from the Bank of the Bluegrass to the Bank of Harlan.

⁵ The record is unclear as to the source of the \$500,000.00.

amount of \$500,000.00. Betsy then presented Clarence with the cashier's check and the stock was transferred into her name.⁶

In February 1995 the couple began to experience marital difficulties and Betsy filed a petition for legal separation. The couple reconciled a few months later and took a trip to Tortola, British Virgin Islands, in June 1995. While in Tortola, Clarence informed Betsy that he had deposited substantial amounts of cash in various offshore accounts and purchased a sailboat from an offshore charter company for approximately \$115,000.00. According to Betsy, Clarence also informed her that he had given an individual named Rick Thomas a substantial amount of cash with directions to slowly filter the money into various offshore accounts. Clarence also appears to have provided Thomas with approximately \$200,000.00 which was to be used as an investment for a "mortgage fund." The couple decided to consolidate the money Clarence had deposited in the offshore accounts into one account under Clarence's name at Barclays Bank in Tortola.

When Clarence and Betsy returned to Tortola in January 1996, they discovered that Thomas had absconded with the sailboat and \$200,000.00, which they claim were never recovered.

⁶ The shareholders agreement for Skyline Motel II Corporation contained a provision which prohibited each shareholder from transferring his shares in the corporation to a third party without first offering the shares to the remaining shareholders. Consequently, Clarence offered his shares in the corporation to the other shareholders prior to transferring the stock to Betsy.

While in Tortola, Clarence and Betsey transferred approximately \$750,000.00 from the account at Barclays Bank into a certificate of deposit listed in both of their names. The couple decided to keep approximately \$90,000.00 in the account at Barclays Bank solely in Clarence's name.⁷

Clarence and Betsy separated again in December 1996. On January 2, 1997, Betsy filed an amended petition for dissolution of marriage in the Fayette Circuit Court. On February 25, 1997, the trial court entered an order prohibiting Clarence from liquidating, transferring, dissipating or disposing of the martial assets. In 1998 Clarence received approximately \$211,247.52 in settlement proceeds from a legal malpractice lawsuit he had filed against Daniel Hicks in 1992.⁸

An evidentiary hearing was held before the trial court on September 20 and 21, 1999. As of September 1999, Clarence and Betsy jointly had a CD at Barclays Bank valued at approximately \$741,779.37. Clarence also had an account at Bank One in his name with a balance of approximately \$53,217.80; an IRA in his name valued at approximately \$90,654.72; and a life insurance policy with Woodmen of the World in his name with a

⁷ It appears that Clarence also had an account in the name of JJB Enterprises at Barclays Bank which was to be used for a chartering business involving Thomas. Betsy did not have access to this account or the account listed in Clarence's name. As of November 1, 1996, the JJB Enterprises account had a balance of approximately \$9,423.10.

⁸ The malpractice action was filed in response to a suit brought by Hicks against Clarence for attorney's fees.

cash value of approximately \$81,577.09. Betsy had an IRA in her name valued at approximately \$7,977.51 and a savings account in her name with a balance of approximately \$30,000.00. Betsy also had 333 1/3 shares of stock in Skyline Motel II Corporation listed in her name. In addition, as of September 1999, Betsy had received approximately \$105,000.00 in several installments from the \$211,247.52 in settlement proceeds Clarence received in 1998 from his legal malpractice action.⁹

Betsy testified at the hearing that Clarence was actively involved in Skyline Enterprises until the partnership was dissolved in 1993. Betsy stated that Clarence spent a lot of time during the marriage in western Kentucky working for the partnership. Betsy further testified that Clarence received monthly draw checks from the partnership until it was dissolved in 1993. Betsy stated that she was actively involved in Givens Construction. Betsy testified that Clarence was the president of the company and she was the treasurer. Betsy further testified that in 1983 Skyline Enterprises hired Givens Construction Company to build a grocery store on a portion of the property owned by the partnership. Betsy explained that Givens construction was paid by Skyline for the work it performed on this project.

⁹ Clarence and Betsy no longer had an interest in the marital residence. In 1993 the couple transferred the marital residence into a trust for the benefit of their children.

Clarence testified that his involvement with Skyline Enterprises during the marriage was minimal. Clarence acknowledged, however, that in 1983 Skyline Enterprises hired Givens Construction Company to build a grocery store on a portion of the property owned by the partnership. Clarence maintained his involvement with the partnership during the marriage was limited to the work performed by Givens Construction in 1983. Clarence further testified that he never intended to give Betsy his shares of stock in Skyline Motel II Corporation as a gift. Clarence claimed he was concerned the value of the stock was limited by the restriction in the shareholders agreement prohibiting the holder of the stock from transferring shares in the corporation to a third party without first offering the shares to the remaining shareholders. Clarence maintained that by transferring the stock to Betsy, he was able to remove this restriction, thereby increasing the value of the stock. Clarence insisted he never intended for Betsy to exercise any control over the stock.

Clarence further testified that the funds used to purchase the joint CD at Barclays Bank came entirely from the \$2,260,269.00 he received when he sold his interest in Skyline Enterprises. Clarence stated that he initially deposited the proceeds from the sale of the partnership in an account under his name at the Bank of the Bluegrass. Clarence claimed he then

transferred the funds to an account at the Bank of Harlan. Clarence testified that the funds used to purchase the joint CD at Barclays Bank came directly from the account at the Bank of Harlan. Clarence insisted he never commingled these funds with any other funds he received during the marriage. Clarence claimed the funds were transferred to Tortola in a "variety of ways." Clarence testified that he made several trips to Tortola and that he took approximately \$10,000.00 with him on each trip.¹⁰ Clarence claimed he also made several wire transfers to various accounts in Tortola. Clarence was unable, however, to produce any documentation evidencing precisely how the funds were transferred from the Bank of Harlan to Barclays Bank in Tortola.

Clarence testified that he purchased a sailboat from an offshore charter company in Tortola for approximately \$115,000.00. Clarence further testified that he provided an individual named Rick Thomas with approximately \$200,000.00 as an investment for a "mortgage fund." Clarence was unable to account for the whereabouts of the sailboat and the \$200,000.00. Clarence testified that he cashed in his life insurance policy with Woodmen of the World shortly before the hearing and received approximately \$81,000.00. Clarence further stated that he had spent the money in the account at Barclays Bank listed in

¹⁰ Clarence insisted he never took more than \$10,000.00 with him on each trip.

his name, which as of November 1996 had a balance of approximately \$90,000.00.¹¹ Clarence testified that the account at Barclays Bank in the name of JJB Enterprises, which as of November 1996 had a balance of approximately \$9,423.10, no longer existed. In closing, Clarence claimed the money he received in 1998 from the settlement of his malpractice lawsuit against Hicks was his non-marital property. Clarence maintained the lawsuit was related to Hick's representation in connection with his father's estate.¹²

Bernard F. Lovely testified at the hearing over Betsy's objection. Lovely explained that he represented Clarence in his legal malpractice action against Hicks. In sum, Lovely opined that the proceeds from the settlement concerned Hicks's negligence in the representation of Clarence in a probate action involving his father's estate.

On October 23, 2002, the trial court entered its findings of fact, conclusions of law and decree of dissolution of marriage. The trial court found that the appreciation in the value of Skyline Enterprises from the time Clarence received his interest in the partnership in 1975 until the time he sold it in

¹¹ As previously discussed, Betsy did not have access to this account.

¹² Clarence's father passed away in 1982.

1993 was marital property.¹³ The trial court found that "[t]he appreciation in value was due both to general economic conditions and efforts of [Clarence] and his siblings in managing the partnership[.]" The trial court noted, however, that Clarence had failed to produce any evidence from which it could "apportion the appreciation[.]" The trial court further found that Clarence had failed to trace the non-marital portion of his partnership interest to the funds in Tortola. The trial court noted that "[t]he funds can be traced as far as the Bank of Harlan, but from there they were converted to cash and no record exists as to their disposition." Consequently, the trial court found that the accounts in Tortola were marital property.¹⁴

The trial court also found that the missing sailboat and the \$200,000.00 that Thomas allegedly absconded with were marital property. The trial court noted, however, that Clarence's explanation as to the whereabouts of the sailboat and the \$200,000.00 was "not credible." The trial court further found the IRA's held by both parties to be marital property. In addition, the trial court found the life insurance policy

¹³ The trial court found that Clarence's interest in the partnership when it was created in 1975 was \$309,000.00. As previously discussed, Clarence received approximately \$2,260,000.00 when he sold his interest in the partnership to his brother and sister in 1993. Consequently, the trial court found that Clarence's non-marital interest in the property was \$309,000.00.

¹⁴ As previously discussed, as of November 1, 1996, Clarence and Betsy had a joint CD at Barclays Bank valued at approximately \$750,000.00. In addition, Clarence had an account in his name at Barclays Bank with a balance of approximately \$90,714.58 and an account in the name of JJB Enterprises with a balance of approximately \$9,423.10.

Clarence liquidated shortly before the hearing and the account at Bank One in his name to be marital property.

As to the transfer of Clarence's shares of stock in Skyline Motel II Corporation to Betsy, the trial court found this property to be a gift. The trial court reasoned that "it would be inequitable to allow [Clarence] to represent this transaction to be a valid arms-length sale for the purpose of defeating the buy-sell provision and yet portray it as a sham in this action, particularly in light of his failure to explain what happened to the \$500,000 he received in the transaction." Consequently, the trial court found that the stock was Betsy's non-marital property. In addition, the trial court found that the savings account in Betsy's name with a balance of approximately \$30,000.00 was her non-marital property.¹⁵ The trial court further found that the \$211,247.52 Clarence received from his legal malpractice lawsuit was his non-marital property. The trial court reasoned that the settlement was primarily related to a probate action involving Clarence's inheritance from his father's estate.

Based on the foregoing findings, the trial court awarded Clarence as his share of the marital estate \$152,584.80 from the joint CD at Barclays Bank; the IRA account in his name valued at approximately \$90,654.72; the life insurance policy in

¹⁵ The trial court found that the money in the account was from an inheritance Betsy received from her uncle.

his name valued at approximately \$81,577.09;¹⁶ the Bank One account in his name with a balance of approximately \$53,217.80; the JJB Enterprises account at Barclays Bank, which as of November 1996 had a balance of approximately \$9,423.10; the account in his name at Barclays Bank, which as of November 1996 had a balance of approximately \$90,714.58; the missing sailboat which the court valued at \$129,000.00; and the \$200,000.00 that he allegedly entrusted to Thomas. The sum of Clarence's share of the marital estate totaled \$807,172.09. As for the account in Clarence's name at Barclays Bank, the missing sailboat and the \$200,000.00, the trial court stated that it was not satisfied with Clarence's explanation as to the disposition of these items. Consequently, the trial court noted that "[i]f and when they are found or recovered, they shall be his sole and exclusive property."¹⁷

The trial court awarded Betsy as her share of the marital estate \$589,194.58 from the joint CD at Barclays Bank and the IRA in her name valued at approximately \$7,977.51. The trial court credited Betsy with the \$105,000.00 she received

¹⁶ As previously discussed, Clarence testified that he cashed in his life insurance policy shortly before the hearing.

¹⁷ The trial court failed to provide any explanation as to why it awarded Clarence the JJB Enterprises account. In its findings of fact, the trial court stated that Clarence testified that the JJB Enterprises account had a balance of approximately \$9,000.00 as of the date of the hearing. After a thorough review of the record, we were unable to find any portion of Clarence's testimony in which he stated that the JJB Enterprises account still existed at the time of the hearing. In fact, Clarence testified that the account no longer existed.

from Clarence's legal malpractice lawsuit, which brought the total value of her share of the marital estate to \$702,172.09.¹⁸ This appeal and cross-appeal followed.

Clarence argues on appeal that the trial court erred (1) in its determination that he failed to trace the non-marital portion of his interest in Skyline Enterprises to the funds in Tortola; (2) in its determination that the appreciation in the value of Skyline Enterprises was marital property; (3) by incorrectly calculating his non-marital interest in Skyline Enterprises; (4) in its determination that the transfer of his shares of stock in Skyline Motel II Corporation to Betsy was a gift; (5) by awarding him sole possession of the missing sailboat and the \$200,000.00 that Thomas allegedly absconded with along with the accounts at Barclays Bank and the life insurance policy with Woodmen of the World that he liquidated prior to the dissolution as part of his share of the marital estate; (6) in its valuation of the sailboat; and (7) by failing to issue its judgment in the matter within 90 days from the date the dissolution proceedings were initiated as required by KRS¹⁹ 454.350(1). Betsy claims in her cross-appeal that the trial

¹⁸ The difference between the total value of Clarence's share of the marital estate and Betsy's share is \$105,000.00. This figure represents the amount Betsy received from Clarence's malpractice action against Hicks. As previously discussed, the trial court found that the \$211,247.52 Clarence received from his legal malpractice lawsuit was his non-marital property.

¹⁹ Kentucky Revised Statutes.

court erred in its determination that the \$211,247.52 in settlement proceeds that Clarence received from his legal malpractice action against Hicks was his non-marital property. We will address the arguments raised by the parties in this appeal seriatim.

I. CLARENCE'S APPEAL

A. SKYLINE ENTERPRISES

1. TRACING

Clarence contends the trial court erred in its determination that he failed to trace the non-marital portion of his interest in Skyline Enterprises to the joint CD at Barclays Bank in Tortola.²⁰ Clarence maintains that the funds used to purchase the joint CD at Barclays Bank came entirely from the \$2,260,269.00 he received when he sold his interest in Skyline Enterprises. Clarence insists that he never commingled these funds with any other funds he received during the marriage.

It is well-established that when a case is tried before the court without a jury, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."²¹ A factual finding is not

²⁰ As previously discussed, the trial court found that Clarence's non-marital interest in Skyline Enterprises was \$309,000.00.

²¹ Kentucky Rules of Civil Procedure (CR) 52.01.

clearly erroneous if it is supported by substantial evidence.²²

"Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people."²³ Moreover, "[i]t is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence."²⁴

The concept of tracing arises from the KRS 403.190(3) presumption that all property acquired during the marriage is marital property.²⁵ In sum, the tracing requirement places the burden on the party claiming a non-marital interest in property no longer owned to "trace the previously owned property into a presently owned specific asset" [footnote omitted].²⁶ A party cannot meet this burden simply by showing that he or she brought non-marital property into the marriage without also showing that

²² See, e.g., Johnson v. Galen Health Care, Inc., Ky.App., 39 S.W.3d 828, 832 (2001); and Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116, 117 (1991).

²³ Burton v. Foster Wheeler Corp., Ky., 72 S.W.3d 925, 929 (2002)(citing Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367, 369 (1971)).

²⁴ Cole v. Gilvin, Ky.App., 59 S.W.3d 468, 473 (2001)(quoting Garland, 805 S.W.2d at 118).

²⁵ See, e.g., Terwilliger v. Terwilliger, Ky., 64 S.W.3d 816, 820 (2002).

²⁶ 15 Graham & Keller, Kentucky Practice, Domestic Relations Law, § 15.10 (2d ed. 1997 & Supp. 2002).

he or she has spent his or her non-marital assets in a traceable manner during the marriage.²⁷

In Chenault v. Chenault,²⁸ the Supreme Court of Kentucky recognized that tracing to a mathematical certainty is not always possible, noting that: “[w]hile such precise requirements for nonmarital asset-tracing may be appropriate for skilled business persons who maintain comprehensive records of their financial affairs, such may not be appropriate for persons of lesser business skills or persons who are imprecise in their record-keeping abilities.”²⁹ As a result, the Chenault Court held that testimony alone may be sufficient to satisfy the tracing requirement. More recently, however, the Supreme Court held that while Chenault relaxed the more draconian requirements for tracing, “it did not do away with the tracing requirements altogether.”³⁰ In Terwilliger, supra, the Supreme Court noted that where the party claiming the non-marital interest is an experienced business person, “it is certainly reasonable to require him to maintain and to produce records to establish his claims of nonmarital property[.]”³¹

²⁷ See Brunson v. Brunson, Ky.App., 569 S.W.2d 173, 176 (1978).

²⁸ Ky., 799 S.W.2d 575 (1990).

²⁹ Id. at 578.

³⁰ Terwilliger, 64 S.W.3d at 821.

³¹ Id.

While Clarence insists that the funds used to purchase the joint CD at Barclays Bank valued at approximately \$750,000.00 came entirely from the \$2,260,269.00 he received when he sold his interest in Skyline Enterprises, he has failed to produce any documentation evidencing the transfer of the funds from the Bank of Harlan to Barclays Bank in Tortola. Clarence's testimony at the dissolution hearing clearly demonstrates that he is a knowledgeable business person who should have been aware of the necessity for keeping records of any transactions involving the transfer of funds to offshore accounts. Moreover, Betsy testified that the money used to purchase the joint CD at Barclays Bank could have come from a variety of sources. Betsy explained that Clarence had built a bagel company and that he was employed as an independent contractor during the time period the money was funneled to Tortola. Consequently, we cannot conclude that the trial court's determination that Clarence failed to trace the non-marital portion of his interest in Skyline Enterprises to the joint CD at Barclays Bank was clearly erroneous.³²

2. APPRECIATION

³² Clarence's reliance on Allen v. Allen, Ky.App., 584 S.W.2d 599 (1979), is misplaced. In Allen, this Court held that "[t]he requirement of tracing should be fulfilled, at least as far as money is concerned, when it is shown that nonmarital funds were deposited and commingled with marital funds and that the balance of the account was never reduced below the amount of the nonmarital funds deposited." Id. at 600. In the case sub judice, Clarence failed to establish that any of the money used to purchase the joint CD at Barclays Bank came from a non-marital source.

Clarence next contends that the trial court erred in its determination that the appreciation in the value of Skyline Enterprises was marital property. When the value of a non-marital asset increases during the marriage due to general economic conditions, the increase is not subject to division as marital property. Conversely, when the increase in value is due to the joint efforts of the parties the appreciation in value of the non-marital asset is subject to division as marital property.³³ KRS 403.190(3) creates a presumption that any such increase in value is marital property.³⁴ Consequently, the

³³ See, e.g., Goderwis v. Goderwis, Ky., 780 S.W.2d 39, 40 (1989). See also Marcum v. Marcum, Ky., 779 S.W.2d 209, 210-11 (1989)("[t]here is a distinction between an increase in value of property which occurs without effort on the part of the owners and the increase in the value of property that occurs as a result of the efforts of the parties").

³⁴ KRS 403.190(3) provides, in relevant part, as follows:

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.

This presumption is not conclusive, however, as it may be overcome by demonstrating that the property was acquired by a method listed in KRS 403.190(2), which provides as follows:

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;

Supreme Court of Kentucky has held that "a party asserting that he or she should receive appreciation upon a nonmarital contribution as his or her nonmarital property carries the burden of proving the portion of the increase in value attributable to the nonmarital contribution" [footnote omitted].³⁵ Failure to meet this burden will result in the increase being characterized as marital property.³⁶

Betsy testified at the dissolution hearing that Clarence was actively involved in Skyline Enterprises until the partnership was dissolved in 1993. While Betsy was unable to describe the precise nature of Clarence's dealings with the partnership, she explained that he spent a lot of time during the marriage in western Kentucky working for the partnership. Clarence, on the other hand, testified that his involvement with Skyline Enterprises during the marriage was minimal. Clarence

(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.

³⁵ Travis v. Travis, Ky., 59 S.W.3d 904, 910 (2001).

³⁶ Id.

acknowledged, however, that in 1983 Skyline Enterprises hired his construction company, Givens Construction, to build a grocery store on a portion of the property owned by the partnership. Clearly, the evidence submitted by the parties on this issue was conflicting. Nevertheless, we are persuaded that the trial court's finding that the appreciation in the value of Skyline Enterprises was marital property is supported by substantial evidence.³⁷ In sum, we are of the opinion that the trial court, as the fact-finder in this proceeding, was in the best position to weigh the credibility of the witnesses and to resolve the conflicting evidence.³⁸

3. NON-MARITAL INTEREST IN SKYLINE ENTERPRISES

This issue is moot in light of our conclusion that the trial court's determination that Clarence failed to trace the non-marital portion of his interest in Skyline Enterprises to the joint CD at Barclays Bank was not clearly erroneous.

B. SKYLINE MOTEL II CORPORATION STOCK

Clarence next argues that the trial court erred in its determination that the transfer of his shares of stock in

³⁷ Clarence argues in the alternative that "[o]nce the court characterized the appreciation as partly due to general economic conditions, it had to apportion the non-marital and marital components." This argument merits little attention as Clarence failed to introduce any evidence from which the trial court could apportion the increase in the value of the partnership. As noted above, KRS 403.190(3) places the burden of proof on the party claiming the property as non-marital to demonstrate any increase in value attributable to general economic circumstances. See Travis, 59 S.W.3d at 910-14.

³⁸ See, e.g., Janakakis-Kostun v. Janakakis, Ky.App., 6 S.W.3d 843, 852 (1999), cert. denied, 531 U.S. 811, 121 S.Ct. 32, 148 L.Ed.2d 13 (2000).

Skyline Motel II Corporation to Betsy was a gift. Whether property is considered a gift for purposes of a divorce proceeding is a factual issue subject to the clearly erroneous standard of review.³⁹ "Like other nonmarital claimants of property acquired during marriage, a party claiming that property is nonmarital by reason of the gift exception has the burden to prove it" [footnote omitted].⁴⁰ Accordingly, the burden was on Betsy to establish that the stock was a gift.⁴¹ A gift has been defined as "'a voluntary and gratuitous giving of something by one without compensation to another who takes it without valuable consideration.'"⁴² In O'Neill v. O'Neill,⁴³ this Court set forth the factors to be considered in determining if a transfer of property from one spouse to another during the marriage was a gift. The O'Neill Court found the following factors to be determinative: (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

³⁹ See, e.g., Ghali v. Ghali, Ky.App., 596 S.W.2d 31 (1980).

⁴⁰ Sexton v. Sexton, Ky., 125 S.W.3d 258, 267 (2004).

⁴¹ Id.

⁴² Id. (quoting Browning v. Browning, Ky.App., 551 S.W.2d 823, 825 (1977)).

⁴³ Ky.App., 600 S.W.2d 493 (1980).

property was to be excluded from the marital property.⁴⁴ In addition, it is well-established that the "donor's intent is the primary factor in determining whether a transfer of property is a gift" [footnote omitted].⁴⁵

Betsy testified at the dissolution hearing that Clarence informed her that he wanted to place the stock in her name and that he "want[ed] [her] to have the stock." While Clarence clearly offered a different version of what transpired, "[i]t is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence."⁴⁶ Given the clandestine and deceptive approach that Clarence appears to have taken with his financial affairs, we are unpersuaded that the trial court's finding with respect to this issue was clearly erroneous.⁴⁷

C. DISSIPATION OF MARITAL ESTATE

Clarence further contends that the trial court erred by awarding him as part of his share of the marital estate sole possession of the missing sailboat and the \$200,000.00 that

⁴⁴ Id. at 495.

⁴⁵ Sexton, 125 S.W.3d at 268.

⁴⁶ Cole, 59 S.W.3d at 473 (quoting Garland, 805 S.W.2d at 118).

⁴⁷ Clarence argues in the alternative that even if the transfer of his shares in Skyline Motel II Corporation to Betsy is viewed as a gift, the trial court erred by failing to award him the \$500,000.00 he received from Betsy in exchange for the stock as his non-marital property. This argument merits little attention as Clarence has failed to account for the disposition of the \$500,000.00 he received in exchange for the stock. That is to say, Clarence has failed to trace the \$500,000.00 to the funds in Tortola.

Thomas allegedly absconded with and the accounts at Barclays Bank and the life insurance policy with Woodmen of the World he liquidated prior to the dissolution. "One of the factors which a court may take into account in determining a proper distribution of marital assets is whether one of the spouses has dissipated or wasted marital assets by spending marital funds in some improper way, thus reducing the amount of marital assets available for distribution" [footnote omitted].⁴⁸ In Robinette v. Robinette,⁴⁹ this Court stated that it is appropriate for a trial court to consider one spouse's dissipation of marital assets in its division of the marital estate (1) if the property is expended during a period when there is a separation or dissolution impending; and (2) where there is a clear showing of intent to deprive the other spouse of his or her share of the marital property.⁵⁰

However, in the case sub judice the trial court failed to make any findings with respect to whether the sailboat and the \$200,000.00 that Thomas absconded with were "expended" during a period when the parties were separated or dissolution

⁴⁸ 24 Am.Jur.2d, Divorce and Separation, § 560 (1998).

⁴⁹ Ky.App., 736 S.W.2d 351 (1987).

⁵⁰ Id. at 354. See also Brosick v. Brosick, Ky.App., 974 S.W.2d 498, 500 (1998).

impending.⁵¹ Likewise, the trial court failed to make any findings with respect to whether Clarence intended to deprive Betsy of her share of the marital estate when he made these expenditures.⁵² As for the account at Barclays Bank in Clarence's name and the JJB Enterprises account, it appears that Clarence liquidated these accounts during a period when the parties were separated and dissolution was impending.⁵³ Nevertheless, the trial court failed to make any findings with respect to whether Clarence intended to deprive Betsy of her share of the marital estate when he liquidated these accounts. Consequently, we must vacate the trial court's judgment as to this issue and remand this matter to the trial court for further factual findings concerning (1) whether the sailboat, the \$200,000.00 given to Thomas and the accounts at Barclays Bank were expended during a period when the parties were separated or

⁵¹ As previously discussed, Clarence was unable to account for the whereabouts of these items at the dissolution hearing.

⁵² As for the sailboat, it is quite possible that Clarence purchased this item during a period of marital bliss. The trial court found that he purchased the sailboat in 1994 and the record indicates that the parties first separated in 1995. Nevertheless, the trial court would have been justified in awarding Clarence the sailboat as part of his share of the marital estate if it found that he divested Betsy of her interest in the sailboat during a period when the parties were separated and dissolution was impending and that he intended to deprive Betsy of her share of the marital estate when he did so.

⁵³ Betsy filed a petition for legal separation on February 22, 1995, and she filed an amended petition for dissolution of marriage on January 2, 1997. As of November 1, 1996, the account at Barclays Bank in Clarence's name had a balance of approximately \$90,714.58 and the JJB Enterprises account had a balance of approximately \$9,423.10. Thus, the accounts were liquidated sometime after November 1, 1996.

dissolution was impending; and (2) whether Clarence intended to deprive Betsy of her share of the marital estate when he made these expenditures. However, as for the life insurance policy with Woodmen of the World that Clarence cashed in shortly before the dissolution hearing, we are of the opinion that the evidence clearly establishes that Clarence expended this item with the intent to deprive Betsy of her share of the marital estate. Consequently, we see no need for the trial court to address this issue on remand.

D. VALUATION OF SAILBOAT

Clarence also takes issue with the trial court's valuation of the sailboat. As previously discussed, the trial court valued the sailboat at \$129,000.00. Betsy testified at the dissolution hearing that Clarence informed her that he paid approximately \$110,000.00 for the sailboat. Clarence testified that he paid approximately \$115,000.00 for the sailboat. We were unable to find any support in the record for the \$129,000.00 figure used by the trial court. "While the circuit court does have the authority to fashion equitable relief where a party has dissipated marital property, that relief must bear some relation to the evidence presented."⁵⁴ On remand the trial court should assign a value to the sailboat consistent with the evidence presented at the dissolution hearing.

⁵⁴ Brosick, 974 S.W.2d at 501.

E. TIMELINESS OF TRIAL COURT'S JUDGMENT

In closing, Clarence contends he was unfairly prejudiced by the trial court's failure to issue its judgment in the matter within 90 days from the date the dissolution proceedings were initiated as required by KRS 454.350(1).⁵⁵ The statute provides, in relevant part, as follows:

Every Circuit and District Judge shall, when at all possible, issue a written judgment or order in all civil actions which have been submitted for final adjudication within ninety (90) days from the date the action was taken under submission.

In Dubick v. Dubick,⁵⁶ this Court held that a violation of KRS 454.350 does not render a judgment void. The Court reasoned that a contrary construction of the statute would "thwart the very intent of the court system and the Legislature--namely, the prompt disposition of litigation."⁵⁷ The Court noted that to avoid prolonged indecision, an aggrieved party may seek "a mandatory writ to rectify the situation, and if this be to no avail then the statute provides the extreme remedy of removal."⁵⁸ Given that Clarence failed to pursue either of these avenues of

⁵⁵ As previously discussed, Betsy filed an amended petition for dissolution of marriage on January 2, 1997. An evidentiary hearing was held on September 20 and 21 1999. The trial court entered its findings of fact, conclusions of law and decree of dissolution of marriage on October 23, 2002.

⁵⁶ Ky.App., 653 S.W.2d 652 (1983).

⁵⁷ Id. at 655.

⁵⁸ Id.

relief, we are simply unpersuaded that he was unfairly prejudiced by the trial court's delay in issuing its judgment.⁵⁹

II. BETSY'S CROSS-APPEAL

We now turn to the argument advanced by Betsy in her cross-appeal. Betsy contends the trial court erred in its determination that the \$211,247.52 in settlement proceeds Clarence received from his legal malpractice action against Hicks was his non-marital property. As noted above, a party claiming that property acquired during the marriage is non-marital bears the burden of proof.⁶⁰ Accordingly, the burden was on Clarence to establish that the proceeds from his legal malpractice action were non-marital. The attorney that represented Clarence in his legal malpractice action, Lovely, testified at the dissolution hearing that the proceeds from the settlement concerned Hicks's negligence in the representation of Clarence in a probate action involving his father's estate. Clarence maintains that this testimony was sufficient to provide the trial court with a sound basis for finding that the settlement proceeds were his non-marital property. We disagree.

⁵⁹ In addition, Clarence fails to explain precisely how he was prejudiced by the delay.

⁶⁰ Sexton, 125 S.W.3d at 266.

In his counterclaim against Hicks for legal malpractice,⁶¹ Clarence set forth five counts, none of which made any reference to Hicks's representation in connection with his father's estate. Moreover, Lovely testified that "there was no breakdown [in the] settlement with respect to any of the counts."⁶² Consequently, we are of the opinion that the trial court's determination that the proceeds from the settlement were non-marital property was clearly erroneous. Accordingly, we must reverse the trial court on this issue. On remand, the trial court should divide the \$211,247.52 Clarence received from his malpractice action between the parties as marital property.

Based on the foregoing reasons, the findings of fact, conclusions of law, and decree of dissolution of marriage entered by the Fayette Circuit Court on October 23, 2002, are affirmed in part, vacated in part, and reversed in part, and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

⁶¹ As previously disused, the malpractice action was filed in response to a suit brought by Hicks for attorney's fees.

⁶² The settlement agreement is not part of the record.

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