

RENDERED: AUGUST 4, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-000306-MR

DAVID SCHOLLA

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JOSEPH W. O'REILLY, JUDGE  
ACTION NO. 02-CI-501357

MARTHA SCHOLLA

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, JUDGE; BUCKINGHAM AND EMBERTON, SENIOR JUDGES.<sup>1</sup>

BARBER, JUDGE: David Scholla (David) appeals that part of a judgment of the Jefferson Family Court awarding appellee, Martha Scholla (Martha), one-half of the value of 320 shares of stock in Scholla Enterprises, Inc., and one-half the value of the equity in the parties' home after determining that certain gifts

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<sup>1</sup> Senior Judges David C. Buckingham and Thomas D. Emberton sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

given by David's parents used to purchase the stock and home were marital property. David also appeals an order amending the child support calculation in the judgment to the extent that the order was made effective the date of its entry, rather than the date of the motion to amend the judgment.

David and Martha were married on December 29, 1984, and separated on March 27, 2002. At the time of dissolution the parties had two minor children. On January 9, 2004, the trial court entered an order dissolving the marriage and reserving all other issues for further orders or agreement of the parties.

A bench trial was held on October 30 and December 12, 2003. Depositions from David's parents, Milton (Milton) and Anna May Scholla (Anna May), were admitted into evidence. Martha's deposition was also entered into evidence. Both Martha and David testified at the trial as did Doug Kottke, Milton and Anna May's accountant.

On May 24, 2004, the trial court entered Findings of Fact, Conclusions of Law and Judgment. The order divided the marital property, divided debt accrued since the date of separation, set maintenance and child support and ordered each party to pay their own attorney fees and costs.

On June 3, 2004, David filed a Motion to Alter, Amend or Vacate the judgment pursuant to Kentucky Rules of Civil Procedure (CR) 59.05, arguing that the court failed to restore

his non-marital property and that the court failed to include Martha's maintenance award in her monthly income for purposes of calculating the child support award. On January 12, 2005, the trial court granted the motion to the extent of correcting the child support award but denied the motion on all other grounds. The child support award was recalculated and the order was made effective the date of its entry.

David first argues that the trial court erred in finding that certain cash gifts from his parents were gifts to both him and Martha and therefore, were marital property.

At various times between February 1986 and June 1999, David's parents gave gifts of money. Some of the checks were signed by Milton and some were signed by Anna May. Some of the checks were drawn on a joint account and some were drawn on Anna May's personal account. The checks were made payable to David Scholla. There was no notation on the checks stating for what purpose the money was given. However, Milton, Anna May and their accountant testified that the money was given in order to reduce Milton and Anna May's taxable estate. The checks were always deposited into David and Martha's joint checking or savings account. The gifted money was used for down payments on the couple's first and second homes. It was also used to purchase stock in Scholla Enterprises, d/b/a Hobart Sales & Service, an S-Corporation owned by Milton and for which David

worked and was an officer. As a closely-held corporation, only the officers could hold stock. At the time of dissolution there were 320 shares of Scholla stock in David's name.

Upon dissolution David claimed as his non-marital property a \$40,613.29 interest in the marital home and 252.562 shares of stock, valued at \$137,330.59, based on his contention that the gifted monies were made to him individually and used as down payments on their first and second homes and to purchase the stock. Martha claimed that the gifts were made to both of them and therefore, she was entitled to one-half the value of the home equity and the value of the stock. The trial court concluded that the gifted monies were a gift to both David and Martha and therefore, the home equity and stock were marital property to be divided equally between the parties.

Whether a gift is jointly or individually made is a factual issue and therefore, is reviewed for clear error. Sexton v. Sexton, 125 S.W.3d 258, 269 (Ky. 2004) and CR 52.01. A factual finding is not clearly erroneous if it is supported by substantial evidence. Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998); Uninsured Employers' Fund v. Garland, 805 S.W.2d 116, 117 (Ky. 1991). Evidence is substantial if it has sufficient probative value to induce conviction in the mind of a reasonable person. Golightly, 976 S.W.2d at 414; Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky.App.

2002). This Court must also give due regard to the trial court's judgment as to the credibility of the witnesses. Hunter v. Hunter 127 S.W.3d 656, 659 (Ky.App. 2003).

KRS 403.190(2) distinguishes marital property from non-marital property for disposition upon dissolution as follows:

(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. KRS § 403.190(2).

There is no question but that the monies at issue were gifts and neither party disputes such. The disputed fact is whether the monies were gifted to David individually or to David and Martha jointly.

David correctly argues that the intent of the donor is "the primary factor in determining whether a gift is made jointly to spouses or individually to one spouse." Sexton v.

Sexton, 125 S.W.3d 258, 269 (Ky. 2004). That being said, "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 [.]'" Sexton v. Sexton, 125 S.W.3d 258, 269 (Ky. 2004) citing 38 AM. JUR. 2D Gifts § 19 (1999).

The trial court concluded that the gifts were given jointly to David and Martha as follows:

This Court finds that the gifts made by Respondent's parents over the course of the marriage were made jointly to Petitioner and Respondent. Respondent's mother, in her deposition, stated that she stopped giving money to the parties when she felt that Petitioner began excluding her from family activities. Respondent's mother also stated in the deposition that she gave the money to Petitioner and Respondent, as long as she felt included in family events. Further, the money was always deposited into the parties' joint checking account. The parties' always discussed together how they were going to spend the money. Petitioner was never told that the money was only for Respondent. For all the above reasons, this Court finds that the gifts were made jointly to Petitioner and Respondent and therefore[,] is [sic] marital property subject to division.

David argues that the trial court disregarded established law by rejecting the testimony of Milton, Anna May and the accountant. However, we conclude that the trial court merely examined all of the surrounding facts and circumstances; the relationship of the parties, including the relationship with Milton and Anna May; the manner in which David and Martha

handled their finances and their actions in depositing and spending the funds.

We do not agree, as David argues, that the trial court transmuted his non-marital property into marital property merely because it considered how the funds were deposited and held in coming to the conclusion it did.

Neither are we convinced that the evidence could not reasonably support a finding that that the monies were intended for both David and Martha. While both Anna May and Milton testified that the gifts were given to David individually, when questioned as to why the gifts were stopped in 1999, Anna May testified as follows:

- Q. Why did those payments cease?  
A. Truthfully?  
Q. That's what we're here for.  
A. Because my daughter-in-law excluded us from family functions.  
Q. So as long as you-all were included by Martha -  
A. That's right.  
Q. - then you gave money to the family?  
A. Absolutely, to Martha - to David. To David.  
Q. So when you felt excluded you stopped?  
A. I stopped. I'm the guilty one.  
Q. And you told your husband to stop -  
A. Absolutely.  
Q. - as well?  
A. Absolutely. You can walk on me for a while but not forever. And I have been generous to both of my children.

Milton testified:

- Q. What if I told you your wife said she told you to quit giving money to David and his family, what would you say?

A. I would say she was probably right. I don't remember it, though.

David's argument focuses only on those statements by Milton and Anna May that they intended the gifts for David only, characterizing the testimony quoted above as a "slip" by Anna May. Even if the statement that the gifts were given to the family and Martha was considered a "slip" as suggested by David, the testimony that the gifts were cut off as punishment for Martha excluding Milton and Anna May from family events supported the trial court's conclusion that the gifts were given to Martha as well as David.

Because of the difficulty in dividing property in the context of an acrimonious divorce, KRS 403.190(2) starts with the presumption that property acquired after marriage is marital property. Gifts given by third parties are an exception to the general rule and therefore, the spouse attempting to except gifted property from marital property has the burden of proof establishing it as such. Sexton, supra, 125 S.W.3d at 266.

While this Court recognizes that David offered evidence from which the trial court could have reasonably concluded that the gifts were given to him individually - the checks were made out to David, the gifts were given for estate planning purposes and a substantial portion of the funds were used to purchase stock held only in David's name - there was



also sufficient evidence from which the Court could reasonably conclude that Milton and Anna May gave the money to both David and Martha. In addition to the quoted portions of Milton's and Anna May's testimony, there was testimony that although the checks were made payable to David, Martha believed the checks were gifts to both of them; the funds were deposited into the couples' joint account with funds used to pay for all household expenses; David and Martha always discussed how the funds would be spent; the stock was purchased for the purpose of benefiting them financially in the future although it could only be held in David's name; and they discussed each time how much stock to purchase.

While this Court might have decided the issue differently under the same facts, we hold that it was not clearly erroneous for the trial court to find as it did. Because we uphold that finding, David's arguments as to tracing need not be addressed.

David next argues that the trial court clearly erred by failing to make the order amending the child support calculation effective the date of its entry. David states that this issue is preserved by the timely motion to alter, amend or vacate the judgment. However, we are not convinced that the issue has been properly preserved. David's motion to amend the judgment did not specifically request that any recalculation be

retroactively applied to the date of the motion. Neither did David file a motion for the trial court to reconsider the effective date of the recalculated child support award. However, even if the issue had been properly preserved, we are not convinced by David's argument that he was entitled to retroactive relief. First, David did not file a motion to amend the child support award pursuant to CR 403.213, which allows for periodic updates of child support obligations based on a change in circumstances, but rather requested that the trial court recalculate its initial award. Further, even if CR 403.213 were applicable, the statute only provides that "The provision of any decree respecting child support may be modified only as to installments accruing subsequent to the filing of the motion for modification and only upon a showing of a material change in circumstances that is substantial and continuing." KRS § 403.213(1). It is not a requirement, either under the statute or the case law interpreting it, that an order modifying a child support award be made effective the date a motion to amend is filed.

This Court is also not convinced by David's implication that the effective date resulted in unfairness to him. The trial court assigned an annual potential income to Martha of \$30,000.00. At the time Martha was not employed and the trial court stated that "Petitioner has been out of the work

force for approximately 10 years, which may affect her ability to find employment. Further, Petitioner is attending school in order to enhance her career opportunities. It is not unforeseeable that it could take Petitioner several years before she can find a position that would allow her to live near the style she had become accustomed to during the marriage." While it was within the Court's discretion to assign potential income to Martha, it was not required absent a showing of bad faith. Keplinger v. Keplinger 839 S.W.2d 566, 568 (Ky.App. 1992).

Because the trial court assigned potential income far above that which Martha was actually making at the time, David more than benefited from the trial court's decision regarding child support during the few months between the initial award and the motion to amend the judgment.

Having concluded that the trial court's finding that the cash gifts were marital property was not clearly erroneous and that the effective date of the order amending the child support award was not in error, we affirm.

EMBERTON, SENIOR JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, CONCURS IN PART AND DISSENTS IN PART.

BUCKINGHAM, SENIOR JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur in the portion of the majority opinion that affirms the court's judgment awarding Martha one-

half of the value of the shares of stock and one-half of the equity in the parties' home. However, I respectfully dissent from the portion of the opinion that affirms the court's denial of David's motion to alter, amend, or vacate the judgment as it relates to the child support award.

Granted, David did not request in his motion that the recalculation be retroactively applied to the date of his motion. Also, he did not file a motion for the court to reconsider the effective date of the recalculated child support award. Nevertheless, assuming David did not properly preserve the issue for appeal, I believe the error is a palpable one entitling him to relief. See CR 61.02.

By not making the recalculation retroactive to the date of the filing of David's motion, the trial court has, in effect, required David to pay hundreds of dollars more than he should have been required to pay for child support, even though the error was caused by the court's miscalculation and did not result from any error or fault on David's part. Furthermore, I can find nothing in Martha's brief where she contests David's right to relief on this portion of his appeal. Therefore, I would reverse this portion of the trial court's order and would remand the case for the entry of an order making the recalculation of the child support award effective the date David filed his motion.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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