

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000627-MR

EVERETT H. CARDWELL, JR.

APPELLANT

v.

APPEAL FROM UNION FAMILY COURT
HONORABLE WILLIAM E. MITCHELL, JUDGE
ACTION NO. 08-CI-00267

NICOLE G. CARDWELL

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS AND DIXON, JUDGES; ISAAC,¹ SENIOR JUDGE.

COMBS, JUDGE: Everett H. Cardwell, Jr., (Buddy) appeals from a judgment of the Union Family Court in his action for dissolution of his marriage to Nicole G. Cardwell (now Geiger) (Nicole). The family court determined that Nicole succeeded in demonstrating that various items of property were gifts from her family to her alone constituting non-marital property not subject to division in

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the divorce proceedings. Buddy contends that the court erred in so finding. After our review, we affirm.

Buddy and Nicole married in September 1992. Buddy was employed by the Kentucky Department of Agriculture as a livestock inspector. In 1993, they moved to Morganfield, Kentucky, Nicole's hometown. Buddy began working with Vaughn Geiger Roark Insurance Agency where he earned a salary that was substantially higher than his salary as a livestock inspector. He had no previous experience in the field of insurance, and all of his training was paid for by the agency.

The insurance agency was a family business founded in 1912 by Nicole's great-grandfather, who, along with his two brothers, acquired a franchise from Home Insurance. Each brother established an agency in Union, Webster, and Henderson counties. Nicole's great-grandfather settled in Union County. In the 1940's, Nicole's grandfather went into the family business with her great-grandfather. When her great-grandfather died in the 1960's, Nicole's grandfather ran the agency alone. Her grandfather managed the agency well, and it grew. Nicole's father, Mike Geiger, began working in the family insurance business in 1968. Geiger acquired six or seven new agencies in the county and incorporated them into the family business. When Nicole's grandfather retired in 1986 or 1987, a one-fourth interest in the business was sold to a third-party, Chapman Roark. For the next 15 years, the business was operated by Nicole's father and his partner, Chapman Roark. Geiger and Roark eventually incorporated the business under the

name of Vaughn, Geiger and Roark Insurance. Since 1986, the agency has been located in a building owned by Mike Geiger.

After becoming employed in 1993, Buddy continued to work in the business. Over time his duties and responsibilities increased. In 1999, the parties' first son was born. In 2001, their second son was born.

Chapman Roark retired in 2001 and sold his one-quarter interest in the business (25 shares) to Buddy and Nicole for \$158,119.64. In order to fund the purchase, Buddy and Nicole borrowed \$158,000 from Old National Bank on February 12, 2001. At the same time, Mike Geiger sold one-third (25 shares) of his 75% interest in the business to Buddy and Nicole at a greatly discounted price of \$112,964.73. Geiger provided the financing for this purchase by his daughter and son-in-law. For about three years, the parties made payments as agreed upon in the note.

In May 2004, Geiger forgave the parties' remaining indebtedness of \$79,519.03. He also gave another 25 shares of the insurance agency to Nicole. Geiger sold his remaining 25 shares to a third party, Matt Lovell, for \$211,000.00. Lovell still owns a one-quarter interest in the business.

In addition to generous annual cash gifts to Nicole, her parents gave her a cash gift of \$50,000.00 in June 2003 and a \$150,000.00 check made payable to Old National Bank in October 2006. The \$50,000.00 was deposited into a construction account and was used exclusively for renovations at the marital residence. The \$150,000 check payable to Old National Bank was used to repay several personal

loans. The proceeds of these loans had been used to acquire Chapman Roark's shares of the insurance agency; a parcel of rental property at Brady Street in Morganfield, Kentucky; and Nicole's Ford Expedition.

Buddy and Nicole separated in 2008, and Buddy filed a petition for dissolution of the marriage. They agreed to share custody of their minor children; they entered into a number of stipulations regarding the character, value, and disposition of certain property, the payment of attorneys' fees, and some tax-related matters. However, they were unable to agree on the proper distribution of the remaining debts and assets, and these contested issues went before the family court for resolution.

The family court entered a decree of dissolution on February 12, 2010. After hearing testimony from the parties, Nicole's parents, and Nicole's sister, Elizabeth, the court concluded that the Geigers had made a number of significant gifts to Nicole. The court was persuaded by the Geigers' conduct at the time the gifts were made and by their subsequent testimony at the hearing that they had no intention of benefitting Buddy directly or even jointly; that is, as a spouse, he was essentially an indirect beneficiary of their largess to their daughter. Consequently, 56.75 shares of the 75 shares of the insurance agency held by the couple at the time of their separation were assigned to Nicole as her non-marital property. The family court also assigned to Nicole as her separate property nearly \$24,000.00 of the \$33,000.00 in equity in the marital home; 73% of the value of the couple's rental property; 77.18% of the value of her 2005 Ford Expedition; and

the parties' pool table. A house and farm located in Hopkins County, Kentucky, were assigned to Buddy as his non-marital property.

The family court characterized 18.25 shares of the insurance agency as marital property and awarded those shares to Nicole as part of her division of the marital property. To equalize the distribution of marital property and debts, Nicole was ordered to pay to Buddy \$55,553.38. The trial court's final judgment was entered on March 23, 2010. This appeal followed.

In a dissolution action, Kentucky Revised Statute(s) (KRS) 403.190(1) requires a court first to classify property as marital or non-marital, then to assign to each party his or her non-marital property, and finally to divide the marital property equitably between the parties. *See Travis v. Travis*, 59 S.W.3d 904 (Ky.2001). Property acquired by either spouse after the marriage is presumed to be marital property regardless of whether title is held individually or by the spouses in some form of co-ownership. KRS 403.190(3). However, the presumption can be overcome by a showing that the property was acquired by gift or acquired in exchange for property acquired by gift. KRS 402.190(2). Income derived from a gift is also considered non-marital except where significant activities of the other spouse contributed to the increase in value of the property. KRS 403.190(2)(a). Because of the statutory presumption that after-acquired property is marital in nature, the party who claims any property acquired after or during the marriage as non-marital bears the burden of proof. *Chenault v.*

Chenault, 799 S.W.2d 575 (Ky. 1990). That party must succeed in rebutting the statutory presumption.

Upon appellate review, due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Kentucky Rule(s) of Civil Procedure (CR) 52.01. Findings of fact shall not be set aside unless clearly erroneous. *Id.* A finding of fact is not clearly erroneous when it is supported by substantial evidence “which has sufficient probative value to induce conviction in the mind of a reasonable person.” *Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky.App. 2003).

Numerous Kentucky appellate decisions have addressed the application of KRS 403.190(2) in connection with the receipt of gifts. *See* 15 Louise E. Graham, *Kentucky Practice, Domestic Relations Law*, Sec. 15:17 (3rd ed. 2010). In *O’Neill v. O’Neill*, 600 S.W.2d 493, 495 (Ky.App. 1980), a case involving a gift between spouses, this court identified four factors that trial courts should consider in deciding whether a transfer of property constituted a gift: (1) the source of the money with which the “gift” was purchased, (2) the intent of the donor, (3) the status of the marriage relationship at the time of the transfer, and (4) the existence of any valid agreement that the transferred property was to be excluded from the martial property.

The *O’Neill* factors also have been applied in cases involving gifts from third parties. *See Sexton v. Sexton*, 125 S.W.3d 258 (Ky. 2004). In *Sexton*, the

Supreme Court of Kentucky made an observation especially pertinent to the issue

before us:

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[.]"

Id. at 268-269. (Emphasis added.) Finally, the court concluded: "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." *Id.* at 269.

After considering the abundant direct testimony presented in this case, the family court found that Nicole rebutted the presumption that the disputed property acquired during the marriage was marital property. It also found that Nicole proved that she alone had been the intended recipient of her parents' generosity. Consequently, the court assigned the disputed property to her as non-marital property not subject to division.

While Buddy points to persuasive evidence in support of his position that the Geigers intended to make gifts to him as well, the family court's findings to the contrary were adequately supported by the testimony of Nicole, her sister, and her parents. The Geigers testified that when they made significant cash gifts to Nicole

in 2003, in 2006, and at the time that they forgave the parties' 2004 debt, they also made comparable gifts to Nicole's sister, Elizabeth. The Geigers indicated that their gifts to Nicole and to Elizabeth often took the form of checks made jointly payable to each of their daughters and to their spouses – but **only** upon the advice of the Geigers' accountant and **only** for tax purposes. Nancy Geiger categorically testified that checks would not have been made payable to Buddy if he had not been married to Nicole. The cash disbursements were made because the Geigers wanted “the girls to enjoy the funds now.”

The various personal loans through Old National Bank were the joint obligations of Nicole and Buddy. The Geigers testified that they had to pay off these claims in their entirety in order for Nicole to be absolved of her liability and to fully enjoy and benefit from the gift. Mike Geiger testified specifically that he forgave the balance of the 2004 note “to help my daughter live a better life and pass along my business.” Finally, Nancy Geiger testified that she bought a disputed pool table at her daughter's personal request so that Nicole could outfit her remodeled basement. She indicated that she would not have purchased the pool table for Buddy. Under these circumstances, whether Nicole does or does not play pool (a point raised by Buddy) is of no consequence.

We have carefully considered Buddy's contentions with respect to: Nicole's limited role at the insurance agency; that title was taken jointly in their initial shares in the agency; the decision of the Geigers not to file federal gift tax returns or Forms 1099; their decision not to pursue him for any debt collection; the nature

of the loans paid off at Old National Bank; and other indications that the Geigers' generosity extended beyond their daughter and grandsons to include Buddy as well. However, his contentions have little relevance to our conclusions in light of the carefully circumscribed scope of our review in such matters. The family court found the Geigers to be credible witnesses, and it was persuaded that they clearly intended to make gifts to their daughter and not to Buddy. The court properly weighed the relevant circumstances surrounding the transfers of property and concluded that these circumstances largely supported the Geigers' testimony. The family court was in the best position to judge the weight and credibility of the evidence. Its judgment is entitled to the deference that we normally accord to a family court's findings in such matters.

We conclude that the family court did not clearly err in its findings that the disputed gifts were intended for Nicole and not for Buddy. Nor did the trial court err by concluding that the cash gifts and loan forgiveness resulted in increases to Nicole's non-marital interest in the insurance agency, the marital home, her vehicle, and the rental property. The parties stipulated as to the value (and unpaid balances) of each of these assets, and the court carefully weighed the marital and non-marital components of the property using the "source of funds rule." *See Travis*, 59 S.W.3d at 909.

Buddy also contends that the family court erred by failing to characterize as marital property the increase in the agency's value after 2001. He contends that the increase in value is attributable not to general market conditions but to his

efforts at the agency instead. Nicole disputes Buddy's assertions. She relies on evidence presented at the hearing indicating that Buddy neglected the agency in favor of his own interests and that he made unauthorized withdrawals from business accounts in violation of a court order. Furthermore, Nicole contends that the value of the disputed stock actually **declined** over time with the result that there was no additional property to divide.² In light of this proof, we cannot conclude that the trial court erred on this point.

Finally, we also reject Buddy's contention that the family court should have awarded him the insurance agency as a "just" division of the property. He contends that he should have been awarded the agency so that he could "continue to make a living in the business which has been his career and life's work," arguing that he alone is "in position to carry on any 'legacy.'" Brief at 24.

Before dividing the marital property in just proportions, a family court must first assign the non-marital property to its owner. KRS 403.190(1). While Buddy contests the trial court's findings of fact, the family court was persuaded by substantial evidence that the majority of the agency belonged to Nicole as her non-marital property. Consequently, the entirety of the shares which formerly belonged to Nicole's family was awarded to her. (She was required to purchase Buddy's one-half interest in the 18.25 shares that the trial court characterized as marital.) Buddy contends that inefficiencies in operation of the business will result from this

² At the time of dissolution, the disputed stock had a stipulated value of \$522,831.50 – a few thousand dollars less than the value of the stock at the time that it was purchased and subsequently gifted.

ruling. He cites his expertise and devotion to the work in contrast to Nicole's lack of experience in the insurance industry. However, his speculations about future operations (even if correct) are not relevant to the central issue in this appeal – namely, the proper characterization of the property as marital or non-marital and its consequent divisibility. In basing its award on the non-marital nature of the business, the court did not err by declining to award a controlling share in the agency to Buddy.

The judgment of the Union Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
FOR APPELLANT:

William B. Norment, Jr.
Henderson, Kentucky

BRIEF AND ORAL ARGUMENT
FOR APPELLEE:

Rebecca J. Johnson
Marion, Kentucky