

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001489-MR

EDDIE TAMME

APPELLANT

APPEAL FROM BOYLE CIRCUIT COURT
v. HONORABLE WILLIAM GUY HART, JR., SENIOR JUDGE
ACTION NO. 11-CI-00581

RUTH LOUISE GOGGIN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, STUMBO, AND THOMPSON, JUDGES.

COMBS, JUDGE: Edward Tamme (Eddie) appeals the order of the Boyle Circuit Court pertaining to the disposition of property as part of a dissolution of marriage.

After our review, we affirm.

The marriage of Eddie and Ruth Goggin was dissolved on December 19, 2012. The decree reserved questions as to property division. The chief properties

being disputed were two tracts of farmland. Eddie and Ruth had purchased the first tract (Tract A) from Ruth's parents in 1998. There is no dispute that Tract A was marital property. They purchased the second tract (Tract B) from her parents in 2009. Its characterization is in dispute.

In 2009, Ruth's parents (the Goggins) were faced with a substantial and imminent balloon payment for their property. Ruth's father was in failing health and was no longer capable of working the farm. Fearing that they would lose their farm, the Goggins called several family meetings with their children in order to find a way to save their land. The result was that each of the Goggin siblings agreed to purchase a tract of land from their parents. Because the purchase prices were significantly below market value, the differences in the purchase prices and fair market value were designated as gifts.

Tract B is the portion which Eddie and Ruth purchased. It consists of 240 acres. The fair market value of Tract B at the time of purchase was \$720,000, but the purchase price was \$481,924.00. The difference between fair market value and the purchase price – the gift from Ruth's parents – was \$238,076.00. Eddie contributed \$260,000 from the proceeds of his inheritance from his father toward the purchase price. The remainder was financed.

There is no dispute that Tract B is marital property. It is also undisputed that Eddie's contribution of \$260,000 represents his non-marital interest. The issue is the characterization of the gift of \$238,076.00.

A bench trial was held on March 19, 2013. On May 30, 2013, the trial court entered its findings of fact and conclusions of law. It found that the gift portion of Tract B was made solely to Ruth and was her non-marital property. It awarded both Tract A and Tract B to Ruth, ordering her to pay Eddie an offset for his non-marital interest and his share of the marital interest. On July 31, 2013, the trial overruled Eddie's motion to alter, amend, or vacate the judgment. This appeal followed.

First, we address Eddie's argument regarding Tract A. He contends that the trial court's award of that parcel to Ruth was erroneous. However, we agree with Ruth that Eddie did not present this argument to the trial court. It is a basic appellate rule that an alleged error may not be raised for the first time on appeal. *Carrier v. Commonwealth*, 142 S.W.3d 670, 676 (Ky. 2004). Eddie claims that he did argue the disposition of Tract A to the trial court. However, we thoroughly searched the record and did not find support for this contention.

We watched the trial, and the evidence presented concerned the nature of Tract B alone. Eddie cites a page in the written record, but it is an order directing the parties to submit post-trial briefs with their arguments. The post-trial briefs are not included in the record. When evidence is missing from the record, we are bound to assume that it supports the trial court's decision. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). Furthermore, Eddie conceded in his pre-trial memorandum that "[a]warding Eddie Tract B and allowing Ruth to keep Tract A is the sensible and accurate solution for division of these properties

and Eddie respectfully requests that the Court order the same.” Eddie has not provided any evidence to support his change of position. Therefore, we affirm the trial court’s award of Tract A.

Eddie also argues that the trial court erred when it determined that the gift amount was Ruth’s non-marital property. Kentucky Revised Statute[s] (KRS) 403.190 provides that property must be classified as marital or non-marital before it can be properly divided. Property acquired during the marriage is presumed to be marital. Pertinent to this appeal, property acquired as a gift or inheritance is an exception. KRS 403.190(2)(a). The burden of proving the exception belongs to the party who is claiming that property acquired during the marriage was actually non-marital.

In reviewing the division of marital property, we must defer heavily to the trial court. Its findings regarding the credibility of witnesses and the weight of the evidence are given wide discretion, and we may not reverse them in the absence of clear error. *See* Kentucky Rule[s] of Civil Procedure (CR) 52.01. However, we review *de novo* its characterization of property as marital or non-marital. *Rearden v. Rearden*, 296 S.W.3d 438, 441 (Ky. App. 2009).

There are four factors guiding a court in determining whether a gift is marital or non-marital: (1) the existence of an agreement that the transferred property was to be excluded from the marital property; (2) the status of the marriage relationship at the time of the transfer; (3) the source of the money with which the gift was purchased; and (4) the intent of the donor. *Sexton v. Sexton*,

125 S.W.3d 258, 268 (Ky. 2004). *Sexton* notes the primacy of donor intent as follows:

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 269. (Internal citations omitted).

In this case, there is no valid agreement which explicitly designates the gift portion as marital or non-marital. Likewise, there is little proof of the status of the marriage. The only evidence on that issue is that Eddie testified that he and Ruth were growing apart in 2009. They separated twelve months after the property transfer.

With respect to the third factor, Eddie emphasizes that he contributed \$260,000 toward the purchase of Tract B. The trial court has already recognized that amount as Eddie's non-marital share. The gift that is being characterized is not Tract B itself. Rather, it is the amount of money that was the difference between the purchase price and market value. Ruth's parents were the source of that gift. Thus, any arguments related to Eddie's contribution are moot since it has been properly recognized as his non-marital property.

Again, as contemplated by the *Sexton* court, the controlling factor in this case is the intent of the donor. We reiterate that it instructed us to examine all the evidence as to the intent.

Ruth testified that the property had been in her family for several generations and that her parents wanted it to remain in the family. She understood the gifted amount to be her inheritance from her parents.

Ruth's mother testified that she and her husband wanted to keep the farm in the family. In order to insure that goal, they arranged to transfer it while they were alive to oversee the transaction. They instructed their children not to sell their portions without offering their siblings the first chance to purchase. She unequivocally stated that the reduced price – the gift portion – was only for Ruth. It was Ruth's inheritance, and it was *not intended to be* for Eddie's benefit.

While the testimony of Ruth's mother on its own is quite compelling, the court also relied on evidence from other family members. Ruth's brothers testified that their parents wanted to keep the farm in the family. Her oldest brother actively farms the land, using Tract B specifically for cattle. He testified that if he could not use Tract B, he would be forced to reduce his operation significantly.

Eddie emphasizes the fact that his name is listed on the deed with Ruth's. However, the deed was accompanied by a letter from the Goggins which set forth the amount of the gift money. It is addressed only to Ruth and her siblings; none of their spouses is listed. Ruth's mother testified that she thought Eddie was included on the deed because it was required by law. The family's tax advisor

testified that both names were included for tax purposes. Additionally, one of Ruth's brothers testified that his wife's name appeared on the deed for his tract in order to satisfy the requirement of a lending institution. They all agreed that the inclusion of spouses was a mere formality rather than an expression of the Goggins' intent.

We are persuaded that the evidence amply supports the trial court's characterization of the gift amount as Ruth's non-marital property. The trial court heard lengthy and consistent testimony supporting the fact that the Goggins transferred their property in order to preserve their family's heritage. The decision was deliberate. It was not executed until several family meetings had been held. Additionally, the letter detailing the purpose of the gift portion was addressed to Ruth. Finally, there was testimony from Ruth's mother – a donor – that the gift was not intended for Eddie. He has not provided any proof that the Goggins intended the gift to be for him and as well as for Ruth.

We affirm the Boyle Circuit Court.

STUMBO, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT BY SEPARATE
OPINION.

THOMPSON, JUDGE, CONCURRING: Respectfully, I cannot agree with the majority opinion to the extent that it relies on a supposed concession from Eddie to affirm the trial court's award of Tract A to Ruth.

Eddie suggested in his pretrial memorandum that it would be sensible for the trial court to award Tract B to Eddie and Tract A to Ruth and requested such a division. The majority opinion asserts this suggestion is a concession by Eddie that he was disclaiming any interest in Tract A. I disagree.

It is very common during the course of dissolution proceedings for parties to offer to forgo a right to one type of property in exchange for another type of property. It appears Eddie maintained he had a marital interest in both tracts as well as a non-marital interest in Tract B, but was offering to exchange his marital interest in Tract A for complete ownership of Tract B. In suggesting such an award, Eddie was setting out what he viewed as a fair division of their property in just proportions. KRS 403.190. While it is appropriate to affirm the trial court's award of Tract A to Ruth on other grounds, I believe the majority is in error to affirm the award on the basis of a supposed concession by Eddie.

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