

RENDERED: NOVEMBER 1, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000045-MR

LANCE KELIEN

APPELLANT

v. APPEAL FROM GREENUP FAMILY COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 18-CI-00271

ANGELA KELIEN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; NICKELL AND L. THOMPSON,
JUDGES.

THOMPSON, L., JUDGE: Lance Kelien appeals from findings of fact,
conclusions of law and decree of dissolution of marriage rendered by the Greenup
Family Court. He argues that the family court erred in considering evidence
outside the four corners of a “gift letter” contract, and in characterizing as

nonmarital the equity in a residence. For the reasons stated below, we find no error and AFFIRM the judgment on appeal.

Facts and Procedural History

Lance Kelien (“Appellant”) and Angela Kelien (“Appellee”) were married on October 23, 2017, and separated on April 27, 2018. No children were born of the marriage. Prior to the marriage, Appellee owned a house located on Riverside Drive in Russell, Kentucky (hereinafter “the Riverside Drive house”). On November 7, 2017, Appellee sold the Riverside Drive house and received proceeds in the amount of \$47,067.40. On that same day, the parties purchased a marital home on Old Dam Road in Greenup, Kentucky (hereinafter “the Old Dam Road house”). Appellant paid \$275,000 for the house, with \$233,850 being mortgaged. The names of both parties appear on the title. Only Appellant’s name appears on the note because Appellee was not able to obtain a loan due to her physical disability, lack of employment, and low credit rating. In order to bring about the loan, Desco Federal Credit Union (“Desco”) required Appellee to execute a “gift letter” evincing her gift of \$50,000 or \$60,000¹ to Appellant representing the proceeds from the sale of the Riverside Drive house. Desco branch manager James Webster would later testify that the \$50,000 gift letter was used to obtain the loan, though the actual gift was \$47,067.40. He would also

¹ Two gift letters with conflicting amounts were entered into the record.

testify that there was never any actual intent to give the money to Appellant, as the letter was merely required to obtain the loan. He stated that there were gift letters of \$50,000 and \$60,000 because it was not initially known which amount would be required to facilitate the loan.

The divorce proceeded in Greenup Family Court, and a hearing was conducted on September 25, 2018, and October 1, 2018. On October 30, 2018, the family court rendered its findings of fact, conclusions of law and decree of dissolution of marriage. It ordered in relevant part that the Old Dam Road house be sold, and that Appellee receive from the proceeds the gifted sum of \$47,067.40 as her nonmarital property. The court determined that the “gift” from Appellee to Appellant was a financial maneuver and not a true gift, and that the gift letter “was done solely because the bank required it to be done for the Petitioner [Appellant] to qualify for the bank loan so that the parties could purchase the marital residence.” Appellant’s motion to alter, amend or vacate the judgment was denied, and this appeal followed.

Arguments and Analysis

Appellant now argues that the family court erred in failing to conclude that the gift letter was a binding contract and should be treated as such. He maintains that because the gift letter is a contract, the family court must limit its analysis to the “four corners” of the letter and not consider parol or other extrinsic

evidence to determine the parties' intent. Appellant directs our attention to *New Life Cleaners v. Tuttle*, 292 S.W.3d 318 (Ky. App. 2009), for the history and usage of the parol evidence rule in Kentucky. He argues that the gift letter could not be more clear and unambiguous, and that it states in bold print that Appellee was gifting \$50,000 or \$60,000 to Appellant from the sale of her nonmarital residence. Appellant argues that the family court erred in considering the arguments of Appellee's counsel which strayed beyond the four corners of the letter. In his related argument, Appellant asserts that the family court improperly characterized the equity in the Riverside Drive house as Appellee's nonmarital property, when it should have been characterized as Appellant's nonmarital property.

The elements of a contract are: 1) offer and acceptance, 2) full and complete terms, and 3) consideration. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 384 (Ky. App. 2002). Absent an ambiguity in the contract, the parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence. *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000).

In *Leasor v. Redmon*, 734 S.W.2d 462 (Ky. 1987), Roy and Juanita Bailey sought to give \$15,000 in home equity to their daughter Angela Leasor and her husband Roger as part of the Leasors' purchase of the Baileys' home. The lender, Cumberland Federal, "needed a real estate purchasing agreement and

a gift letter to complete its file on the loan application.” *Id.* at 463. When the Leasors decided not to purchase the home and requested instead a \$15,000 cash gift, the Baileys sued for back rent and a declaration that they owned the subject parcel. In response, the Leasors counterclaimed alleging tortious interference with contractual relations. In affirming an award of damages to the Leasors’ real estate agent, the Kentucky Supreme Court noted that the Leasors had given up nothing in exchange for the gift letter. The court did not characterize the gift letter as a contract. Rather, it stated that, “[t]he only contract we find in the Court of Appeals record in the Bailey case is a standard real estate contract in which the Baileys agreed to sell and the Leasors agreed to purchase the house, with a balance of \$26,000 to be financed by a mortgage.” *Id.* at 465.

Similarly in the matter before us, Appellant gave nothing in exchange for the gift letter, which was required merely to facilitate the loan application. Appellant was not a party to the \$47,067.40 transfer. Rather, Appellee received a check in that amount representing the proceeds of the sale of her nonmarital residence on November 7, 2017. The check was endorsed by the closing attorney’s law firm of Rose, Short and Pitt, and was placed in the firm’s escrow account to facilitate the purchase of the marital residence. Further, Desco branch manager James Webster testified that the funds were used as a down payment on the purchase, and the house was titled in both parties’ names.

We conclude from *Redmon, supra*, and the totality of the record that the gift letter was not a contract. The parties did not negotiate its terms, and nothing was given by Appellant in consideration for the gift. As the gift letter was not a contract, it does not implicate the parol evidence rule. *New Life Cleaners, supra*.

In a dissolution of marriage proceeding, the family court's division of property requires a three-step process: 1) the court first characterizes each item of property as marital or nonmarital; 2) the court then assigns each party's nonmarital property to that party; and lastly, 3) the court equitably divides the marital property between the parties. Kentucky Revised Statutes ("KRS") 403.190.

"An item of property will often consist of both nonmarital and marital components, and when this occurs, a trial court must determine the parties' separate nonmarital and marital shares or interests in the property on the basis of the evidence before the court." Neither title nor the form in which property is held determines the parties' interests in the property; rather, "Kentucky courts have typically applied the 'source of funds' rule to characterize property or to determine parties' nonmarital and marital interests in such property." "The 'source of funds rule' simply means that the character of the property, *i.e.*, whether it is marital, nonmarital, or both, is determined by the source of the funds used to acquire the property."

Sexton v. Sexton, 125 S.W.3d 258, 265 (Ky. 2004) (footnotes and citations omitted).

“Tracing” is defined as “[t]he process of tracking property’s ownership or characteristics from the time of its origin to the present.” in the context of tracing nonmarital property, “[w]hen the original property claimed to be nonmarital is no longer owned, the nonmarital claimant must trace the previously owned property into a presently owned specific asset.” The concept of tracing is judicially created and arises from KRS 403.190(3)’s presumption that all property acquired after the marriage is marital property unless shown to come within one of KRS 403.190(2)’s exceptions. A party claiming that property, or an interest therein, acquired during the marriage is nonmarital bears the burden of proof.

Id. at 266 (footnotes and citations omitted).

The source of the funds used for the down payment on the Old Dam Road house was Appellee’s nonmarital property, which can be traced to the equity she received from the Riverside Drive house. In fact, those funds could not be more easily traced, as the check received from the sale of the nonmarital home was endorsed as the deposit on the marital home. The Greenup Family Court properly characterized these funds as Appellee’s nonmarital property, and we find no error.

Conclusion

The gift letter is not a contract because its terms do not meet the elements of a contract. *Cantrell Supply, Inc., supra*. As the letter was not a contract, the family court properly considered extrinsic evidence to determine the scope and nature of the letter. *New Life Cleaners, supra*. Finally, the court did not err in characterizing the funds as Appellee’s nonmarital property, as those funds

were traceable to the equity in Appellee's nonmarital home. For the foregoing reasons, we AFFIRM the judgment of the Greenup Family Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Tracy D. Frye
Russell, Kentucky

BRIEF FOR APPELLEE:

Jeffrey D. Hensley
Russell, Kentucky