RENDERED: APRIL 5, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000334-MR
AND
NO. 2011-CA-001206-MR

ALFRED LAUD LANGLEY III — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 09-CI-504089

MARY EDELEN LANGLEY AND
ARMAND I. JUDAH — APPELLEES

OPINION
AFFIRMING AND REMANDING

** ** ** ** **

BEFORE: MAZE, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: Alfred Langley appeals from a decree of dissolution of marriage. He appeals issues concerning child custody, child visitation, child support, child tax exemption, the classification of nonmarital property, division of marital property, maintenance, and attorney fees. We find the trial court made no

error on the issues; however, we must remand for the court to rule on an issue it overlooked. We therefore affirm and remand.

Mr. Langley and Mary Langley were married on July 10, 1996. They separated on or about October 11, 2009. They have one minor child, born in 1996. A trial was held on September 23, 2010, and the trial court entered its decree of dissolution on December 27, 2010. Mr. Langley is appealing almost every issue decided by the trial court in its decree of dissolution; therefore, further facts will be discussed as they become relevant to our analysis.

Mr. Langley's first issue on appeal is that the trial court erred in awarding Ms. Langley sole custody of their child. We find no error on this issue and affirm.

Kentucky Rules of Civil Procedure (CR) 52.01 directs that "[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." A judgment "supported by substantial evidence" is not "clearly erroneous." *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is defined as "evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men." *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972).

> In reviewing the trial court's decision, we must determine whether it abused its discretion by awarding custody of the children to [the parent at issue]. An abuse of discretion occurs when a trial court enters a decision that is arbitrary, unreasonable, unfair, or unsupported by

> sound legal principles. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000); *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We will not substitute our own findings of fact unless those of the trial court are "clearly erroneous." *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Further, with regard to custody matters, "the test is not whether we would have decided differently, but whether the findings of the trial judge were clearly erroneous or he abused his discretion." *Eviston v. Eviston*, 507 S.W.2d 153, 153 (Ky. 1974); *see also Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982).

Miller v. Harris, 320 S.W.3d 138, 141 (Ky. App. 2010).

Kentucky Revised Statutes (KRS) 403.270 states that a trial court shall determine custody in accordance with the best interests of the child. In its decree, the trial court set forth specific findings detailing why it was granting sole custody to Ms. Langley. The trial court found that the child's relationship with Mr. Langley is strained, with her having last seen him in April of 2010, and that the child currently lived with Ms. Langley. The trial court also found credible Ms. Langley's testimony that she believed Mr. Langley makes inappropriate and negative comments about the child's appearance and that Mr. Langley discusses the parties' divorce with the child. The court also found that the child was doing well in her current school and Ms. Langley testified that the child was well-adjusted and involved in her studies at her school. Mr. Langley was awarded visitation with the child and the court ordered that Mr. Langley and the child begin counseling with a therapist to try to repair their relationship. Clearly, the trial court set forth sufficient findings of fact to justify its award of sole custody to Ms.

Langley. These findings were supported by substantial evidence in the record and the trial court did not abuse its discretion in its award of custody.

Mr. Langley's next argument on appeal is that the trial court erred in suspending his visitation with the minor child. After the decree of dissolution was entered, Ms. Langley moved to suspend Mr. Langley's visitation. A hearing was held on the issue on May 19, 2011. The minor child testified at the hearing. She testified that her initial visits with her father went well, but she became increasingly uncomfortable with his behavior. She testified that Mr. Langley would stare inappropriately at young girls, that he threatened her uncle (Ms. Langley's brother), and that he continued to engage her in discussions concerning the parties' divorce. The child also testified that Mr. Langley had sent text messages to a friend of the child and had made offensive comments about the friend's physical development. Finally, the child testified that she had refused to visit with Mr. Langley since March 5, 2011. On that date, the two were having dinner at a restaurant, when Mr. Langley began talking to a young woman. The child was embarrassed by the situation and asked him to stop. This caused Mr. Langley to become angry with her.

The trial court found that Mr. Langley did not deny these allegations, nor did he believe his actions were inappropriate. The court also found that Mr. Langley had discontinued his therapy sessions. The court held that Mr. Langley's visitation should be suspended until he resumes therapy and his therapist recommends that visitation should resume.

KRS 403.320(3) states that "[t]he court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health." We believe that the trial court's findings support the suspension of visitation. The evidence presented at the hearing indicates that the child's mental and emotional health would be seriously endangered if visitation were to continue. Mr. Langley's visitation has not been permanently suspended. Should he continue with therapy as ordered by the trial court, it is likely visitation will be restored. We find no error.

Mr. Langley's next claim of error is that the trial court abused its discretion in failing to impute income to Ms. Langley. At the time of the divorce decree, Ms. Langley was unemployed. Until November of 2009, she had worked part-time night shifts at UPS. She earned $11.95 per hour and worked around 18 hours per week, for a gross monthly income of $932. Ms. Langley left UPS when the parties separated because she did not want to leave the minor child home alone at night while she went to work. Prior to her job at UPS, Ms. Langley had earned a nursing degree, but she has not worked in that field since 2001 and does not have an active nursing license.

KRS 403.212(2)(d) states:

> If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income, except that a

> determination of potential income shall not be made for a parent who is physically or mentally incapacitated or is caring for a very young child, age three (3) or younger, for whom the parents owe a joint legal responsibility. Potential income shall be determined based upon employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community. A court may find a parent to be voluntarily unemployed or underemployed without finding that the parent intended to avoid or reduce the child support obligation.

The trial court found that Ms. Langley left her position at UPS because she did not want to leave her minor child home alone at night. This is particularly relevant since the trial court also granted Ms. Langley sole custody of the child. Furthermore, the trial court found that Ms. Langley could not return to the UPS position because she can no longer lift 70 pounds, which is a physical requirement of the job. The court ultimately found that Ms. Langley is in good health and does not suffer any physical or mental disabilities which would prevent her from working. The trial court stated that Ms. Langley is "capable of working and will be expected to work, [but] it will take her a reasonable amount of time to find a new job." The court decided not to impute income to Ms. Langley "at this time."

The trial court did not err in refusing to impute income to Ms. Langley. KRS 403.212(2)(d) allows a court to base child support on a parent's potential income if it determines that the parent is voluntarily unemployed or underemployed. *Polley v. Allen,* 132 S .W.3d 223, 226 (Ky. App. 2004). The court must consider the totality of the circumstances in deciding whether to impute

income to a parent. *Id.* at 227. If the court finds that earnings are reduced as a matter of choice and not for reasonable cause, the court may attribute income to a parent up to his or her earning capacity. *Snow v. Snow,* 24 S.W.3d 668, 673 (Ky. App. 2000). In light of the fact that Ms. Langley's previous job was during the night-shift, we cannot say that the trial court erred in finding that it was reasonable for her to quit her job when she became the sole custodian of the parties' minor child. The trial court stated that it would not impute income to Ms. Langley "at this time." This demonstrates that the trial court is open to revisiting the issue at a later date.[1]

Mr. Langley's next argument is that the trial court erred in failing to award the tax exemption for the minor child. This appears to have merely been an oversight by the trial court; therefore, we remand this issue for the court to make such an award.

Mr. Langley also argues that the trial court erred in the valuation of his checking account. The trial court found that Mr. Langley's checking account had a value of $44,000 at the time the parties separated in 2009. Mr. Langley argues his checking account should have been valued at the time of the divorce decree a lesser amount of $23,013.02. We disagree and affirm.

When the parties separated in 2009, Mr. Langley's checking account had a value of $44,000. Also at the time of separation, Ms. Langley took $13,400 out of a safe in the marital home. In determining the value of each party's assets in order

[1] It may have been prudent for the trial court to direct Ms. Langley to file regular reports as to her employment search and status, but no such order was entered.

to divide the marital estate, the trial court considered the money each party had at the time of separation. Mr. Langley cites to no case law to support his argument that the valuation of the checking account should have been calculated as of the date of the divorce decree. Valuing and dividing property are within the sound discretion of the trial court. *Cochran v. Cochran,* 746 S.W.2d 568, 569-70 (Ky. App. 1988). At the time of separation, Mr. Langley had sole control over the checking account and we find that it was not an abuse of discretion to value the account as of the date of separation. *See Kaelin v. Meiners*, 2009 WL 2707562 (Ky. App. 2009).[2]

Mr. Langley's next argument is that the trial court erred in classifying certain property as marital instead of nonmarital. The two pieces of property at issue are 1027 Trevilian Way and 3530 Tyrone Drive. "The question of whether an item is marital or nonmarital is reviewed under a two-tiered scrutiny in which the factual findings made by the court are reviewed under the clearly erroneous standard and the ultimate legal conclusion denominating the item as marital or nonmarital is reviewed *de novo*." *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006).

KRS 403.190(2)(a) states in pertinent part that all property acquired during the marriage is marital property, except property acquired by gift. Additionally, the marital or nonmarital nature of the gifted property is not determined solely by the deed. *Hunter v. Hunter*, 127 S.W.3d 656, 660 (Ky. App. 2003). It is

[2] Unpublished cases are cited as persuasive authority pursuant to CR 76.28.

undisputed that the two pieces of property at issue were acquired by gift during the marriage from Nancy Fitch, Mr. Langley's mother. It is also undisputed that both Mr. Langley and Ms. Langley are listed on the deeds. The trial court found that the property was marital; however, Mr. Langley claims the property was meant as a gift for him solely.

> Factors relevant to determining whether particular property was a gift include the source of the money used to purchase the item, the intent of the donor, and the status of the marriage at the time of the transfer. However, the intent of the purported donor is considered the primary factor in determining whether a transfer of property is a gift.

Id. (citations omitted). "In determining the intent of the donor, a court should look at all the circumstances such as statements of the donor, statements of the spouses, the tax treatment of the gift, whether the gift was jointly titled, the relationship of the parties, and the intended use of the property." *Id*. at 662 (citation omitted).

> 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 [.]" 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.

Sexton v. Sexton, 125 S.W.3d 258, 269 (Ky. 2004) (citations omitted).

The trial court found that both properties were gifted equally to both parties because Ms. Langley testified that Ms. Fitch told her she was gifting the two

houses jointly for Ms. Langley's protection. Further, the trial court noted that Ms. Fitch had transferred other property to Mr. Langley alone, indicating that she had a different intent as to these two properties. It was also significant that Ms. Fitch testified that she knew she was creating an interest in the property for Ms. Langley by transferring the property to both as well as obtaining a tax benefit.

As Mr. Langley notes, the evidence is strong that Ms. Fitch intended the property to be nonmarital. At trial, Ms. Fitch, the attorney Ms. Fitch used to perform the transfers, and Mr. Langley all testified that the property was being transferred for estate tax purposes only. Ms. Fitch and her attorney both testified that when the property was being transferred, Ms. Fitch could only transfer around $20,000 worth of property a year to her son alone without having to pay gift taxes. Ms. Fitch and her attorney both testified that the only reason Ms. Langley was added to the deeds was because she was married to Mr. Langley and it would enable Ms. Fitch to transfer the property faster. By transferring the property to both parties, she could transfer a total of $40,000 worth of value a year instead of only $20,000. In addition, Ms. Fitch testified that it was her intent for the property to go solely to Mr. Langley. Ms. Fitch also testified that the properties had been in her family for over 50 years. Lastly, when transferred both pieces of property were rental properties owned by Ms. Fitch and generating income for her. At the divorce hearing, it was undisputed that Ms. Fitch was still receiving the rental income from the properties and would continue to do so during her lifetime.

As noted previously, the determination of whether a gift was jointly or individually made is one of fact, which is within the purview of the trial court. That this Court might have decided the issue otherwise is irrelevant so long as there is substantial evidence to support the trial court's decision. We cannot say that the court was clearly erroneous in finding 1027 Trevilian Way and 3530 Tyrone Drive as marital property.

Mr. Langley also claims that the trial court erred in classifying his Scottrade IRA account as marital property. This issue is also reviewed *de novo*. *Heskett v. Heskett*, 245 S.W.3d 222, 226 (Ky. App. 2008). We find no error and affirm.

Prior to marriage, Mr. Langley worked for GEICO Insurance. At the time of the parties' marriage, he had established a GEICO/Vanguard Group Profit Sharing Plan (Vanguard account) worth $81,321.96. Over the course of the marriage money was placed in the account and withdrawn when it was needed. After Mr. Langley withdrew $72,250 to purchase a house, awarded to him as nonmarital property, the account had $157,303 remaining. The trial court determined that the house was nonmarital because the amount used to purchase the house was less than the value of the account when it was brought into the marriage. According to Mr. Langley, in late June of 2004, the Vanguard account totaled $54,352.66. That money was then transferred to a UBS Financial Services account. In 2006, the UBS account had $46,063.56 left in it. That amount was later transferred into the Scottrade account at issue. Mr. Langley's argument is that the money in the Scottrade account came solely from his Vanguard account, which he had prior to

marriage; therefore, the Scottrade account should have been classified as nonmarital. We disagree.

> "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.

Sexton at 266 (citations omitted).

In the case at hand, Mr. Langley's nonmarital Vanguard account fluctuated in value during the marriage. Also, it was moved from account to account. The burden therefore rested upon him to trace the amount acquired before marriage and demonstrate that it ended up in the Scottrade account. The trial court found, and we agree, that Mr. Langley did not meet this burden. When Mr. Langley moved the Vanguard account money into the UBS account, there was already over $43,000 in that account. At this point in time, the evidence established that the UBS account was valued at over $99,000. Mr. Langley did not establish the source of the original $43,000. Later, when the UBS money moved into the Scottrade account, there was only $46,063.56 left. Apparently, the UBS account either lost around $53,000 during the marriage or money was withdrawn at some point. Mr.

Langley did not trace the use or destination of that money or establish that the reduction in amount was due to market losses. Nor does he show whether the $46,063.56 that went into the Scottrade account was originally from his Vanguard account or if it was part of the $43,000 already in the UBS account. Additionally, as the trial court found, the bulk of the nonmarital interest he would have had in the account was used in the purchase of a house already awarded to him as nonmarital property. Because Mr. Langley did not trace the money in the UBS account, we find that the trial court did not err in classifying this account as marital property.

Mr. Langley next argues that the trial court erred when it found both marital and nonmarital interest in a house located at 1773 Belmar Drive. The trial court found that 45% of the property was nonmarital and 55% was marital. Mr. Langley claims all of the property should have been classified as nonmarital. We disagree.

Mr. Langley purchased 1773 Belmar in 1986 for $22,000.[3] The parties began using the home as their marital residence in 1999. Mr. Langley provided little to no evidence regarding how much of the mortgage was paid off by the time the parties married. The only evidence presented was a bank statement showing that the principle loan balance was $7,817.71 as of June 6, 1999, and that the mortgage was released in 2002. The trial court found that Mr. Langley had contributed $10,000 toward the purchase price at the time the parties were married, thereby making his nonmarital interest 45%. Because Mr. Langley provided little

[3] Mr. Langley purchased the property from Ms. Fitch. Mr. Langley did not pay $22,000 in cash for the property, he took over the mortgage from Ms. Fitch which had a balance of $22,000.

evidence concerning the outstanding mortgage on the house during the marriage, we cannot say that the trial court erred in its finding. We therefore affirm.

Mr. Langley also appeals from the trial court's decision awarding Ms. Langley $750 per month in maintenance for a period of 42 months. He argues that maintenance was inappropriate considering her ability to work and the assets awarded to her in the decree. He points out that Ms. Langley is able to work at least part-time. He also notes that she was awarded significant assets, including several income-producing rental properties. Consequently, he argues that Ms. Langley failed to establish any need for maintenance.

KRS 403.200(1) authorizes a trial court to award maintenance upon a finding that the spouse seeking maintenance:

> (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and
>
> (b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

Once the court finds that maintenance is appropriate under this standard, the court must consider the factors set out in KRS 403.200(2)(a)-(f) to determine the amount and duration of the maintenance award. However, the amount and duration of the maintenance award are matters within the sound discretion of the trial court. *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990). "As an appellate court . . . this Court is [not] authorized to substitute its own judgment for that of the trial

court on the weight of the evidence, where the trial court's decision is supported by substantial evidence." *Leveridge v. Leveridge*, 997 S.W.2d 1, 2 (Ky. 1999) (citation omitted). This Court may disturb the trial court's order only if the trial court abused its discretion or based its decision on findings of fact that are clearly erroneous. *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003).

As discussed above, the trial court found that Ms. Langley is not voluntarily unemployed or underemployed, and that finding is supported by substantial evidence. In addressing maintenance, the trial court found that Ms. Langley has reasonable monthly living expenses of $2,300 per month. Against these expenses, she will have expected rental income of $600 per month and an SSI income of $930 per month. The award of $750 per month recognizes this unmet need.

The trial court did not conclude that it would be necessary for Ms. Langley to liquidate any of the assets awarded to her in order to meet her reasonable living expenses. Given the duration of the marriage and her other obligations, the trial court determined that an intermediate award of maintenance would allow Ms. Langley to become self-supporting within a reasonable time and still retain sufficient assets for the future. Under the circumstances, the trial court's decision on this matter was supported by substantial evidence and did not constitute an abuse of its discretion.

Mr. Langley also argues it was error for the trial court to subsequently modify the amount of maintenance awarded to Ms. Langley. After Mr. Langley appealed the decree of dissolution, he posted a supersedeas bond. Included in this

bond was an amount for the maintenance Mr. Langley owed beginning with the date Ms. Langley filed her motion seeking maintenance to the time he appealed the divorce decree. Ms. Langley then sought to modify the maintenance award. She argued that in calculating the amount of maintenance she was to be awarded, the trial court took into consideration the rent she would begin receiving from 1236 Milton Avenue.[4] Because Mr. Langley appealed the divorce decree, the trial court reasoned that Ms. Langley may not end up with the Milton property; therefore, entitling her to an adjustment in maintenance. The trial court increased Ms. Langley's maintenance to $1,350 per month.

The trial court maintains jurisdiction over maintenance issues even though an appeal is pending. *Ogle v. Ogle*, 681 S.W.2d 921 (Ky. App. 1984). KRS 403.250(1) states that maintenance may be modified upon a showing of "changed circumstances so substantial and continuing as to make the terms unconscionable." We find modification was warranted in this instance. Half of Ms. Langley's monthly income was to be derived from rent she would receive from properties awarded to her in the divorce. Once Mr. Langley filed an appeal, those properties were placed at issue and Ms. Langley could not receive the rent proceeds. The circumstances surrounding Ms. Langley's income, therefore, had a substantial and continuing change. This increase in maintenance was within the trial court's discretion during the duration of the appeal.

[4] This property was awarded to Ms. Langley. Although this award is not being specifically appealed, the appeal of the divorce decree halts all awards pending the outcome of the appeal.

Mr. Langley's next argument on appeal is that the trial court abused its discretion in awarding Ms. Langley attorney fees. KRS 403.220 states that

> [t]he court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

As with the other issues presented here, an award of attorney fees is a matter for the trial court's discretion. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 519 (Ky. 2001). We will not disturb its award.

Mr. Langley's final argument is that the trial court abused its discretion in failing to apportion the costs of experts to both Mr. Langley and Ms. Langley. During the divorce proceedings, Mr. Langley paid for all the expert appraisal costs. Mr. Langley requests that we remand this issue to the trial court with directions to allocate these costs equally between the parties. The trial court did not order Mr. Langley to pay these costs and Mr. Langley cites no legal authority to support his argument. We find no error.

For the foregoing reasons we affirm, but remand for a determination of the child tax exemption issue.

MAZE, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: I respectfully dissent in part from the portions of the opinion affirming the family court's determination that the proportion of the marital share in 1773 Belmar is 55% and that 1027 Trevilian Way and 3530 Tyrone Drive constitute marital property.

Each of these properties was originally owned by Mr. Langley's mother, Nancy Fitch. The 1773 Belmar property was a partial gift to Mr. Langley from Ms. Fitch, and 1027 Trevilian Way and 3530 Tyrone Drive were gifted in whole from Ms. Fitch.

In 1979, Ms. Fitch purchased 1773 Belmar. In 1986, Mr. Langley acquired this property by assuming his mother's outstanding mortgage of $22,000. He paid off $10,000 of the mortgage before he was married in 1996, leaving $12,000 outstanding on the mortgage at the time of his marriage to Ms. Langley. During the marriage, Mr. and Ms. Langley paid off the remaining mortgage and the residence was used as the marital home during part of the marriage.

As the family court acknowledged, the home had some nonmarital value derived from Mr. Langley purchasing the property and paying down the mortgage while he was single because the source of those funds was nonmarital. *See Smith v. Smith*, 235 S.W.3d 1, 5 (Ky. App. 2006). To separate the property into its marital and nonmarital proportions, the family court determined the fair market value of the property at the time of the marriage and awarded Mr. Langley the

value of his nonmarital interest. *Allison v. Allison*, 246 S.W.3d 898, 907 (Ky. App. 2008). A correct valuation was needed in order for the court to determine what percentage of the home's value was acquired as marital property through satisfying the mortgage during the marriage, and what percentage was nonmarital property acquired through purchase, gift, mortgage reduction, appreciation or other means.

The valuation of the property at the time of the marriage is a factual issue subject to review under CR 52.01. A trial court's findings of fact are clearly erroneous when they are not supported by substantial evidence. "Substantial evidence is evidence that a reasonable mind would accept as adequate to support a conclusion and evidence that, when taken alone or in the light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable men." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (internal citations and quotations omitted).

There is no evidence establishing that $22,000 was the fair market value of the property, either at the time of Mr. Langley's marriage or at the time he acquired it. Mr. Langley presented evidence that the $22,000 mortgage he assumed was not the true value of the property because Ms. Fitch had equity in the property. The deed stated that the fair market value of the property and purchase price was $35,800 and Ms. Fitch testified that the property was worth between $30,000 and $35,000 at the time Mr. Langley purchased it. Accordingly, Ms. Fitch gifted Mr. Langley with the value of the property above the assumed mortgage still due.

Additionally, during the ten years that Mr. Langley owned the property while he was single, the property increased in value due to market forces.

The family court erred by determining that the value of the property at the time of the marriage was $22,000 and, thus, its calculation that 45% of the property was nonmarital and 55% of it was marital was erroneous. By valuing the nonmarital portion of this property incorrectly, the family court failed to make a proper division of the property into its marital and nonmarital proportions. Accordingly, I would reverse and remand for further development of the value of the house at the time of the marriage, so that the nonmarital and marital percentages can be properly established.

The 1027 Trevilian Way and 3530 Tyrone Drive properties were owned by Ms. Fitch with no mortgage indebtedness and had been in her family since the 1950's. During the first few months of the Langleys' marriage and over the next three years, Ms. Fitch began gifting the properties yearly in $40,000 increments ($20,000 to each spouse) until the property had all been given. To assign these assets, the family court had to determine whether these properties were intended as a joint marital gift to both Mr. and Ms. Langley, or a nonmarital gift to Mr. Langley.

Whether a gift was jointly or individually made is a factual issue subject to review under CR 52.01. *Sexton v. Sexton*, 125 S.W.3d 258, 269 (Ky. 2004). However, the classification of property as marital or nonmarital under KRS

403.190 is a question of law, which is reviewed *de novo*. *Holman v. Holman*, 84 S.W.3d 903, 905 (Ky. 2002).

The donor's intent is the primary factor in determining whether a transfer is a joint gift or a gift to only one spouse, and the donor's testimony is highly relevant to the donor's intent. *Sexton*, 125 S.W.3d at 269. "[T]he 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.

The title or form in which property is held is not determinative as to whether the property is marital or nonmarital. *Id*. at 264. For example, in *Angel v. Angel*, 562 S.W.2d 661, 665 (Ky. App. 1978), the Court determined that property which was conveyed to the couple as a gift from the wife's brother should be considered nonmarital property unless "[the husband] was named as a grantee for a reason other than his marriage to [wife]." Similarly in *Sexton*, the Court confirmed that debt forgiveness on a partnership interest which was titled to both spouses was a nonmarital gift from husband's parents and was titled in the wife's name merely because she was married to the husband. *Sexton*, 125 S.W.3d at 269.

Although a spouse may be named on property merely as an available conduit for gift tax purposes to ensure that the property is transferred, this does not change the nature of the property to marital. *Smith*, 235 S.W.3d at 10-11. *See generally Gripshover v. Gripshover*, 246 S.W.3d 460, 465-467 (Ky. 2008) (parties may

voluntarily enter into an estate plan with the lowest estate tax burden even though this plan removes marital assets from division).

The evidence in this case is overwhelming that these properties were intended as nonmarital gifts to Mr. Langley. Ms. Fitch, her attorney who handled the transfers, and Mr. Langley all testified that the property was transferred as a gift to Mr. Langley alone, but made in the name of both parties solely for gift tax purposes so that the transfers could occur sooner and avoid gift tax. These properties had been in Ms. Fitch's family since the 1950's, and the parties agreed that Ms. Fitch would continue to receive the income from these properties during her lifetime. Naming both of the Langleys on the deeds was fully consistent with achieving tax benefits rather than supportive of joint donative intent and explains why these properties were in both the Langleys's names compared to the other properties Ms. Fitch gave Mr. Langley in his name.

The family court's finding that a joint gift was intended is only supported by Ms. Langley's self-serving testimony[5] and the form of the deed. This evidence is not sufficiently probative, when rebutted by the testimony of the donor about her intent, to support the finding that the property was marital. Accordingly, the family court's finding that the gift was marital was clearly erroneous and these properties should have been awarded solely to Mr. Langley.

[5] Ms. Langley testified that Ms. Fitch told her at the time of the transfers that she was gifting the properties to both spouses so that Ms. Langley would be protected. Ms. Fitch denies having this conversation with Ms. Langley and, even if this conversation took place, it is subject to a variety of inferences because the transfer started at the beginning of the marriage and was not made in contemplation of separation or divorce.

I would reverse on these issues and revisit the issue of maintenance after the proper division of marital property. *Newman v. Newman*, 597 S.W.2d 137, 138 (Ky. 1980).

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