

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001704-MR

VINCENT J. GIBNEY

APPELLANT

v.

APPEAL FROM BOONE FAMILY COURT
HONORABLE LINDA BRAMLAGE, JUDGE
ACTION NO. 97-CI-01100

LENA G. SANDLIN

APPELLEE

OPINION

AFFIRMING

** ** *

BEFORE: BARBER, GUIDUGLI AND PAISLEY, JUDGES.

GUIDUGLI, JUDGE. Vincent J. Gibney (hereinafter "Vincent") appeals from the Boone Family Court's order entered July 10, 2002, which determined that he must pay his ex-wife, Lena G. Sandlin (hereinafter "Lena") the sum of \$55,481.50 as her interest in a jointly held SEP/IRA account and denied his motion to alter, amend or vacate the court's order of November 7, 2001, which refused to hold Lena in contempt of court. We affirm.

The parties hereto began cohabitating in July, 1985, and were married on April 7, 1990. They separated on December 1, 1996, and a decree of dissolution was entered on January 15, 1998. The court reserved on all other issues pending before the court. Thereafter, numerous attempts were made to resolve the remaining issues dealing with the parties' real estate and personal property. Settlement of the various property issues was accomplished in piece-meal fashion. Eventually, the division of the majority of the assets was accomplished and Vincent takes issue with the Family Court's disposition of a ruby ring and the date upon which the jointly held SEP/IRA account is to be valued and distributed. We shall address each issue separately and develop additional facts as necessary.

We will address the issue of the ruby ring first. In distributing the personal property, the Family Court awarded the ring to Vincent. Testimony reveals that the ring was given to Vincent by a girlfriend when he was a 15-year-old high school sophomore. Vincent claimed it to be an expensive heirloom ring.¹ The ring had been re-set by a local jeweler in the early 1990's and two diamonds were added to the setting. Upon separation in November, 1996, Lena maintained possession of the ring until July, 2001, when she turned the ring over to her attorney who

¹ Although the appraised value was suppressed, Vincent's exhibit number 1, filed with the Family Court on November 6, 2001, states an appraised value of \$34,500.00.

subsequently gave it to Vincent's attorney. When Vincent finally received the ring, he claimed it did not contain the original ruby or the newly added diamonds. As such, he had the ring re-appraised and had it confirmed that the ring now contained a synthetic ruby and synthetic diamonds. When Lena did not respond adequately to his demands, Vincent filed a motion to hold her in contempt for violating the court's order for failing to return his ruby ring.

A hearing was held on November 5, 2001, in which both parties testified and the deposition of a local jeweler was admitted. Based upon the evidence presented, the Family Court concluded that Vincent had not presented sufficient evidence that "when he left the ring with (Lena) there was a genuine ruby in the ring or that (Lena) was the person who switched the synthetic ruby for the genuine ruby." Based upon Vincent's lack of evidence, the court denied the motion to hold Lena in contempt of court.

On appeal, Vincent argues that the Family Court erred in placing the burden of proof and the risk of non-persuasion on him and not on Lena. We disagree. At the hearing, there was conflicting testimony as to the quality of the stones in the ring at different periods of time. Based on evidence presented, the trial court determined that it had not been proven that Lena did not return the ring in the condition it was when she took

possession upon separation in 1996. The hearing was held some five years after separation. Testimony revealed the ring had been materially modified prior to the separation. Based upon the significant time lapse and lack of specific evidence concerning the condition of the ring upon separation, the Family Court could not determine whether Lena had altered the ring. In that she had returned the ruby ring as ordered, the court had no alternative but to dismiss the contempt motion. "Findings 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." CR 52.01. See also Blakeman v. Schneider, Ky., 864 S.W.2d 903, 905 (1993); M.P.S. v. Cabinet for Human Resources, Ky. App., 979 S.W.2d 114 (1998). The Family Court did not err in its holdings or place the burden of proof improperly upon Vincent. The issue then became, was it the same ruby ring? Conflicting evidence was presented and the Family Court made detailed findings based upon the contradictory evidence. The findings were based upon substantial evidence and not clearly erroneous. While another court may have ruled differently based upon the same facts, upon review we cannot say that the Boone Family Court erred in its determination to deny the motion for contempt.

The second issue raised by Vincent concerns the date upon which the SEP/IRA account should be valued and divided.

Vincent contends that the account should be valued on the date the account is actually disbursed. The Family Court ordered the account be valued on the date of entry of the decree dissolution. The date of the divorce decree was January 15, 1998. The first motion relative to the SEP/IRA account was filed by Lena on May 8, 2000, in which she requested "[c]opies of all financial statements concerning the SEP IRA Fund." Thereafter, in Lena's pre-trial memorandum filed February 28, 2001, she requested that the funds be divided equally. In the joint pre-trial memorandum filed March 27, 2001, Vincent accepted Lena's position as to the SEP/IRA account. In fact, attached to the joint memorandum as Plaintiff's [Vincent's] exhibit 6 is a summary of the account in question. In this exhibit, Vincent suggests a distribution to Lena of the SEP/IRA account based upon its value as to the date of the last statement prior to the dissolution. Vincent used this amount (\$111,029.00) despite the fact that the last figure given in the account summary listed the value of the account at \$126,878 as of June 30, 2000.

Following the final hearing before the Family Court on April 23, 2001, the court entered its findings of fact and conclusions of law on May 29, 2001. As to the SEP/IRA account, the court made the following finding:

24. The Husband opened a SEP account with Kemper in 1983. The parties have stipulated to Petitioner's Exhibit 6 which shows that in 1985 when the parties began cohabitating the account had a balance of \$66.00 non-marital money. The balance of the SEP account when the Decree of Dissolution was entered was approximately \$111,029.00.

Based upon this finding, the court concluded that:

7. The Wife will receive one-half (1/2) of the SEP account from the date the parties began cohabitation, July 1985, to the Decree of Dissolution, January 15, 1998 minus the Husband's \$66.00 non-marital money. Unwed cohabitants may claim an interest in property acquired during the relationship if the existence of a joint venture or partnership is evident. Glidewell v. Glidewell, Ky. App., 790 S.W.2d 925 (1990).

8. It is the opinion of this Court, after considering that the Wife received \$100,000.00 advancement from the proceeds of the sale of the marital home as well as approximately \$55,000 from the SEP account, and personality and vehicles, that each party shall pay his or her own attorneys' fees. Hollingsworth v. Hollingsworth, Ky. App., 798 S.W.2d 145 (1990).

Following the entry of the May 29, 2001, order, the parties could not agree on the amount to be divided in the SEP/IRA account, since by then the funds had decreased significantly in value. As such, Lena was forced to file a motion seeking division of the account based upon the December, 1997 value. Eventually the matter came on for another hearing before the Family Court on July 9, 2002. Reviewing its previous

orders and the arguments of the parties, the Family Court entered its July 10, 2002, order which required Vincent to pay \$55,481.50 to Lena. Specifically, the court held:

1. The Court grants the Respondent's Motion to release her one half share of the SEP account as of the date of entry of the Decree of Dissolution. This amount was determined to be \$111,029.00 minus \$66.00, which was the Petitioner's non-marital interest. The Respondent's one half share is \$55,481.50.

Vincent appeals from that order.

On appeal, Vincent contends that the court's order dividing the SEP/IRA account is unclear, incorrect and unjust. We disagree. While we agree with Vincent that the unnecessary and lengthy time lapse between the entry of the decree of dissolution and the order dividing the jointly held account resulted in "fluctua[tion] due to market condition," we do not agree that the result is unfair or incorrect. Vincent contends that if the value had increased (as opposed to decreased) then Lena would be arguing that it wasn't fair. To avoid this situation, he contends that each party should receive his/her percentage share (in this case 51% and 49%) on the day the funds are actually divided. He cites no statutory authority or case law for his position and we have not uncovered any that supports his position.

In Clark v. Clark, Ky. App., 782 S.W.2d 56, 62 (1990), this Court held that the correct date for such evaluation is the date of the dissolution decree. See also KRS 403.190; Armstrong v. Armstrong, Ky. App., 34 S.W3d 83 (2000); Stallings v. Stallings, Ky., 606 S.W.2d 163 (1980). We believe the ruling set forth above is applicable to the facts herein. It is clear that the law considers marital property to be that which is accumulated by the parties during the marriage. Upon dissolution, the parties start anew as single persons and the individual efforts are rewarded accordingly. In this case, the Family Court evaluated the marital assets as of the date of dissolution and divided them accordingly. It is obvious that the court took into consideration the numerous assets and liabilities which the parties possessed on that date and attempted to make an equitable distribution thereof. The value of the SEP/IRA on that date was part of the overall evaluation and distribution of the parties' pre-marital, marital and post-marital assets and liabilities. The court made sufficient findings as to factors set forth in KRS 403.190 (Disposition of property) and those findings are supported by substantial evidence found in the record. As such, we will not disturb the court's findings on this matter. We defer to the sound discretion of the trial court in its ruling in that we do not

believe it abused its discretion in dividing the SEP/IRA account as of the date of dissolution.

For the foregoing reasons, we affirm the orders entered by the Boone Family Court dealing with the ruby ring and the SEP/IRA account.

ALL CONCUR.

BRIEF FOR APPELLANT:

Beverly R. Storm
Covington, KY

BRIEF FOR APPELLEE:

N. Jeffrey Blankenship
Florence, KY

Michael L. Williams
Southgate, KY