

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002080-MR

MARY ANN UPTON

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 00-CI-00517

JACK L. UPTON

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: BARBER, GUIDUGLI AND PAISLEY, JUDGES.

GUIDUGLI, JUDGE. Mary Ann Upton ("Mary Ann") appeals from an order of the Oldham Circuit Court distributing marital property and denying maintenance. We affirm.

Mary Ann and Jack Upton ("Jack") were married on June 5, 1988. On September 29, 2000, Jack filed a petition for dissolution of marriage in Oldham Circuit Court. In that there were no children born during the marriage, the only contested issues involved property and maintenance.

The matter proceeded before the trial commission in September, 2001. Proof was taken, and the commissioner's recommendations were rendered on March 21, 2002. Both parties filed exceptions to the recommendations, and the circuit court rendered a final order on September 13, 2002. The court opined in relevant part that Jack was entitled to an interest in two parcels of real property owned or previously owned by the parties, and that Mary Ann was not entitled to maintenance. This appeal followed.

Mary Ann first argues that the trial court abused its discretion by making an inequitable disposition of the marital property. Specifically, she maintains that the court erred in awarding Jack an interest in the marital residence and a parcel of rental property. Mary Ann and Jack became joint owners of the parcels in 1988 and 1992, respectively. On July 1, 1994, Jack executed quitclaim deeds to Mary Ann on both parcels for the apparent purpose of protecting those assets from a potential civil action against him.

Citing KRS 403.190, Mary Ann argues that since Jack divested himself of his legal interest in the parcels in 1994, the court erred in finding that he had a marital interest in them at the time of dissolution. Her argument focuses on the KRS 404.190(2)(d) exception to the presumption that all property acquired subsequent to the marriage is marital property. This

provision states that property excluded by valid agreement of the parties may be characterized as non-marital. She also contends that the 1994 title transfer may also properly be characterized as a gift, the effect again being that Jack retained no marital interest in the parcels.

We have closely examined this issue, and find no error. We must first note that Mary Ann has not complied with CR 76.12(4)(c)(v), requiring an argument which "shall contain at the beginning . . . a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Mary Ann has not shown where, nor in what manner, her first argument was raised below, and our review of her exceptions to the commissioner's recommendations has not uncovered same. As errors to be considered on appellate review must be precisely preserved and identified in the lower court, Skaggs v. Assad, Ky., 712 S.W.2d 947 (1986), and since one may not present one can of worms to the trial court and another to the appellate court, Neal v. Commonwealth, Ky., 95 S.W.3d 843 (2003), we would be justified in summarily affirming the trial court on this issue.

Assuming, arguendo, that Mary Ann raised this argument below, we find no error in the trial court's disposition of the two parcels. In characterizing property as marital, KRS Chapter 403 does not require the trial court to examine title to the

property. Rather, the dispositive inquiry first is whether the property was acquired after the marriage, in which case it is presumed to be marital, and second, whether it falls within one of the limited exceptions to that presumption. KRS 403.190(2). The exceptions are limited to property acquired by gift, bequest, devise, or descent, property acquired in exchange for property acquired before marriage, property acquired after a decree of legal separation, property excluded by valid agreement of the parties, and increase in the value of property acquired before marriage which did not result from the marriage. KRS 403.190(2)(a-e). Clearly, the two parcels of real property were acquired after the marriage,¹ and Mary Ann has cited nothing in the record supportive of the assertion that the quitclaim deeds should be characterized as either a gift or as valid agreement intended to exclude the property from marital status.

More important, KRS 403.190(3) is dispositive. It provides that,

[A]ll property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co- ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. (Emphasis added).

¹ Mary Ann also had a pre-marital interest in one of the parcels, which the trial court properly recognized.

Thus, since the parcels in question were properly recognized by the trial court as being acquired after marriage, and as the form of title is not consequential, we find no error in the trial court's disposition of these assets.

Mary Ann's second argument is that the trial court abused its discretion in failing to award her maintenance. She maintains that the court failed to properly consider the maintenance statute, the effect of the property settlement, and whether she was able to support herself and provide for her reasonable needs. She seeks an order vacating the trial court's order denying maintenance.

We find no error in the trial court's adoption of the commissioner's recommendation that an award of maintenance was not warranted under the facts at bar. As the parties are well aware, KRS 403.200 addresses maintenance. It states that

(1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds 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.

(2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:

(a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(c) The standard of living established during the marriage;

(d) The duration of the marriage;

(e) The age, and the physical and emotional condition of the spouse seeking maintenance; and

(f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

The record indicates that Mary Ann has a monthly gross income of approximately \$2,302.00, consisting of wages of \$1,750 and social security benefits of \$552.00. Jack's monthly income is approximately \$2,110.00, resulting from \$1,365.00 in social security benefits and \$745.00 in disability income. It is uncontroverted that the marital debt of approximately \$24,800.00

was split equally between the parties, though Mary Ann has the additional burden of paying to Jack \$18,640.00 representing Jack's non-marital interest in a houseboat, reimbursement for maintenance expenses, and proceeds from LG&E stock which the parties sold.

Our review of the parties' assets and liabilities supports the commissioner's conclusion that the parties' post-judgment incomes are approximately equal. While Mary Ann is saddled with more debt (much of it to compensate Jack for his non-marital interest in the houseboat), we find no error in the trial court's adoption of the commissioner's recommendation that an award of maintenance was not warranted. The elements of KRS 403.200 were examined by the commissioner and the trial court, albeit in a piecemeal fashion, and we find no basis for tampering with order on appeal as it relates to this issue.

For the foregoing reasons, we affirm the order of the Oldham Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Travis Combs, Jr.
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