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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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BY: JT

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE THE MARRIAGE OF:) 1 CA-CV 09-0481
)
STEPHEN ALAN BAY,) DEPARTMENT E
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
)
v.) (Not for Publication -
) Rule 28, Arizona Rules of
BONITA RAE KOSBERG BAY,) Civil Appellate Procedure)
)
Respondent/Appellee.)
)

Appeal from the Superior Court in Maricopa County

Cause No. FN 2008-070651

The Honorable Harriett E. Chavez, Judge

VACATED AND REMANDED

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J O H N S E N, Judge

¶1 Stephen Alan Bay ("Husband") appeals from the superior court's order classifying certain real property as community property and awarding Bonita Bay ("Wife") an equalization payment. For the reasons that follow, we vacate the order and remand.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Husband and Wife married in 1981 and lived in California. In February 1997, Wife initiated a dissolution action in California. That same month, the parties signed a Marital Termination Agreement ("Agreement") that provided for a division of their property and debts. Pursuant to the Agreement, Wife received the marital residence in California and Husband assumed approximately \$90,000 of community debt. The Agreement further provided:

18. DISPOSITION OF AFTER-ACQUIRED ASSETS. All assets acquired by either party after the date of separation of the parties will be the separate property of the party acquiring them, and each party disclaims and waives any and all rights and interest in each asset acquired by the other after that date.

* * * *

35. RECONCILIATION. If the parties reconcile, this agreement will nevertheless remain in full effect unless and until it is modified or revoked in a writing signed by both parties.

36. MODIFICATION BY SUBSEQUENT AGREEMENT. This agreement may be modified by subsequent

agreement of the parties only by an instrument in writing signed by both of them, an oral agreement to the extent that the parties execute it, or an in-court oral agreement made into an order by a Court of competent jurisdiction.

¶13 In June 1997, Husband inherited a property located in California known as the Woodland Hills property. Husband put this property into his revocable trust. In October 1997, the parties reconciled and began to live together in the Woodland Hills property. Their marriage never was dissolved.

¶14 In November 2001, Husband conveyed the Woodland Hills property to himself and Wife as joint tenants in order to obtain a loan. The \$199,000 loan was in both parties' names. In May 2004, the parties transferred the Woodland Hills property back to Husband's trust. A few months later, Husband's trust sold the Woodland Hills property. Husband deposited the proceeds in a joint account with Wife and used those funds to purchase a house in Surprise (the "Rawhide property"). The Rawhide property was titled in the name of Husband's trust. The parties moved to Arizona and lived in the Rawhide property.

¶15 In June 2008, Husband filed a petition for dissolution in the Maricopa County Superior Court. After a trial, the court found the Agreement binding and "in effect res judicata." The court further found that by agreeing to have the proceeds from the sale of the Woodland Hills property placed in the parties'

joint bank account, Husband gifted those funds to the community. Accordingly, the court concluded that the Rawhide property, which was purchased with those funds, was community property. The court also ordered Husband to make an equalization payment for the difference in the values of the parties' vehicles and affirmed the division of the remaining property as set forth in the Agreement.

¶6 Husband timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B).

DISCUSSION

A. Rawhide Property.

1. Legal principles.

¶7 We review the superior court's characterization of property *de novo*. *In re Marriage of Pownall*, 197 Ariz. 577, 581, ¶ 15, 5 P.3d 911, 915 (App. 2000). Nevertheless, we view the court's factual findings in the light most favorable to upholding the decision, and will affirm unless the findings are clearly erroneous or unsupported by credible evidence. *Hrudka v. Hrudka*, 186 Ariz. 84, 91, 919 P.2d 179, 186 (App. 1995); see also *Valladee v. Valladee*, 149 Ariz. 304, 307, 718 P.2d 206, 209 (App. 1986).

¶8 Generally, property acquired during marriage is presumed to be community property unless acquired by gift,

devise or descent. A.R.S. §§ 25-211(A), -213(A) (Supp. 2009); *In re Marriage of Flower*, 223 Ariz. 531, 535, ¶ 12, 225 P.3d 588, 592 (App. 2010). This presumption may be rebutted by clear and convincing evidence. *Bender v. Bender*, 123 Ariz. 90, 93, 597 P.2d 993, 996 (App. 1979). The status of property is determined at the time of acquisition and does not change except by agreement or operation of law. *Id.*; see also *Potthoff v. Potthoff*, 128 Ariz. 557, 561-62, 627 P.2d 708, 712-13 (App. 1981). Separate property may be "transmuted to community property by commingling, gift, agreement, or otherwise." *Muchesko v. Muchesko*, 191 Ariz. 265, 271, 955 P.2d 21, 27 (App. 1997).

¶19 Arizona law allows spouses to agree to divide their property presently and prospectively. A.R.S. § 25-317(A); *In re Estate of Harber*, 104 Ariz. 79, 88, 449 P.2d 7, 16 (1969); see also *Wick v. Wick*, 107 Ariz. 382, 384, 489 P.2d 19, 21 (1971) (spouses in contemplation of divorce may enter into an agreement settling their property rights and obligations arising out of the marital relationship). Such an agreement must be free from fraud, coercion and undue influence. *Harber*, 104 Ariz. at 88, 449 P.2d at 16. Reconciliation may revoke a settlement agreement "depend[ing] on the intentions of the parties as shown by their acts." *Muchesko*, 191 Ariz. at 271, 955 P.2d at 27

(quoting *Smith v. Smith*, 71 Ariz. 315, 319, 227 P.2d 214, 216 (1951)).

2. **The Rawhide property was purchased with Husband's sole and separate funds and remained his sole and separate property.**

¶10 The issue of the proper characterization of the Rawhide property begins with the proper characterization of the Woodland Hills property. Wife does not dispute that the Woodland Hills property, which Husband inherited from his mother, originally was Husband's sole and separate property. See A.R.S. §§ 25-211(A), -213(A).

¶11 In connection with obtaining a loan, Husband subsequently transferred the Woodland Hills property out of his trust to himself and Wife as joint tenants. "Joint tenants hold an equal, undivided interest in the subject property" and married joint tenants each hold "his or her ownership interest as separate property." *State v. Superior Court*, 188 Ariz. 372, 373, 936 P.2d 558, 559 (App. 1997); see also *Toth v. Toth*, 190 Ariz. 218, 220, 946 P.2d 900, 902 (App. 1997) ("joint tenancy property is separate, not community, property"). The transfer from the trust to Husband and Wife as joint tenants, therefore, did not convert the Woodland Hills property from separate property to community.

¶12 The Woodland Hills property subsequently was transferred back to Husband's trust, which provides that all

property held therein is Husband's separate property.¹ By transferring her separate interest in the Woodland Hills property back to Husband's trust, Wife relinquished her interest in the property and the entire property became Husband's sole and separate property.²

¶13 As noted, Husband's trust sold the Woodland Hills property in August 2004. Because the Woodland Hills property was Husband's separate property, the proceeds from its sale were his separate property as well. *Potthoff*, 128 Ariz. at 563, 627 P.2d at 714 ("proceeds from the sale of separate property remain the separate property of the seller").

¶14 After the sale, Husband wired the proceeds, in the amount of \$435,337.48, to the parties' joint account. Eleven

¹ The document by which the joint tenants conveyed the Woodland Hills property back to Husband's trust is not in the record, but Wife concedes that such a transfer occurred, and a settlement statement evidencing a subsequent sale of the property by the trust is in the record.

² Wife argues the conveyance to Husband's trust "was merely for estate planning purposes and did not change the nature of the property." Under Husband's trust, upon his death, Wife was to retain a life estate in the property. Even if, as she seems to argue, Wife agreed to transfer her separate interest in the Woodland Hills property back to Husband's trust in exchange for a life estate in the property, we do not understand how that would change the nature of the transfer. Wife never owned a community interest in the property, but, as a joint tenant, had only an undivided one-half interest. By conveying her interest back to Husband's trust, Wife relinquished her interest in the property.

days later, Husband withdrew \$250,649.60 from the joint account to acquire the Rawhide property and, as we have said, his trust took title to the property.

¶15 In its ruling, the superior court apparently overlooked that the Rawhide property was acquired by Husband's trust; instead, the court noted that a settlement statement prepared in connection with the acquisition of the property noted it was to be purchased by Husband and Wife as husband and wife. Apparently at least in part in reliance on that misunderstanding, the superior court concluded husband had gifted the proceeds of the sale of the Woodland Hills property to the community.

¶16 A gift requires donative intent, delivery and vesting of irrevocable title upon delivery. *Neely v. Neely*, 115 Ariz. 47, 51, 563 P.2d 302, 306 (App. 1977). A deposit of separate funds into a joint account does not create a presumption of a gift, but a court may find a gift by clear and convincing evidence. See *Stevenson v. Stevenson*, 132 Ariz. 44, 46, 643 P.2d 1014, 1016 (1982). We conclude the record does not contain clear and convincing evidence that by placing the proceeds of the Woodland Hills sale into the parties' joint account for 11

days before he purchased the Rawhide property, Husband intended to gift those proceeds to the community.³

¶17 As noted above, one spouse's deposit of separate property funds into a joint account does not create a presumption of a gift. *Stevenson*, 132 Ariz. at 46, 643 P.2d at 1016. Nor does commingling alone transmute separate property to community property; rather, "the commingling must be such that the identity of the property as separate or community is lost." *Potthoff*, 128 Ariz. at 562, 627 P.2d at 713. In this case, the Woodland Hills proceeds' identity as separate property was not lost by its deposit in the parties' joint account. The funds remained in the account for only 11 days and Wife acknowledged in her testimony that it was those specific funds that were used to pay the \$250,649.60 balance on the Rawhide property. Nor do Wife's subsequent contributions to taxes, landscaping and other costs associated with the Rawhide property affect its separate property status. *Id.* at 564, 627 P.2d at 715 (use of community funds to improve separate property does not transmute separate property into community property). Thus, we conclude Wife failed to provide clear and convincing evidence that Husband intended to make a gift of the Woodland Hills proceeds to the

³ The parties do not dispute the characterization of the remaining proceeds from the Woodland Hills property (i.e., \$435,337.48 less \$250,649.60).

community. As a result, the superior court erred in finding the Rawhide property belonged to the community.

¶18 When community property funds are used to improve one spouse's separate property, the community acquires a claim for reimbursement of the amount expended. *E.g., Flower*, 223 Ariz. at 538, ¶ 27, 225 P.3d at 595. Evidence in the record suggests that community funds or Wife's separate property may have been used to pay expenses such as property taxes and maintenance associated with the Rawhide property. Accordingly, we remand to the superior court for a finding of whether reimbursement to the community and/or Wife may be appropriate.

B. Vehicles.

¶19 Husband argues the court erred by awarding Wife a \$3,517 equalization payment based upon the value of each party's vehicle. Wife contends Husband offered no evidence regarding the vehicles and the burden was on Husband to show the vehicles were separate property.

¶20 In its ruling, the court determined the Agreement was effective. The Agreement provides that after-acquired assets will be the separate property of the party who acquired such asset. The record does not disclose any reason why the Agreement would not govern the distribution of the vehicles. Accordingly, we conclude Wife was owed no equalization payment

for the vehicles, and we vacate the \$3,517 equalization payment awarded to Wife.

C. Attorney's Fees.

¶21 Husband requests attorney's fees on appeal pursuant to the Agreement and A.R.S. § 12-341.01 as the prevailing party in a matter arising out of contract. The Agreement provides that in an action to enforce the Agreement, the prevailing party will be awarded attorneys' fees and costs. Accordingly, we award Husband his attorney's fees incurred in this appeal, along with his costs, contingent on compliance with Arizona Rules of Civil Appellate Procedure 21.

CONCLUSION

¶22 For the foregoing reasons, we vacate the superior court's order and remand for further proceedings consistent with this decision.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
PATRICK IRVINE, Judge

/s/
PHILIP HALL, Judge