DIVISION ONE
FILED: 12/27/2012
RUTH A. WILLINGHAM, CLERK
BY: mjt

**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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| In re the Matter of: | ) | No. 1 CA-CV 11-0784 |
| | ) | |
| SHANNON ELENBURG, | ) | DEPARTMENT D |
| | ) | |
| Petitioner/Appellant-Cross-Appellee, | ) | **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure) |
| | ) | |
| v. | ) | |
| | ) | |
| STEVEN W. WINTER, | ) | |
| | ) | |
| Respondent/Appellee-Cross-Appellant. | ) | |
| | ) | |

Appeal from the Superior Court in Maricopa County

Cause Nos. FC2010-000630

The Honorable Sam J. Myers, Judge

**AFFIRMED**

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The Murray Law Offices, P.C. Scottsdale
By Stanley D. Murray
Attorneys for Petitioner/Appellant-Cross Appellee

Rowley Chapman Carney & Buntrock, Ltd. Mesa
By Joshua R. Boyle
Attorneys for Respondent/Appellee-Cross Appellant

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**J O H N S E N**, Judge

**¶1** In this appeal and cross-appeal we review the superior court's division of property in a dissolution decree and denial

of a request for attorney's fees. For the following reasons, we affirm.

## FACTS AND PROCEDURAL BACKGROUND

**¶2** Steven Winter ("Husband") and Shannon Elenburg ("Wife") married in 2002. During the marriage, Husband received a $409,754 personal-injury settlement and used the proceeds to purchase a 50 percent interest in two farm properties located in Snowflake (the "Farms"). Husband titled the Farms in his and Wife's names as joint tenants with the right of survivorship.

**¶3** Also during the marriage, the parties purchased a house in Indiana from Wife's father, and Husband added Wife's name on two properties he owned prior to the marriage (the "Leland house" and the "cabin"). They also acquired other properties during the marriage, all of which are titled jointly.

**¶4** Prior to trial, the parties agreed Husband would keep the Leland house and be responsible for repaying the home equity line of credit ("HELOC") on that property. However, they disputed whether the remaining properties were separate or community property and how they should be divided. After trial, the court entered a dissolution decree, as subsequently amended, which awarded Husband the Farms and Wife the Indiana house. The court also concluded the community interests in the remaining properties should be equally divided and denied both parties' requests for attorney's fees.

**¶5** Wife timely appealed from the amended decree and Husband filed a timely cross-appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (West 2012).[1]

## DISCUSSION

### A. Standards of Review.

**¶6** The superior court's characterization of property as community or separate is a conclusion of law we review *de novo*. *In re Marriage of Pownall,* 197 Ariz. 577, 581, ¶ 15, 5 P.3d 911, 915 (App. 2000). We view the evidence and all reasonable inferences in the light most favorable to sustaining the superior court's ruling regarding whether property is community or separate. *Valladee v. Valladee,* 149 Ariz. 304, 307, 718 P.2d 206, 209 (App. 1986). The superior court's determination of whether a spouse has made a gift to the other is a finding of fact that we will affirm unless it is clearly erroneous. *Chirekos v. Chirekos,* 24 Ariz. App. 223, 227, 537 P.2d 608, 612 (App. 1975). We review the court's denial of attorney's fees for an abuse of discretion. *Alley v. Stevens,* 209 Ariz. 426, 429, ¶ 12, 104 P.3d 157, 160 (App. 2004).

### B. The Farms.

[1] Absent material revisions after the relevant date, we cite a statute's current version.

**¶7** The court's order stated, "Husband has shown by clear and convincing evidence that the [Farms] were bought with the funds from the settlement of Husband's claim . . . . *Therefore*, **IT IS ORDERED** awarding Husband the [Farms]." The order continued, "As to the remaining properties, the Court finds that Husband has failed to show by clear and convincing evidence that he did not intend to make a gift of the properties to Wife." Wife argues the court erred by awarding the Farms to Husband as his sole and separate property.

**¶8** When a spouse uses separate funds to purchase property and then allows the property to be placed in joint tenancy, there is a presumption that the spouse has made a gift of one-half of the property to the non-contributing spouse. *In re Marriage of Flower,* 223 Ariz. 531, 535, ¶ 15, 225 P.3d 588, 592 (App. 2010). The presumption that a gift has been made can be overcome by clear and convincing evidence. *Id.* If the presumption is not rebutted, the court errs if it orders a substantially unequal distribution of jointly held property, absent other factors, only for the purpose of reimbursing a spouse who expended separate monies to acquire a property. *Id.*

**¶9** Because the parties did not request and the superior court did not issue findings of fact, we presume the court "found every fact necessary to support its judgment, and we will sustain those presumptive findings if they are justified by any

reasonable construction of the evidence." *Able Distrib. Co., Inc. v. James Lampe, Gen. Contractor*, 160 Ariz. 399, 402, 773 P.2d 504, 507 (App. 1989); *see Coronado Co., Inc. v. Jacome's Dep't Store, Inc.*, 129 Ariz. 137, 139, 629 P.2d 553, 555 (App. 1981) ("Implied in every judgment, in addition to express findings made by the court, is any additional finding that is necessary to sustain the judgment, if reasonably supported by the evidence, and not in conflict with the express findings.").

**¶10** Wife acknowledges Husband used his sole-and-separate settlement proceeds to purchase the Farms. However, she argues Husband did not show by clear and convincing evidence that he did not intend to make a gift to her of a half-interest in the Farms when he arranged for title to be taken jointly in both their names. The superior court awarded the Farms to Husband as his separate property because it apparently concluded that he rebutted the gift presumption with respect to those properties.[2]

**¶11** Husband testified he purchased the Farms with the settlement proceeds as an investment so he would be able to pay future medical bills that he will incur as a result of the personal injury involved in the settlement. It is undisputed Husband will have significant future medical expenses. Husband explained he invested the money in real estate instead of

[2] In a separate minute entry, the court explained it intended to award the Farms to Husband "based on the purchase funds having come from his [personal injury] settlement."

putting it in a bank or other investment account because interest rates were very low at the time and Husband believed he would be able to get a higher return on his investment in real estate. Finally, he testified he titled the Farms jointly for estate planning purposes; specifically, to avoid probate.

**¶12** Wife countered that Husband never told her about his estate-planning intentions. She is correct that Husband cannot rebut the gift presumption solely with after-the-fact testimony concerning a hidden intention to avoid probate. *See Valladee,* 149 Ariz. at 307, 718 P.2d at 209. However, this testimony, coupled with the evidence concerning the settlement proceeds and Husband's desire to preserve his ability to pay his future medical expenses, all of which we view in a light most favorable to sustaining the superior court's ruling, constitutes a sufficient basis to conclude that Husband adequately rebutted the gift presumption.

**¶13** Finally, Wife argues the Farms are not distinguishable from the other properties that Husband purchased with his separate property and which the court determined were community and divided equally. The other properties, however, were not purchased with the proceeds of Husband's personal-injury settlement. After Husband titled the Leland house jointly, the parties obtained the HELOC and used that money to purchase the other properties.

**¶14** Because the record contains sufficient evidence to overcome the presumption of a gift with respect to the Farms, the court did not err in concluding those properties are Husband's sole and separate property.[3]

**C. Indiana House.**

**¶15** In the cross-appeal, Husband argues that if we reverse the superior court's ruling on the Farms, we should reverse the court's ruling with respect to the Indiana house. Because we affirm the superior court's award of the Farms to Husband, we need not address the cross-appeal.

**D. Denial of Attorney's Fees.**

**¶16** Wife argues the superior court erred by denying her request for attorney's fees pursuant to A.R.S. § 25-324 (West 2012), which provides that the court may award reasonable fees "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." The court in this case determined "that neither party has taken unreasonable positions in this matter" and denied all requests for attorney's fees.

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[3] In light of the court's conclusion that Husband rebutted the gift presumption, the court was not required to perform an equitable analysis under *Toth v. Toth*, 190 Ariz. 218, 946 P.2d 900 (1997). *See Flower,* 223 Ariz. at 535, ¶ 16, 225 P.3d at 592.

**¶17** Wife argues the court misapplied A.R.S. § 25-324 because it did not consider the financial disparity between the parties. We disagree. The court set forth the statute and noted the legal basis for considering a fee award. Additionally, because neither party requested specific findings, the court was not required to make findings. *See* A.R.S. § 25-324(A). Moreover, the decree contains findings of the parties' incomes for child support purposes, which show Husband earns $5,000 per month and Wife earns $3,293 per month.[4] Although Wife earns less than Husband, she received a one-half interest in all the community properties, in addition to the Indiana house. The record accordingly does not reveal a significant financial disparity. *Cf. Roden v. Roden*, 190 Ariz. 407, 412, 949 P.2d 67, 72 (App. 1997) ("It is an abuse of discretion to deny attorneys' fees to the spouse who has substantially fewer resources, unless those resources are clearly ample to pay the fees.").

**¶18** Wife also argues Husband took unreasonable positions concerning child custody. Prior to the parties' custody agreement, the court denied Husband's two motions seeking additional parenting time. In denying one motion, the court noted it was inclined to find Husband's position unreasonable, but reserved the fees issue for trial in order to assess overall

[4] Husband had been receiving an additional $1,900 per month in Social Security benefits, but those payments stopped prior to trial.

reasonableness. Regarding Husband's second motion, the court explained Husband's position was reasonable on its face, but appeared less reasonable in light of the custody evaluator's report. Nevertheless, the court presumed good faith and determined Husband's position was not so unreasonable to justify an award of fees. Wife does not cite other instances of alleged unreasonableness. On the record presented, the court did not abuse its discretion by denying Wife's fees request.

**E. Attorney's Fees on Appeal.**

**¶19** Both parties request attorney's fees on appeal under A.R.S. § 25-324. After considering the financial resources of the parties and the reasonableness of their positions, we decline to award fees to either party.

**CONCLUSION**

**¶20** For the foregoing reasons, we affirm the decree. We award Father his costs of appeal, contingent on compliance with Arizona Rule of Civil Appellate Procedure 21.

/S/

DIANE M. JOHNSEN, Judge

CONCURRING:

/S/

ANDREW W. GOULD, Acting Presiding Judge

/S/

DONN KESSLER, Judge