NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Marriage of:

KATHERINE L. MALMQUIST, *Petitioner/Appellant*,

v.

CARL Y. MALMQUIST, III, *Respondent/Appellee*.

No. 1 CA-CV 18-0649 FC
FILED 2-20-2020

Appeal from the Superior Court in Yuma County
No. S1400DO201500051
The Honorable Roger A. Nelson, Judge

REVERSED AND REMANDED

COUNSEL

Torok Law Office PLLC, Yuma
By Gregory T. Torok
Counsel for Petitioner/Appellant

M. Wayne Lewis Attorney at Law, Chandler
By M. Wayne Lewis
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge Peter B. Swann joined.

H O W E, Judge:

¶1 Katherine L. Malmquist ("Wife") appeals from the decree dissolving her marriage to Carl Y. Malmquist, III ("Husband"), including the trial court's characterization of a business as Husband's sole and separate property. For the following reasons, we reverse and remand for further proceedings consistent with this decision.

FACTS AND PROCEDURAL HISTORY

¶2 Husband and Wife married in April 1982. They separated in June of 2010, and that same year Wife petitioned for dissolution of their marriage. The case was dismissed, however, after Wife had a stroke. Following the dismissal, Husband and Wife remained physically separated. They each managed their own finances and maintained separate bank accounts.

¶3 In September 2014, Husband purchased Quality Rehabilitation Network, Inc. ("QRN") from David Gadyzs. Husband financed the purchase with a $620,953.42 purchase money note to Gadyzs. As part of the same transaction, the parties also executed a second promissory note for the advance of working capital. This note's terms provided that Husband promised and agreed to pay $50,000 within 12 months of entering the purchase agreement.

¶4 Four months later in January 2015, Wife again petitioned to dissolve the marriage. Husband accepted service of the petition in February 2015, thereby terminating the parties' community. At trial on the dissolution, Husband claimed that QRN should be awarded to him as his sole and separate property. The trial court initially found, however, that QRN was purchased during the marriage and therefore was a community asset.

¶5 In the court's decree after trial dissolving the marriage and dividing the marital property and debts, the court changed its view and awarded Husband the business as his sole and separate property. The court

stated that "[v]arious factors" weighed in favor of recharacterizing QRN as a sole and separate asset: Husband and Wife had separate bank accounts, had paid their own bills, and had not held themselves out as a couple since 2010. Moreover, Husband was the only party to the subject purchase transaction, made no down payment for the business, and assumed all debts as his own. Wife timely appealed the dissolution decree.

DISCUSSION

¶6 Wife asserts that the trial court erred by characterizing QRN as Husband's sole and separate property.[1] We review de novo a trial court's characterization of property as separate or community. *In re Marriage of Pownall*, 197 Ariz. 577, 581 ¶ 15 (App. 2000). At the same time, we view all evidence and the trial court's conclusions in the light most favorable to supporting its characterization of property as community or separate. *Sommerfield v. Sommerfield*, 121 Ariz. 575, 577 (1979); *Hatcher v. Hatcher*, 188 Ariz. 154, 157 (App. 1996).

¶7 Property acquired by either spouse during marriage is presumed to be community property unless it is (1) obtained by gift, devise, or descent, or (2) acquired after service of a petition for the dissolution of marriage, legal separation, or annulment and the petition results in a decree. A.R.S. § 25–211. A spouse may overcome this presumption by establishing the separate nature of the property by clear and convincing evidence. *Brebaugh v. Deane*, 211 Ariz. 95, 98 ¶ 6 (App. 2005). Here, the record reflects that Husband purchased QRN during the marriage, and the purchase did not involve a gift or inheritance. As such, under A.R.S. § 25–211, QRN is presumptively a community asset, despite Husband's acquisition of the business during Husband and Wife's separation. *See Neal v. Neal*, 116 Ariz. 590, 593 (1977) (holding that "[e]ven though the parties were separated, the community continued to exist[,]" and "[e]ach party, therefore, still had the authority to bind the community").

¶8 Husband contends nonetheless that he had overcome the presumption of community property. For support, he relies primarily on

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[1] Wife also argues that her due process rights were violated when the trial court reversed its earlier ruling that QRN was community property without giving her notice of the change and an opportunity to be heard. She further argues that the trial court's ruling deprived her of the ability to argue on appeal about the correct valuation of QRN as a community asset and her right to profit distributions from it. Our resolution of this appeal moots these issues.

United Bank of Am. v. Allyn, 167 Ariz. 191 (App. 1990). That decision, however, is inapposite here. In *Allyn*, a married man borrowed money from a bank with a promissory note secured by a deed of trust that noted that the man was the "husband of Martha H. Allyn, dealing with his sole and separate property." *Id.* at 193. Unlike the documents in *Allyn*, however, the documents here state nothing about Husband being married nor do they indicate the capacity in which he signed.

¶9 Husband also relies on *Johnson v. Johnson*, 131 Ariz. 38 (1981). But that decision does not support Husband's claim. In *Johnson*, a married man borrowed money during his marriage and used his separate property as security for those loans. *Id.* at 44. The Court affirmed the finding that the debts were community obligations, noting that the mere fact that the borrowing spouse's separate property was used as security for the loan does not overcome the community property presumption. *Id.* at 45–46. Accordingly, Husband has failed to overcome the community property presumption.

CONCLUSION

¶10 For the foregoing reasons, we reverse and remand for further proceedings. In our discretion, we decline to award attorneys' fees. As the prevailing party, however, Wife is entitled to costs on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21.

AMY M. WOOD • Clerk of the Court
FILED: AA