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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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 Matter of:

GERALD W. OSBORNE, *Petitioner/Appellee*,

v.

PATRICIA A. OSBORNE, *Respondent/Appellant*.

No. 1 CA-CV 19-0351 FC
FILED 3-5-2020

Appeal from the Superior Court in Maricopa County
No. FN2017-050059
The Honorable Dawn M. Bergin, Judge

AFFIRMED

COUNSEL

Law Office of Katherine Kraus PLLC, Peoria
By Katherine Kraus
Counsel for Petitioner/Appellee

Canterbury Law Group, LLP, Scottsdale
By Johnathan P. Ibsen, Craig P. Cherney
Counsel for Respondent/Appellant

OSBORNE v. OSBORNE
Decision of the Court

MEMORANDUM DECISION

Judge D. Steven Williams delivered the decision of the Court, in which Presiding Judge Michael J. Brown and Judge Kenton D. Jones joined.

WILLIAMS, Judge:

¶1 Patricia A. Osborne (“Wife”) appeals from the superior court’s decree dissolving her marriage to Gerald W. Osborne (“Husband”), arguing the court erred in designating two properties as community property and dividing them equitably. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Husband and Wife married on April 16, 2011. Shortly after the marriage, Husband and Wife created separate limited liability companies (“LLC”) funded by the sole and separate property of each. They also jointly formed GPO Enterprise LLC (“GPO Enterprise”) in June 2011 to facilitate their joint efforts to purchase real estate, and then resell or rent acquired properties. The GPO Enterprise articles of organization named Husband and Wife as member managers, each with fifty percent ownership interest. Finally, they entered into an operating agreement for GPO Enterprise.

¶3 Wife entered the marriage with significant premarital assets, including property in Texas. After Husband expended time and effort in repairing and remodeling the Texas property, Wife sold it and used the proceeds to fund GPO Enterprise. GPO Enterprise purchased and later sold property located on 85th Drive, with the proceeds deposited into the GPO Enterprise account. GPO Enterprise then purchased property located at 23411 S. Sunny South, Crown King, Arizona, (the “Sunny South Property”) and 19014 N. 45th Avenue, Glendale, Arizona, (the “45th Avenue Property”) in July 2013 and September 2014, respectively. GPO Enterprise held title to both properties until March 2017, when Wife transferred the Sunny South Property to her revocable trust via warranty deed without Husband’s knowledge.¹

¹ There is some evidence Wife also transferred the 45th Avenue Property to her revocable trust, although the record is inconclusive. This fact is inconsequential to the decision.

OSBORNE v. OSBORNE
Decision of the Court

¶4 Husband filed a petition for dissolution of marriage on April 7, 2017. In his pretrial statement, Husband argued the Sunny South and 45th Avenue Properties were community property subject to equitable distribution, asserting Wife made a gift to the marriage when she voluntarily used her separate property to fund GPO Enterprise. Wife, however, argued in her pretrial statement that the properties were her separate property, asserting her original transfer of separate property into GPO Enterprise was invalid due to Husband's alleged wrongful coercion and unfair practices. Wife further argued the GPO Enterprise operating agreement met the definition of a postnuptial agreement under Arizona law, requiring Husband to prove the agreement was not fraudulent, coerced, inequitable, or unfair by clear and convincing evidence.

¶5 Following a trial, the superior court rejected Wife's argument, finding the GPO Enterprise operating agreement did not qualify as a postnuptial agreement, that Wife "failed to rebut the presumption that the Sunny South and 45th Avenue Properties were gifts to the community," and that "the GPO Enterprises [*sic*] funds were sufficiently commingled to transmute the Properties into community assets." The court therefore concluded that Husband and Wife were each entitled to a fifty percent interest in both properties. Wife timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1).

ANALYSIS

¶6 Wife argues the superior court erred in finding the GPO Enterprise operating agreement did not meet the definition of a postnuptial agreement under Arizona law and therefore failed to assign Husband the burden to prove the agreement's fairness. She also contends Husband cannot meet this burden. We review the question of whether the court applied the proper burden of proof *de novo*. *Am. Pepper Supply Co. v. Fed. Ins. Co.*, 208 Ariz. 307, 309, ¶ 8 (2004).

¶7 Generally, when a spouse's separate property is converted to jointly-owned property a gift to the community is presumed, and the contributing spouse bears the burden of proof by clear and convincing evidence to establish the spouse did not intend a gift. *See Battiste v. Battiste*, 135 Ariz. 470, 472 (App. 1983). If, however, the property's transmutation occurs via a postnuptial agreement and one spouse claims the agreement is unfair, the burden shifts to the other spouse to prove "by clear and convincing evidence that the agreement was not fraudulent or coerced, or that it was not unfair or inequitable." *In re Harber's Estate*, 104 Ariz. 79, 88 (1969). A postnuptial agreement is defined as "[a]n agreement entered into

OSBORNE v. OSBORNE
Decision of the Court

during marriage to define each spouse's property rights in the event of death or divorce." Black's Law Dictionary (11th ed. 2019); *see also Austin v. Austin*, 237 Ariz. 201, 206-07, ¶ 14 (App. 2015). LLC operating agreements may qualify as postnuptial agreements under certain circumstances, subjecting them to *Harber's Estate's* analysis. *Austin*, 237 Ariz. at 201.

¶8 In *Austin*, a husband and wife used LLC operating agreements to obtain asset valuation discounts and tax savings for the surviving spouse or wife's children from a previous marriage when one or both spouses passed. *Id.* at 207, ¶ 15. The agreements gave the husband exclusive, absolute power and control over the LLC and its assets, placing "severe and permanent" limitations upon the wife's property rights, affecting those rights "to the same or greater extent than would a postnuptial property settlement agreement." *Id.* The court held the operating agreements qualified as postnuptial agreements, triggering *Harber's Estate's* burden of proof. *Austin*, 237 Ariz. at 208, ¶ 20.

¶9 The GPO Enterprise operating agreement's purpose and effect are wholly different from those in *Austin*. While the *Austin* spouses used LLC operating agreements to accomplish the same ends as traditional postnuptial agreements; that is, maneuvering property to plan for death or divorce, the GPO Enterprise operating agreement was created for the purpose of—and indeed was used for—facilitating real estate purchases and transfers unrelated to estate planning. Further, in contrast to the severe restrictions imposed upon the wife's property rights in *Austin*, the GPO Enterprise operating agreement gave Husband and Wife equal power and control over the LLC's management and assets.

¶10 Because the GPO Enterprise operating agreement's purpose was not to define property rights in the event of death or divorce, the superior court correctly concluded it did not qualify as a postnuptial agreement. Accordingly, the court properly declined to impose the *Harber's Estate* burden upon Husband, and properly imposed upon Wife the burden to rebut by clear and convincing evidence the presumption that her transfer of property into the LLC constituted a gift.²

² We note that Wife does not challenge the superior court's finding that the GPO Enterprise funds were sufficiently commingled such that they were transmuted into community assets. *See Cooper v. Cooper*, 130 Ariz. 257, 259-60 (1981) ("[W]here community property and separate property are commingled, the entire fund is presumed to be community property unless

OSBORNE v. OSBORNE
Decision of the Court

¶11 Because the superior court applied the correct burden of proof, we will not disturb its conclusion nor its credibility determination of witnesses. See *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13 (App. 1998) (“We will defer to the [family] court’s determination of witnesses’ credibility and the weight to give conflicting evidence.”).

CONCLUSION

¶12 For the foregoing reasons, we affirm. Both Husband and Wife request attorney’s fees and costs on appeal under A.R.S. §§ 12-349 and 25-324. Having considered the parties’ financial resources and the reasonableness of the positions asserted on appeal, we deny both requests.



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the separate property can be explicitly traced,” placing “the burden . . . upon the person claiming that the commingled funds, or any portion of them, are separate to prove that fact and the amount by clear and satisfactory evidence.”). The court, therefore, did not err in dividing the property equitably.