DIVISION ONE
FILED: 05/20/2011
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	No. 1 CA-CV 10-0733 A
	)	
JUDITH LORENE CATTANEO,	)	DEPARTMENT A
	)	
Petitioner/Appellant,	)	MARICOPA COUNTY
	)	Superior Court
v.	)	No. FN2008-051847
	)	
JOSEPH CHARLES CATTANEO,	)	**DECISION ORDER**
	)	
Respondent/Appellee.	)	
	)	

Wife in this case appeals the superior court's order on summary judgment in favor of Husband that 471.33 shares of common stock in A & C Tank Sales, Inc. ("Tank") and all outstanding common stock of A & C Properties, Inc. ("Properties") are Husband's sole and separate property. Wife also appeals the denial of her motion for new trial. We have jurisdiction of Wife's appeal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") section 12-120.21(A)(1) (2003).

A. Wife's Contention that Husband Paid for Stock With Community Funds.

Wife argues the community has an interest in 50 shares of common stock in Tank that Husband purchased in September 1980. In acquiring that stock, Husband paid $5,000 at the time of purchase and signed a note in which he promised to pay the balance of $35,000 in seven equal annual installments at an interest rate of seven percent. If Husband paid the 1980 note according to its terms, he would have made some of the payments after his wedding in 1984, presumably with community funds. Wife offers no evidence that he made payments after 1984, however. A recapitalization plan that Tank adopted in February 1981 stated that all outstanding shares had been "fully paid for." On the other hand, at oral argument, Husband's counsel suggested Husband did not make the remaining installment payments.

Wife argues we should infer that Husband paid the promissory note in accordance with its terms. We conclude Wife has failed to offer evidence sufficient to create a genuine question of fact on this issue.

B. Wife's Contention that the Gifts by Which Husband Acquired His Remaining Stock in Tank Were Remunerative in Nature.

Even if labeled a gift, a transfer of value in consideration of services rendered or to be rendered is remunerative, and in that event the value acquired may be

community property. *Cf. Holby v. Holby,* 131 Ariz. 113, 114, 638 P.2d 1359, 1360 (App. 1981) (holiday bonus received during marriage was remunerative and therefore community property).

Wife argues that a gift by Husband's father ("Charles") to Husband of 412 shares of common stock in Tank in 1981 was remunerative in nature. Charles testified the transfer was a gift, and he filed a federal gift tax return accounting for the transfer. Citing language in the 1981 recapitalization plan, Wife argues the gift was remunerative because, as the plan stated, Husband was not in a position to buy shares at the time and wanted to have full operational control of the company.

The recapitalization plan is a contract. *See Mordka v. Mordka Enters., Inc.,* 143 Ariz. 298, 301-02, 693 P.2d 953, 956-57 (App. 1984). When the terms of a contract are plain and unambiguous, its interpretation is a question of law for the court. *Chandler Med. Bldg. Partners v. Chandler Dental Grp.,* 175 Ariz. 273, 277, 855 P.2d 787, 791 (App. 1993).

The plain terms of the plan included no conditional or *quid pro quo* language applying to the transfer of 412 common shares to Husband. Indeed, according to the plan, Charles gifted the 412 shares to Husband before the plan was adopted. Significantly, Husband received the stock from Charles, not from Tank. *See Davis v. Davis,* 149 Ariz. 100, 103, 716 P.2d 1037, 1040 (App. 1985).

Assuming for the sake of argument that Wife is correct that the plan was susceptible of more than one meaning, the extrinsic evidence she points to simply does not allow the conclusion that the transfer was not truly a gift. For this reason, the record supports the superior court's conclusion that Wife failed to establish a genuine issue of material fact concerning Charles's gift of the 412 shares to Husband.

Without citing evidence to support her contention, Wife also argues Charles's gift to Husband of an additional 248 shares of Tank preferred stock before and during the marriage was remunerative in nature. The record, however, includes substantial evidence that the stock transfers were unconditional gifts. Charles testified he transferred all of his Tank preferred stock to family members as part of an annual gifting program, the transfers were made on or near Christmas, the recipients included individuals who did not participate in the management of Tank, and after Charles divested himself of all his Tank stock, he continued making annual gifts of cash to family members. Wife has failed to create a genuine issue of material fact as to whether Charles's gift to Husband of 248 shares of preferred stock was remunerative.[1]

[1] Likewise, the record contains no genuine issue of material fact concerning the nature of Husband's acquisition of shares in Properties.

C. Wife's Contention that Tank and Properties Were Husband's Alter Egos.

Alternatively, Wife argues Tank and Properties were Husband's alter egos; she contends the superior court erred by failing to address that issue in concluding that Husband's stock in the companies was his sole and separate property.

A corporation is the alter ego of its owner "when there is such unity of interest and ownership that the separate personalities of the corporation and owners cease to exist." *Dietel v. Day*, 16 Ariz. App. 206, 208, 492 P.2d 455, 457 (1972). If a corporation is found to be the alter ego of a person, a court may properly disregard the corporate form to avoid an injustice. *Standage v. Standage*, 147 Ariz. 473, 476, 711 P.2d 612, 615 (App. 1985) (upholding superior court's decision to pierce corporate veil in a dissolution proceeding).

Husband contends that corporate governance issues are not relevant to the classification of his ownership interests in Tank and Properties. We conclude otherwise. Tank and Properties both are engaged in the commercial real estate business. If the companies are Husband's alter ego, such that Husband is deemed to own (outright or a majority interest in) the assets of the companies, then any asset either company acquired during the parties' marriage is presumed to be community property and Husband bears the burden to prove

otherwise. *See* A.R.S. § 25-211(A)(1) (Supp. 2010) ("All property acquired by either husband or wife during the marriage is the community property of the husband and wife except for property that is . . . [a]cquired by gift, devise or descent."); *Davis*, 149 Ariz. at 102, 716 P.2d at 1039 ("There is a strong presumption that property acquired during marriage is community."); *Thomas v. Thomas*, 142 Ariz. 386, 392, 690 P.2d 105, 111 (App. 1984).

In response to Husband's motion for summary judgment, Wife offered substantial evidence that Tank and Properties did not adhere to requisite corporate formalities. In reply in support of his motion, Husband did not dispute Wife's evidence; nor did he offer evidence that the assets Tank and Properties acquired during the marriage are traceable to his sole and separate property.

On appeal, Husband argues the superior court correctly concluded it had no jurisdiction to decide corporate governance issues. But corporate governance issues may bear on the proper characterization of spouses' property interests. *Cf. Standage*, 147 Ariz. at 476, 711 P.2d at 615 ("[I]t is not unusual for a domestic relations court to pierce the corporate veil in a dissolution proceeding."); *Lyons v. Lyons*, 340 So. 2d 450, 452 (Ala. Civ. App. 1976) (approving the distribution of corporate assets to wife in a dissolution decree because husband had

operated business as his alter ego); *Medlock v. Medlock*, 642 N.W.2d 113, 125 (Neb. 2002) (alter-ego analysis required corporate assets to be treated as part of the marital estate).

In *Standage,* the court pierced the corporate veil of a community-owned real estate company in order to award wife her equitable share of specific corporate assets. 147 Ariz. at 476, 711 P.2d at 615. Husband argues that *Standage* only permits the corporate veil to be pierced in a dissolution action if the corporation is a community asset. We do not read that case so narrowly, and note that courts in other jurisdictions have held that alter-ego analyses and remedies may be employed when appropriate to achieve equity in dissolution proceedings even when the corporation at issue ostensibly is one spouse's sole and separate property. *See State ex rel. Grabhorn v. Grabhorn*, 559 P.2d 923, 926 (Or. Ct. App. 1977) (approving consideration of corporate assets in determining husband's financial situation because he had exclusive control over the company and extensively used corporate assets for his personal benefit); *Zisblatt v. Zisblatt*, 693 S.W.2d 944, 952 (Tex. App. 1985) ("In an action for divorce, [alter ego doctrine] is applied to properly characterize corporate assets as part of the community estate."); *Colman v. Colman*, 743 P.2d 782, 789 (Utah Ct. App. 1987) (upholding award of corporate assets to wife in light of evidence that husband used his corporations "as a façade for

[his] personal business operations"); *see also A & L, Inc. v. Grantham*, 747 So. 2d 832, 839 (Miss. 1999) (when husband's corporation was his alter ego, corporate income was community property); *Vallone v. Vallone*, 644 S.W.2d 455, 458 (Tex. 1982) ("Consideration of whether a corporation is an *alter ego* for purposes of determining whether assets held in the corporation's name should be treated as community property is an issue of fact from which the status of the property is determined.").

Husband cites *Neibaur v. Neibaur*, 125 P.3d 1072, 1076 (Idaho 2005), but that case is not persuasive. *Neibaur* was a dissolution action in which one spouse argued the community had not been compensated adequately for the value of the labor the other spouse devoted to a corporation he owned as sole and separate property. *Id.* at 1074. The trial court had pierced the corporate veil of the company in order *to award the community a share of the corporation*. *Id.* at 1075. On appeal, the Idaho court held it was not necessary to pierce the corporate veil because state law already allowed the court to compel the solely owned corporation to reimburse the community for the uncompensated value of the owner's labor. *Id.* at 1076.

By contrast to the order at issue in *Neibaur*, as we understand Wife's argument, she does not seek an order requiring Tank or Properties to issue stock to her. Instead, she argues that because neither company obeyed corporate formalities, the

court should rule that Husband owned the assets of those companies (not their stock), and that his interests in those assets are subject to customary community property analysis.

Husband cites *Jones v. Teilborg*, 151 Ariz. 240, 727 P.2d 18 (App. 1986), in arguing Wife lacks standing to challenge the corporate formalities of Tank or Properties. *Jones* was a breakup of a law firm in which the withdrawing lawyers obtained a judgment against the legal corporation and its remaining shareholders individually. *Id.* at 241, 727 P.2d at 19. In reversing the superior court's decision to pierce the corporate veil, this court observed that the "doctrine is only available to third parties who deal with the corporation." *Id.* at 247, 727 P.2d at 25. It is not clear to us whether by this language the court intended to depart from its observation in *Standage*, less than a year before, that "it is not unusual for a domestic relations court to pierce the corporate veil in a dissolution proceeding." *Standage*, 147 Ariz. at 476, 711 P.2d at 615.

Given that the superior court did not consider Wife's alter-ego contentions, and in the absence of fuller briefing, we decline to decide whether under *Jones*, a spouse who is a stockholder in a company primarily owned by the other spouse is barred from pursuing an alter-ego remedy. We note, moreover, that this defense would not apply to Wife's argument that

Properties is Husband's alter ego because Wife owns no stock in that company.

Because we presume that assets acquired during marriage are community property, if Wife is correct that under an alter-ego analysis, Husband entered the marriage owning the assets of Tank and Properties and sold those assets and bought other assets in complicated real estate transactions several times over during the marriage, the consequences of the alter-ego issue may affect the proper characterization of those assets. Accordingly, the superior court in the dissolution case has the power to address Wife's alter-ego allegations and should consider whether those allegations affect the proper characterization of Husband's interests in the two companies.[2]

At oral argument, counsel for the parties confirmed that Wife has raised her alter-ego claim in a separate civil case pending before another division of the superior court and that the judges presiding over the two actions wisely have conferred about the cases. Under the circumstances, our decision in this appeal does not preclude the superior court in the dissolution action from exercising its discretion to decline to address in the first instance the merits of Wife's contention that Tank and Properties operated as Husband's alter egos and instead adopt

[2] We do not mean to express any view of the ultimate outcome in the superior court of Wife's alter-ego allegations or Husband's defenses to those allegations.

(for purposes of characterizing the nature of Husband's property) the outcome of the alter-ego claim in the companion civil case.

D. The Court Properly Did Not Address Wife's Tort Claims.

Wife also argues summary judgment was improper because the superior court disregarded her contention that Husband fraudulently converted the value of preferred shares she held in Tank. She argues Husband caused Tank to use an improper and unfair formula to convert preferred shares to common stock, thereby reducing her percentage of ownership in the company while simultaneously increasing his own.

The superior court's power in a dissolution proceeding is strictly limited by statute. *Weaver v. Weaver*, 131 Ariz. 586, 587, 643 P.2d 499, 500 (1982); *see* A.R.S. § 25-311(A) (2007); A.R.S. § 25-318 (Supp. 2010). Section 25-318 reads in relevant part:

> A. In a proceeding for dissolution of the marriage . . . the court shall assign each spouse's sole and separate property to such spouse. It shall also divide the community . . . and other property held in common . . . .
>
> * * *
>
> C. This section does not prevent the court from considering all actual damages and judgments from conduct that resulted in criminal conviction of either spouse in which the other spouse or a child was the victim or . . . concealment or fraudulent

> disposition of community . . . and other property held in common.

The statute does not confer on the superior court in a dissolution proceeding the power to decide a claim for damages to a spouse's sole and separate property. *Weaver*, 131 Ariz. at 587, 643 P.2d at 500. Therefore, the superior court properly declined to address Wife's tort claims in deciding Husband's motion for partial summary judgment.

E. Wife's Motion for New Trial.

Our resolution of Wife's arguments on appeal with respect to the court's entry of summary judgment also resolves the issues raised in Wife's motion for new trial.

CONCLUSION

For the reasons stated, we affirm and remand the superior court's entry of summary judgment and denial of Wife's motion for new trial. On remand, the court shall consider whether Wife's alter-ego allegations affect the proper characterization of Husband's interests in Tank and Properties. As we have stated, the court in this case may choose to defer consideration of that issue pending the outcome on the merits of Wife's alter-ego claim in the separate civil action.

Both spouses have asked for their attorney's fees and costs pursuant to A.R.S. § 25-324 (Supp. 2010). We decline their requests, but authorize the superior court to consider the fees

and costs incurred in this appeal in determining whether and how much to award at the conclusion of the case.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Judge

/s/
JON W. THOMPSON, Judge