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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
FILED: 12/15/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

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

In re the Marriage of:

DAVID E. RYE,

 Petitioner/Appellee,

 v.

MARCIA L. RYE,

 Respondent/Appellant.

1 CA-CV 10-0888

DEPARTMENT A

MEMORANDUM DECISION
(Not for Publication -
Rule 28, Arizona Rules
of Civil Appellate
Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV FN2009-000341

The Honorable David J. Palmer, Judge

AFFIRMED

Frederick J. Thompson
Attorney for Petitioner/Appellee

Scottsdale

Janet R. Feeley, L.L.C.
by Janet R. Feely
Attorneys for Respondent/Appellant

Mesa

I R V I N E, Judge

¶1 David Rye ("Husband") and Marcia Rye ("Wife") were married in May 2007. In June 2007, David and Marcia created a revocable trust, The Rye Family Trust ("Trust"). Husband

transferred his Scottsdale home ("the home") into the Trust. It is undisputed that the home was Husband's separate property prior to marriage.

¶2 In July 2008, Husband and Wife sought to take out a home equity line of credit for \$250,000 to be secured by the home. The bank, however, required Husband and Wife to transfer title of the home out of the Trust into both Husband and Wife's names, so that they could each be held personally liable in the event of a default. Accordingly, on July 9, 2008, Husband executed a deed conveying the home from the Trust to Husband and Wife as joint tenants with right of survivorship. Husband immediately transferred the home back into the Trust. The bank approved the loan for \$250,000, but Husband testified that the money was never used, and the loan was paid back in full less than two months later.

¶3 In March 2009, Husband filed a petition for dissolution of marriage. Wife responded to the petition and filed a request for spousal maintenance. On June 5, 2009, Husband revoked the Trust and requested that the home be transferred back to him in its original character as his separate property.

¶4 Although it is not in the appellate record, Husband asserts in his answering brief that he sent his initial request for production of documents to Wife in April 2009. Wife

responded to the request, but she did not produce copies of her financial statements. Husband attempted to depose Wife on October 5, 2009, regarding her finances, but the deposition ended prematurely when Wife became uncooperative. On October 9, 2009, Husband again sent a request demanding production of Wife's financial statements. Wife failed to produce the requested statements. In December 2009, Husband filed a motion to compel discovery of the financial statements and requested that Wife appear for a second deposition. Wife did not respond to the motion or appear for a second deposition.

¶15 In January 2010, the court issued an order requiring Wife to produce "all checking, savings and/or investment account statements for any financial account for which she is authorized [to] make withdrawals." The order also required Wife to appear for a deposition before a Special Master. Wife again failed to produce the requested statements. Although Wife attended the deposition, the Special Master issued a report stating that he terminated the deposition early because "Wife was hostile, avoided answering questions, misled [Husband] . . . and generally caused the proceeding to go on much longer than was necessary." The Special Master also stated "Wife went into an absolute, uncontrolled tirade."

¶16 In July 2010, the trial court issued an order for sanctions, finding that Wife failed to produce the requested

financial statements. The court also found that Husband attempted to depose Wife on two occasions and that both depositions were terminated because of Wife's "belligerent, uncooperative and evasive behavior." Consequently, the court issued several sanctions against Wife. The court prohibited Wife from testifying, calling witnesses, presenting any evidence, and supporting or opposing any claims or defenses presented at trial. The court also struck Wife's request for spousal maintenance and ordered Wife to pay attorney's fees and costs associated with Wife's failure to provide requested discovery.

¶7 Despite the trial court's ruling, Wife was ultimately allowed to testify at trial and admit exhibits. Following the trial, the court took the matter under advisement and later issued a detailed minute entry finding that the home continues to be Husband's separate property, subject to some offsets, because "Husband testified convincingly and presented persuasive evidence that there was no intent to transfer any ownership interest in the house to Wife." The trial court explained that "[i]n making this decision, the court relies on the fact that the purpose behind the Trust was estate planning . . . and the transfer from the Trust to the parties as husband and wife was clearly intended to facilitate the acquisition of a home equity loan."

¶8 Wife timely appeals.

DISCUSSION

¶9 Wife argues that the trial court erred when it held that the home was Husband's separate property. Wife asserts that Husband intended to transmute the home to community property when he placed the home into the Trust. Wife relies on a provision in the Trust to support her argument. The provision states:

All property transferred into the trust which had an original source as community property shall remain community property and all property which had an original source as separate property shall remain separate property of the contributing spouse, unless other provisions shall have been made therefore, *except that joint tenancy property transferred into the trust shall be converted to community property upon transfer into the trust.*

(Emphasis added.)

¶10 Wife claims that the trial court erred because Husband and Wife signed a joint tenancy deed, and Husband placed the deed into the Trust. Wife therefore claims that Husband converted the home to community property per the terms of the Trust.

¶11 Husband argues that he did not intend to transfer any interest in the home. Husband asserts that the bank required him to transfer the deed into both Husband and Wife's names to obtain the home-equity loan and that placement of the home into

the trust was merely an estate-planning tool to provide for Wife upon his death.

¶12 All property owned by a spouse prior to marriage is the separate property of that spouse. Arizona Revised Statutes ("A.R.S.") section 25-213(A) (Supp. 2010). In construing a deed, every attempt should be made to carry out the intent of the grantor, and the purpose and conditions at the time when the deed was made should be taken into account. *Shulansky v. Michaels*, 14 Ariz. App. 402, 405, 484 P.2d 14, 17 (1971). Substance rather than form should control. *Id.* "When real property is paid for by one spouse and taken jointly in both names, the law presumes a gift." *In re the Marriage of Cupp and Cupp*, 152 Ariz. 161, 164, 730 P.2d 870, 873 (App. 1986). "The spouse who purchased the property must prove otherwise by clear and convincing evidence." *Id.*

¶13 Where there is uncontroverted evidence that a spouse placed real property in both spouses' names to avoid probate in the event of one spouse's death, any presumption of a gift was defeated. *Id.* We find that this is such a case.

¶14 Husband's uncontroverted testimony at the divorce trial was that the escrow officer required Husband to sign the joint tenancy deed of trust because the title company would not insure the note for a home equity line of credit, and the bank would not loan him money unless the property was put into Wife

and Husband's names. Husband also explained that it was not his intention to make a gift to the community and that is why he intentionally placed the home back into the trust. Husband further explained that if he had intended to make Wife a joint tenant, he would have left Wife's name on the deed as an owner.

¶15 The trial court had an opportunity to observe the credibility and demeanor of Husband and Wife during the trial. The trial court found that "Husband testified convincingly and presented persuasive evidence that there was no intent to transfer any ownership interest in the house to Wife." Because the trial court is in the best position to judge the credibility and demeanor of the witnesses at trial, we defer to such determinations. *In re Estate of Zaritsky*, 198 Ariz. 599, 601, ¶ 5, 12 P.3d 1203, 1205 (App. 2000). We affirm the trial court's finding that Husband presented clear and convincing evidence to overcome the presumption of a gift.

¶16 Wife also argues that the trial court erroneously relied on Husband's mere allegations that Wife failed to comply with discovery requests and that Husband presented no proof of her alleged failure to comply with discovery requests. Wife asserts that the trial court should have held a hearing requiring Husband to show proof that she failed to comply with discovery requests. Wife alternatively argues that the sanctions were excessive.

¶17 In reviewing sanctions for discovery violations, we review for an abuse of discretion. *Wayne Cook Enters., Inc. v. Fain Props. Ltd. P'ship*, 196 Ariz. 146, 147, ¶ 5, 993 P.2d 1110, 1111 (App. 1999). "A trial court abuses its discretion when it exercises discretion in a manner that is either 'manifestly unreasonable' or based on untenable grounds or reasons." *Kimu P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 39, 42, ¶ 11, 178 P.3d 511, 514 (App. 2008).

¶18 If a party fails to obey a discovery order, the court may strike the pleadings, dismiss the action, or proceed by default. Ariz.R.Fam.L.P. 65(B)(2)(6). An evidentiary hearing is not required before entry of default if the record demonstrates that a party has engaged in a pattern of willful discovery delay and non-compliance. *Hammoudeh v. Jada*, 222 Ariz. 570, 573, ¶ 11, 218 P.3d 1027, 1030 (App. 2009). Although an evidentiary hearing may often be necessary to determine whether responsibility for obstructing discovery lies with the party or with his or her counsel, such a hearing is not required when the facts are apparent from the record. See *Lenze v. Synthes Ltd.*, 160 Ariz. 302, 306, 772 P.2d 1155, 1159 (App. 1989).

¶19 We find no abuse of discretion with the trial court's sanctions. Although the sanctions were severe, Wife demonstrated a lack of respect for the legal process by engaging in a pattern of willful discovery delay and non-compliance. Wife repeatedly

failed to respond to requests for production of her financial statements, and she disregarded a court order requiring her to produce the statements. Wife also failed to cooperate and became "belligerent" when being deposed on two different occasions. Wife's failure to cooperate cost Husband and the trial court considerable time and expense. Additionally, the trial court ultimately permitted Wife to cross examine Husband, testify on her own behalf, and admit exhibits at trial. On this record, we cannot say that the trial court abused its discretion.

¶20 We also find that a hearing was not necessary because it was apparent from the record that Wife, rather than her attorney, was responsible for obstructing discovery. Wife had been representing herself for over two months when the order compelling discovery was entered on January 11, 2010. Wife therefore knew about the court order and failed to comply. Wife was also uncooperative and confrontational at both of her depositions. A hearing was therefore unnecessary.

¶21 Husband requests that this Court award attorneys' fees under A.R.S. § 25-324 (2010) because he claims that Wife filed this appeal for an improper purpose. In our discretion, we decline to award attorneys' fees.

CONCLUSION

¶22 We affirm.

/s/

PATRICK IRVINE, Judge

CONCURRING:

/s/

ANN A. SCOTT TIMMER, Presiding Judge

/s/

DANIEL A. BARKER, Judge