IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-137

Filed: 31 December 2020

Wake County No. 18 CVS 3242

MICHAEL BRANDON POYTHRESS, Plaintiff

v.

LISSETTE R. POYTHRESS, Defendant.

Appeal by Defendant from judgment entered 8 August 2019 by the Honorable Ned Magnum in Wake County District Court. Heard in the Court of Appeals 21 October 2020.

Fox Rothschild LLP, by Michelle D. Connell, for Plaintiff-Appellee.

John M. Kirby for Defendant-Appellant.

DILLON, Judge.

Defendant Lissette R. Poythress ("Wife") appeals portions of a judgment in favor of Plaintiff Michael Brandon Poythress ("Husband"), declaring certain real estate to be his sole property based on the terms of their premarital agreement.

I. Background

Husband and Wife were married in 2010 and separated in 2017.

Just prior to getting married, Husband and Wife entered into a premarital agreement (the "Premarital Agreement" or "Agreement").

Husband had recently divorced his first wife, a marriage which produced three children. Though he had significant assets, he lost much of his wealth in the divorce, prompting him to seek the Agreement before marrying again to protect his assets should his second marriage also end in divorce.

Wife was also previously married and had two children of her own. She, however, did not have any significant assets.

During the marriage, the parties acquired several properties which, at the time of their separation, were titled *either* to them jointly *or* to an entity which they purportedly jointly owned. The consideration paid to acquire these properties came from Husband's separate property and from loans guaranteed by both parties.

Husband and Wife now dispute whether, under the terms of their Premarital Agreement, these assets belong to the marriage or to Husband. The Agreement provides, generally, that the property owned by Husband prior to the marriage and all property he acquired during the marriage with his separate property would remain his separate property if the parties separated. The Agreement, however, also provides that Husband could make gifts to Wife and to the marital estate.

Husband brought this action to enforce the Agreement, claiming that the disputed assets are solely his and that Wife is obligated under the Agreement to sign over her legal interest in them. Wife, though, claims that the disputed assets are

marital and should be divided equally, as the Agreement provides that all marital property is to be split equally if the marriage ended in divorce.

After a hearing on the matter, the court entered an order declaring Husband as the sole owner of the disputed assets and directing Wife to execute documents to transfer her legal interest therein. The trial court also awarded Husband attorneys' fees, based on its finding that Wife had breached the Agreement by not previously executing the documents. Wife appeals.

II. Disputed Property

The trial court's order covered real estate, interests in the entity the parties set up during the marriage to hold other real estate, and some personal property. These assets are located either in North Carolina or Peru. Wife's brief on appeal only takes issue with some of these assets. Accordingly, we address the trial court's order, only with respect to those assets. As to the assets about which Wife makes no argument, the order is affirmed.

One of the assets is POGO, LLC, ("POGO"), the entity that they set up during the marriage. The purpose of POGO was to be the holding company for investment real estate. POGO, in fact, owned six investment properties in North Carolina at the parties' date of separation.

Three of these six properties were acquired early in the marriage, all with consideration provided from Husband's sole property, but which were initially titled

in their names personally. After they set up POGO, they re-titled these three properties to POGO.

The fourth and fifth properties were acquired directly by POGO, as follows: POGO obtained a line of credit which was secured by the original three properties and guaranteed by both Husband and Wife. POGO purchased two additional rental properties with proceeds from this line and from a mortgage guaranteed by both parties.

The sixth property owned by POGO was contributed to POGO by Husband. Husband came to own this sixth property in his own name in resolution of claims from his first divorce. He re-titled that home to POGO. POGO then obtained a cash-out mortgage loan secured by this property which was guaranteed by both parties.

In addition to the ownership interests in POGO, the parties dispute ownership of a beach house in North Carolina titled to the parties as tenants by the entirety. Husband purchased this property during the marriage, but entirely with his separate assets. Husband, though, later re-titled to him and Wife as tenants by the entirety.

The other assets in this appeal are located in Wife's home country of Peru. They include interests in various businesses and four real estate properties, all acquired during the marriage with Husband's separate property.

III. Analysis

The trial court determined that all the disputed properties are solely Husband's. The trial court based its decision largely on its findings that Husband had provided all the consideration for their acquisitions; that Husband never intended to gift the properties to the marital estate; but that *if* titling the properties jointly or to POGO created a presumption of a gift, there was clear, cogent, and convincing evidence to rebut this presumption, based on the Agreement and Husband's reliance thereon.

For the reasons stated below, we hold as follows with respect to the North Carolina properties:

- POGO is jointly owned by Husband and Wife in equal shares. POGO was capitalized with joint assets. Husband has failed to produce clear, cogent, and convincing evidence to show otherwise, as a matter of law. And both parties provided consideration, in the form of their personal guarantees, for the purchase of other real estate owned by POGO. We reverse the portion of the trial court order holding otherwise.

- The trial court relied, in part, on its erroneous interpretation of the Agreement to find clear, cogent, and convincing evidence that Husband did not intend to gift the beach house to the marital estate. There is evidence from which the trial court could make this finding. We, therefore, remand this portion of the order so that the trial court can reconsider the matter.

- With respect to the Peru properties, we hold that the trial court did not err in exercising jurisdiction over the parties' dispute concerning these properties. However, we vacate and remand the portion of the trial court order concerning these properties for further proceedings.

- Finally, we vacate the portion of the trial court's order awarding attorneys' fees to Husband.

Gifts

One issue on appeal is whether Husband *intended a gift at all* when he allowed the disputed properties to be titled to the marriage, including the properties that were used to capitalize POGO. That is, did Husband intend a *present* transfer of interest or did he intend to create a resulting trust, whereby he was simply transferring *title* to be held in trust for his benefit?

A second issue on appeal is, if Husband did intend a present gift, whether Husband intended the present gift to be *conditional* in nature. That is, did Husband intend his gifts to be conditioned such that any interest acquired by Wife by the gift would revert to him if the marriage ended in divorce?

A valid gift (whether conditional or unconditional) occurs when there is (1) donative intent and (2) actual or constructive delivery. *Halloway v. Wachovia*, 333 N.C. 94, 100, 423 S.E.2d 752, 755 (1992).

In any event, our Supreme Court has held – as a matter of common law, apart from our equitable distribution statutes – that where a spouse allows his separate assets to be used to acquire property titled to both spouses as tenants by the entirety or to the other spouse, it is presumed that the spouse supplying the consideration has made a gift to the marriage; it is not presumed that the transaction creates a resulting trust in favor of the spouse supplying the consideration. *Mims v. Mims*, 305 N.C. 41, 53-54, 286 S.E.2d 779, 788 (1982). Our Supreme Court further instructs that this gift

presumption may only be overcome by "clear, cogent, and convincing" evidence. *Id.* at 57, 286 S.E.2d at 790.[1]

Trial Court's Erroneous Findings

Before discussing the assets at issue specifically, we first discuss findings by the trial court to support its determination that no gift occurred by Husband and our holding that the trial court erred in two key findings in reaching its ultimate finding that Husband did not intend any gifts to the marriage when the assets were acquired.

First, the trial court erroneously relied on the Agreement as evidence to rebut the marital gift presumption, finding that Husband's "procurement of and reliance on the definitions of separate property in the Premarital Agreement is clear, cogent, and convincing evidence sufficient to rebut any such presumption."

Though the Agreement provided that property acquired during the marriage by Husband with his separate assets would be his solely upon separation, the Agreement also provided that Husband could make gifts of his separate property to Wife or to the marriage. Specifically, the Agreement provided as follows:

If Husband and Wife separated, the distribution of their properties would be controlled by the Agreement and not by Chapter 50.[2]

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[1] Our equitable distribution statute states that the presumption may be overcome by "the greater weight of the evidence." N.C. Gen. Stat. § 50-20(b)(1) (2017). However, this present case is not governed by that statute but is a contract claim.

[2] In her Answer, Wife prayed that the trial court declare the Agreement void, such that Chapter 50 would apply to determining the classification and distribution of their property. However,

If Husband and Wife divorced, the property owned by Husband prior to marriage and any property he acquired during marriage using his separate property would be his separate property. Wife waived all marital interest in Husband's property, whether the marriage ended in divorce or Husband's death.

Paragraph 21 of the Agreement, though, provided that Husband could make gifts to Wife or to the marital estate during the marriage and bequests to Wife which would take effect upon his death:

> 21. VOLUNTARY TRANSFERS PERMITTED. The purpose of this Agreement is to limit the rights of each party in the assets of his or her spouse in the event of death, separation or divorce, but this Agreement shall not be construed as placing any limitation on the rights of either party to make voluntary *inter vivos* and/or testamentary transfers of his or her assets to his or her spouse.
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> In the event that [Husband] shall create [ ] tenancies by the entirety, or otherwise so establish assets that upon [his] death[,] it shall be presumed that [Husband] presumed that [he] intended such passage and [that Wife] shall then become the sole and uncontested owner of such asset or assets, anything herein contained to the contrary notwithstanding.
>
> . . . [It is] the wish of each party that any affirmative action taken by either after the signing of this Agreement, whether it be testamentary or in the creation of joint assets, shall override the releases and renunciations herein set forth.
>
> [T]he parties acknowledge that no representation or promises of any kind whatsoever have been made by either of them to the other with respect to any such transfers, gifts, contracts, conveyances, or fiduciary relationships.

Wife makes no argument on appeal that the Agreement is void. Rather, her arguments on appeal concern her disagreement as to how the trial court construed the Agreement.

The language in this paragraph is unambiguous: The first section recognizes that Husband may make gifts of his separate property during the marriage to Wife or could leave Wife any of his separate property in his last will.

The second and third sections indicate that Husband could transfer property to the marital estate, which would then become "solely" Wife's property upon his death, notwithstanding her waiver of her marital interests in his estate provided by North Carolina law. These sections, however, do *not* state that such transfers to the marital estate by Husband otherwise were not to be deemed a present gift to the marital estate and that such transfers should not be divided equally as a marital asset should the parties separate. Rather, the third section expressly provides that any affirmative action by Husband to create joint assets during the marriage "shall override [Wife's] releases and renunciations" in the Agreement.

And the fourth section affirms there was no understanding at the time the Agreement was executed between the parties with respect to any transfers that might be made during the marriage.

Second, the trial court erroneously relied on its finding that Husband provided *all* consideration to acquire the properties. This finding was erroneous for two reasons. First, the trial court fails to recognize that Wife provided consideration for many of the assets by personally guaranteeing the loans used to acquire them. Under the Agreement, Wife had no obligation to personally guarantee any loan to

help Husband mortgage or acquire his separate property: she was only required to pledge her marital interest in Husband's separate properties whenever Husband sought a loan secured by these properties. Her personal guarantees used to acquire some of the assets are strong evidence that these assets were intended to be marital. And, second, many assets were acquired with the line which was itself secured by the three properties owned by the marriage which was used to initially capitalize POGO.

Having concluded that the trial court erroneously relied upon the Agreement to support its finding that the marital gift presumption had been rebutted, we now turn to address whether there was *other* evidence to support the trial court's finding. It would be appropriate to vacate and remand with respect to such properties where there is other competent evidence.

POGO

The only evidence that Husband did not intend a gift of POGO, including the properties contained therein, was a few lines in Husband's testimony that he did not subjectively intend gifts to Wife when he allowed properties to be titled to POGO. We have held that testimony by a spouse concerning a lack of intent to make a gift when titling separate property to the marriage, without other evidence, is not necessarily insufficient to constitute clear, cogent, and convincing evidence to overcome the marital gift presumption. *Romulus v. Romulus*, 215 N.C. App. 495, 506, 715 S.E.2d 308, 316 (2011) ("Yet, arguably the only evidence which could potentially support

findings of fact to rebut the marital presumption is plaintiff's testimony as to her intent. Herein lies the issue which the trial court must resolve on remand.")

Romulus, however, is distinguishable from the present case. In *Romulus*, there was not much in evidence from which it could be determined *either way* whether a wife intended to gift a house to the marriage when she titled it to her and her spouse. Accordingly, in that case, we held that the wife's testimony alone might be enough to constitute evidence sufficient to rebut the marital presumption.

Here, though, there is substantial evidence *from Husband* regarding his words and actions that would indicate that he intended POGO and its properties to be joint assets. Accordingly, we hold that the evidence in the record, as a matter of law, fails to arise to the level of clear, cogent, and convincing evidence to rebut the marital presumption. For instance, Husband testified that he wanted Wife to be involved in real estate investing and that the first property, originally titled to her only, was purchased to get her started. He testified that Wife was active in locating properties, that she participated in managing them, that she helped in negotiating for some of the purchases, and that she found a property and the tenant for one of the properties that they acquired through POGO. He testified that POGO was so named based on a combination of their last names and that their intent was to acquire ten properties total in POGO so that their combined five children would each one day have two rental properties. He testified that he told his accountant on one occasion that the

ownership interests in POGO should be reflected as 70% for himself and 30% for Wife rather than equal ownership, though he never followed through with any change. Husband participated with Wife in the acquisition of several properties by POGO with the proceeds from loans guaranteed by both of them, never telling Wife that she was guaranteeing loans to buy property he considered to be his separate property. And we note that there was no evidence that Husband ever indicated to Wife or anyone else that he did *not* intend gifts.

It may be that Husband, otherwise, thought that POGO and the properties therein would revert to him if the marriage ended in divorce. However, this belief would still indicate that he intended gifts, though conditional gifts, rather than the creation of a resulting trust, whereby POGO was merely holding *his sole* property in trust for him. Our Court has held as follows with conditional gifts generally:

> A person has the right to give away his or her property as he or she chooses and may limit a gift to a particular purpose, and render it so conditioned and dependent upon an expected state of facts that, failing that state of facts, the gift should fail with it. . . .
>
> The intention of the donor to condition the gift must be measured at the time the gift is made, as any undisclosed intention is immaterial in the absence of mistake, fraud, and the like, and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his intention by his outward expression and excludes all questions in regard to his unexpressed intention.

Courts v. Annie Penn, 111 N.C. App. 134, 139, 431 S.E.2d 864, 866-67 (1993) (quotation marks omitted). The record here, though, does not disclose any evidence regarding Husband's words or actions when the properties were titled to Wife, the marital estate, or POGO that suggested that the properties would revert to him if the marriage ended in divorce.

The Beach House

The beach house was never titled to POGO. Rather, Husband acquired this property in his own name with his own assets and then later re-titled it to both him and Wife as tenants by the entirety. Though the trial court erroneously found that the marital gift presumption was overcome, in part, by the Agreement, the trial court also relied on a conversation that Husband and Wife had when he made the transfer. In this conversation, Wife indicated that she was afraid that Husband's ex-wife would kick her out of the beach house were he to die as the sole owner. The trial court found that Husband, therefore, re-titled the property to the marital estate so that it would become Wife's if he were to die. This conversation is *some* evidence as to what the parties, especially Husband, was thinking when the property was re-titled. This finding could support an ultimate finding that Husband intended only a resulting trust, that the property be held by the marital estate for his benefit, whereby Wife would only acquire any interest when he died. We, therefore, vacate this portion of the order and remand for further findings on this issue.

Peru Properties

Wife identifies interests in four Peruvian companies owned by Husband and several parcels of real estate in Peru.

She argues that the trial court erred by exercising jurisdiction over these Peruvian properties. We disagree. The trial court had *in personam* jurisdiction over the parties, as they were married in North Carolina, entered the Agreement in North Carolina, and subjected themselves to the jurisdiction of the court. And the trial court had subject matter jurisdiction to resolve the contract claim. Of course, whether Peru will honor a judgment from North Carolina concerning property located in Peru is not before us.

Alternatively, Wife argues that the trial court erred by declaring Husband the sole owner of these Peruvian properties. It is unclear from the findings how these properties are actually titled in Peru or how they came to be so titled. We vacate the portion of the order declaring that these properties are Husband's properties and remand for the trial court to make further findings with respect to these properties and to determine ownership of these properties based on those findings. The trial court, in its discretion, may hear additional evidence concerning these properties and consider legal arguments from the parties, including the effect of Peruvian property law, if any, on our marital gift presumption.

Breach of Contract and Attorneys' Fees

We conclude that the trial court erred by concluding that Wife breached the Agreement when she refused to execute documents transferring her legal interest in the disputed properties to Husband. Accordingly, we vacate the award of attorneys' fees.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judge MURPHY concurs.

Judge YOUNG concurs in result only.