IN THE SUPREME COURT OF THE STATE OF NEVADA

LASHELL FITTERER,
Appellant,
vs.
HOWARD FITTERER,
Respondent.

No. 46729

FILED

MAY 06 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court divorce decree. Eighth Judicial District Court, Family Court Division, Clark County; Cynthia Dianne Steel, Judge.

Appellant LaShell Fitterer filed a complaint for divorce from respondent Howard Fitterer in January 2002. In June 2002, the district court entered a divorce decree, finding that the parties' marital residence was community property and ordering LaShell to buy Howard out of his interest in the home or else to sell the residence within one year. The district court ordered an equal distribution of the remaining community property. LaShell appeals, arguing that the district court erred in finding that the marital residence was community property subject to equal division and by failing to unequally distribute the remainder of the parties' community property. We reject both of LaShell's arguments. Because the parties are familiar with the facts, we do not recount them here except as necessary for our disposition.

We review a district court's decision concerning a divorce proceeding for an abuse of discretion, and we will affirm the court's rulings

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in such proceedings if they are supported by substantial evidence.[1] Substantial evidence is that which a reasonable person may accept as adequate to sustain a judgment.[2] We review questions of law de novo.[3]

LaShell argues first that the district court erred as a matter of law by determining that the marital residence was community property. LaShell contends that Howard failed to rebut by clear and convincing evidence the presumption that he gifted the property to LaShell when he transferred his interest in the property to her by quitclaim deed. Howard asserts in response that the applicable standard of proof for rebutting a presumption of gift when one spouse transfers to the other an interest in community property is proof by a preponderance of the evidence. Howard argues that even if he was required to adduce clear and convincing evidence, he satisfied the burden.

"We have consistently held that a spouse to spouse conveyance of title to real property creates a presumption of gift that can only be overcome by clear and convincing evidence."[4] In Kerley v. Kerley, we held that where a wife quitclaimed her interest in property held in joint tenancy to the husband, the property was presumed to be a gift of the

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[1]Shydler v. Shydler, 114 Nev. 192, 196, 954 P.2d 37, 39 (1998).

[2]See Schmanski v. Schmanski, 115 Nev. 247, 251, 984 P.2d 752, 755 (1999).

[3]Day v. Washoe County Sch. Dist., 121 Nev. 387, 388, 116 P.3d 68, 69 (2005).

[4]Kerley v. Kerley, 112 Nev. 36, 37, 910 P.2d 279, 280 (1996).

wife's interest until proven otherwise by clear and convincing evidence.[5] The instant case is factually analogous. Howard and LaShell held title to the marital residence in joint tenancy; Howard then transferred title to LaShell individually by quitclaim deed. That transfer created a presumption of gift that could be overcome only by clear and convincing evidence. Therefore, we reject Howard's contention that he was required only to rebut the presumption by a preponderance of the evidence and conclude that the district court did not err by requiring him to rebut the presumption by clear and convincing evidence.

We further conclude that the district court did not abuse its discretion by finding that Howard adduced clear and convincing evidence to rebut the presumption of gift. Our prior jurisprudence instructs that the presumption of gift may be overcome "by presenting substantial evidence of conduct, expressions or intent at the time of taking or during the holding of the real property."[6] Here, Howard presented substantial evidence concerning LaShell's actions following the transfer of property. Specifically, Howard presented evidence that mortgage payments continued to be made with community funds, that LaShell did not claim the house as a separate asset in the bankruptcy proceeding that followed the filing of the divorce complaint, and that LaShell claimed the house as a community asset in her affidavit of financial condition to the court. We cannot conclude that the district court abused its discretion by finding that Howard overcame the presumption of gift by clear and convincing

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[5]Id.

[6]Graham v. Graham, 104 Nev. 472, 474, 760 P.2d 772, 773 (1988).

evidence, nor the court's conclusion that the residence was community property subject to equal division.

Next, LaShell argues that the district court abused its discretion by refusing to award an unequal division of property in favor of LaShell because she established that Howard committed fraud and community waste. We disagree. In dividing community property, the district court must, to the extent practicable, make an equal disposition of such property.[7] The district court may make an unequal division of property "in such proportions as it deems just if the court finds a compelling reason to do so and sets forth in writing the reasons for making the unequal disposition."[8] We have upheld unequal dispositions of community property where one spouse wastes or secretes community assets.[9] However, we have also held that "undercontributing and overconsuming . . . of community assets during the marriage" are not "compelling reasons" that justify an unequal disposition of community property.[10]

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[7]NRS 125.150(1)(b).

[8]Id.

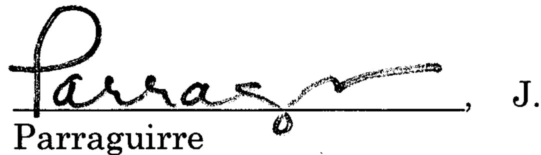
[9]Lofgren v. Lofgren, 112 Nev. 1282, 1284, 926 P.2d 296, 298 (1996) (affirming the district court's unequal disposition of property where the husband committed intentional financial misconduct by transferring funds to his father to avoid sharing the money with his wife and using community funds for his own purposes, all in violation of a preliminary injunction).

[10]Putterman v. Putterman, 113 Nev. 606, 609, 939 P.2d 1047, 1048-49 (1997).

Here, we conclude that the district court did not abuse its discretion by determining that LaShell failed to establish that an unequal disposition of property was warranted. Although LaShell submitted evidence that Howard invested and lost upwards of $100,000 in community assets and was not otherwise employed for the majority of their relationship, it was within the district court's discretion to find that his undercontribution and overconsumption did not create a compelling reason to divide the community property unequally.

Because we conclude that the district court did not err, we ORDER the judgment of the district court AFFIRMED.

_______________, J.
Hardesty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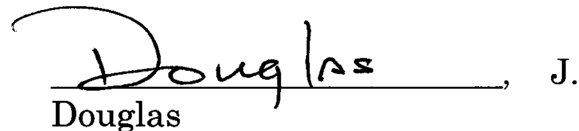
_______________, J.
Douglas

cc: Hon. Cynthia Dianne Steel, District Judge, Family Court Division
Carolyn Worrell, Settlement Judge
Joseph W. Houston II
Sterling Law, LLC
Mario D. Valencia
Eighth District Court Clerk