IN THE SUPREME COURT OF THE STATE OF NEVADA

JUDY ANN BARNES,
Appellant,
vs.
KARL MAYER,
Respondent.

No. 35051

FILED

JUL 14 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a final divorce decree granted to appellant Judy Ann Barnes and respondent Karl Mayer. Judy contends that the district court abused its discretion by, inter alia, finding that $20,000.00 of a $40,000.00 down payment she made on a house in Virginia with her separate funds was community property and determining that the fair market value of their Las Vegas residence was community property, given the fact that Karl had quitclaimed his interest in the house to Judy.[1] For the following reasons, we conclude that Judy's arguments have merit, and accordingly, we reverse the portion of the divorce decree with regard to those two issues. We further conclude that Judy's other contentions lack merit, and, accordingly, affirm the decree as to the remaining issues.

We review the district court's decisions regarding divorce proceedings for an abuse of discretion, and we will not disturb the district court's rulings if they are supported by substantial evidence.[2] All property

[1]Judy argues that the district court abused its discretion regarding several other issues, all of which we conclude are without merit.

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

03-11754

acquired during the marriage, except by gift or devise, is presumed to be community property, but this presumption may be overcome by clear and convincing evidence to the contrary.[3] Similarly, where separate property is used to acquire realty in joint tenancy, it creates a presumption that the separate property was a gift to the community, which can only be overcome by clear and convincing evidence to the contrary.[4] The district court must make an equal distribution of community property unless it sets forth in writing compelling reasons for making an unequal distribution.[5] However, the district court has discretion, within the confines of the statutes,[6] to determine the distribution of community property, as that court has the benefit of being able to observe the parties and evaluate the situation.[7]

Judy argues that the district court abused its discretion by only awarding her $20,000.00 of the $40,000.00 down payment made on the parties' Virginia house as her separate property. She argues that the entire $40,000.00 is her separate property, which was derived from the

---

[3]Norwest Financial v. Lawver, 109 Nev. 242, 245, 849 P.2d 324, 326 (1993); see also NRS 123.220.

[4]Gorden v. Gorden, 93 Nev. 494, 497, 569 P.2d 397, 398 (1977); see also Schmanski v. Schmanski, 115 Nev. 247, 251, 984 P.2d 752, 755 (1999) (holding that "in accordance with Gorden, separate property placed into joint tenancy is presumed to be a gift to the community unless the presumption is overcome by clear and convincing evidence").

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

[6]Lewis v. Hicks, 108 Nev. 1107, 1112, 843 P.2d 828, 831 (1992).

[7]Wolff v. Wolff, 112 Nev. 1355, 1359, 929 P.2d 916, 918-19 (1996).

sale of the condominium she owned prior to marriage and which was listed as her separate property in the antenuptial agreement. Judy contends that, although the Virginia house was acquired in joint tenancy, the $40,000.00 down payment was never intended to be a gift to the community.

Karl responds that, although the $40,000.00 originated from Judy's separate property, she placed the house in joint tenancy with him, thus creating the presumption that the $40,000.00 was a gift to the community. He argues that the court properly considered the factors enumerated in NRS 125.150(2) and deemed it equitable to award Judy partial reimbursement for her contribution under that statute.

At the time the parties met, Judy owned a condominium in Alexandria, Virginia. Their antenuptial agreement specifies that the condominium had a market value of $83,000.00, with a remaining mortgage of $45,000.00 as of June 15, 1985, and was to remain Judy's separate property. The condominium sold in 1986 for a little over $80,000.00, and the parties purchased a house in Virginia in January 1987. Judy contributed $40,000.00 from her proceeds of the condominium sale towards the purchase of the house, and the parties took title to the house as joint tenants. Karl testified that he paid the $1,700.00 per month mortgage on the house for ten of the eleven years they owned it, and that he thought his payment of the first two years of the mortgage equaled out Judy's down payment so that they owned it jointly and equally. When the Virginia house was sold in May 1997, the parties placed the proceeds in a joint account, which was then used for the purchase of a house in Las Vegas.

The record reflects that the district court considered whether to reimburse Judy for her separate property contribution pursuant to NRS 125.150(2).[8] The district court found that the parties were married for fourteen years and that they held the Virginia house in joint tenancy for ten of those years. Because the parties held the house in joint tenancy for a significant number of years, the district court deemed it equitable to award Judy only partial reimbursement for her contribution. The district

---

[8]NRS 125.150(2) provides, in relevant part:

> 2. . . . If a party has made a contribution of separate property to the acquisition or improvement of property held in joint tenancy, the court may provide for the reimbursement of that party for his contribution. . . . In determining whether to provide for the reimbursement, in whole or in part, of a party who has contributed separate property, the court shall consider:
>
> (a) The intention of the parties in placing the property in joint tenancy;
>
> (b) The length of the marriage; and
>
> (c) Any other factor which the court deems relevant in making a just and equitable disposition of that property.
>
> As used in this subsection, "contribution" includes a down payment, a payment for the acquisition or improvement of property, and a payment reducing the principal of a loan used to finance the purchase or improvement of property. The term does not include a payment of interest on a loan used to finance the purchase or improvement of property, or a payment made for maintenance, insurance or taxes on property.

court awarded her $20,000.00 of the $40,000.00 as her separate property and divided the remaining $20,000.00 equally between the two.

The district court may grant reimbursement of a party's separate property contribution to acquire property held in joint tenancy, after considering the parties' intention in placing the property in joint tenancy, the length of the marriage and any other relevant factors.[9] We conclude that the district court abused its discretion when it concluded that Judy failed to show by clear and convincing evidence that her $40,000.00 was her separate property and was not intended as a gift to the community.

The record reveals that the district court found that Judy had overcome the presumption, at least in part, by awarding her $20,000.00 of the $40,000.00 as her separate property. It is unclear from the record, however, why the district court concluded that Judy had failed to overcome the presumption as to the full amount. The district court determined that it would be fair and equitable to award Judy $20,000.00 as her separate property and split the remaining $20,000.00 equally because for ten of the fourteen years of the parties' marriage, they owned the house as joint tenants. The district court further concluded that Karl's testimony that he thought that his payment of principal and interest for the first two years cancelled out Judy's down payment was credible, and that Judy's testimony that her payment of the insurance and taxes and allowing Karl to drive her car for three years equaled his mortgage

---

[9]NRS 125.150(2).

payments was also credible. We conclude that the district court's ruling is not supported by substantial evidence.

The record reveals that the parties' antenuptial agreement was clear that the assets they brought to the marriage were to remain separate, and that the Virginia condominium, the source of the $40,000.00, was listed as Judy's separate property. The agreement remained in effect even though the parties took title to the Virginia house as joint tenants. While Karl contends that his payment of the mortgage for the first two years they owned the house equaled out Judy's down payment so that they owned it equally, we conclude this argument lacks merit. Karl's payment of the mortgage came from his income and constituted marital property.[10] The antenuptial agreement was silent with regard to future earnings of the parties, and because it was silent, the parties' earnings were marital property. Furthermore, Judy also contributed to the house by paying taxes and insurance on the house, apparently from her income. Hence, both parties contributed to the house from their marital property. Substantial evidence supports Judy's contention that she produced clear and convincing evidence at trial that the $40,000.00 was not meant as a gift to the community.[11]

---

[10]In Virginia, all property acquired during marriage which is not separate property is marital property and is subject to equitable distribution by the court upon divorce. See Va. Code Ann. § 20-107.3(A) (2003); see also Theismann v. Theismann, 471 S.E.2d 809, 812 (Va. Ct. App. 1996).

[11]Judy conceded at trial that Nevada law governed the division of property between the spouses. Therefore, we decline to address the effect of Virginia law on the parties' Virginia property. Even if Virginia law

continued on next page . . .

Next, we address Judy's argument regarding the division of equity in the Las Vegas house. The purchase price of the Las Vegas residence was $278,000.00. The parties made a down payment of $169,000.00 from the proceeds of their Virginia house. At the time of their divorce, the balance owed on the Las Vegas house was $107,000.00. Karl sought fifty percent of the equity in the house. Because neither party had an appraisal done, the district court used comparable sales to arrive at a value of $298,000.00 for the house. The district court then subtracted $107,000.00, leaving a net equity of $191,000.00. After crediting Judy for $20,000.00 as her separate property as discussed in the above section, the district court determined that $171,000.00 was to be split equally between the parties.

Judy contends that the district court abused its discretion because it had no authority to award Karl any of the increased value because, on November 25, 1997, Karl quitclaimed his interest in the house to Judy. The parties stipulated that Karl reserved the right to litigate his community property interest in the $169,000.00 down payment and closing costs, but that the purpose of the quitclaim deed was to relinquish his community interest in the house.

Karl argues that at the time of the stipulation, it was not contemplated that the divorce would take almost two years, and the document failed to address appreciation. He further argues that he reserved the right to fully litigate the community and separate property

---

. . . *continued*
were to apply, however, the result would be the same. See Va. Code Ann. § 20-107.3(A).

interests in the residence, and that appreciation is a natural extension of community property. He contends that, but for the stipulation, he would have held the property in joint tenancy with Judy, and that NRS 125.150(2) allows the court to consider appreciation of property held in joint tenancy.

We conclude the district court abused its discretion by failing to take into account the stipulation that Karl relinquished his community interest in the house, except for the down payment and closing costs. The record reveals that the property was never held in joint tenancy; accordingly, Karl's reliance on NRS 125.150(2) is misplaced. Judy testified that the quitclaim deed was executed because the parties had already paid the down payment, but that Karl was no longer willing to live there and did not want to continue with the deal. The record reflects that the $169,000.00 down payment would have been lost as liquidated damages if the sale was not consummated. Judy, still married to Karl, could not obtain financing unless he agreed to co-sign the mortgage or to quitclaim his interest to her. Karl, therefore, quitclaimed his interest to Judy, "a married woman, as her sole and separate property," and Judy obtained financing. The record reveals that Karl did not sign the loan, nor did he make any payments on the mortgage. Nor has Karl made any contributions toward the maintenance and upkeep of the house. The stipulation and order that accompanies the quitclaim deed states that Judy was solely responsible for obtaining financing and Karl would "execute a Quit Claim Deed on said residence, with a full reservation of rights to fully litigate the respective community and separate property interests of the parties in the $169,000.00 down payment and closing costs." (Emphasis added.) The quitclaim deed itself states that "[t]he

purpose of this quitclaim deed is to relinquish any possible community interest that grantor may have or may acquire in the future." The quitclaim deed was executed two months before the parties filed for divorce.

The stipulation and quitclaim deed are clear with regard to Karl's relinquishment of rights in the equity of the house. Despite his argument that he reserved the right to fully litigate any interests in the house, the stipulation specifies that Karl would relinquish all rights except for his interest in the down payment and closing costs. Furthermore, "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."[12] The quitclaim deed, in conjunction with the stipulation and order, created a gift of equity in the house to Judy, and Karl kept his rights to his portion of the down payment and closing costs, especially since the deed was executed a full two months prior to Judy's complaint for divorce. The record does not support the district court's conclusion that Karl overcame the presumption by clear and convincing evidence that the conveyance resulted in a gift to the community.[13] Hence, we conclude that the district court abused its discretion by awarding Karl one-half of the equity in the house. The proper community interest was

---

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

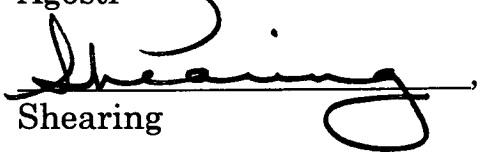
[13]Gorden, 93 Nev. at 497, 569 P.2d at 398.

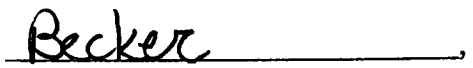
$169,000.00 less Judy's $40,000.00 separate property interest, or $129,000.00. This amount should then have been divided equally.[14]

For the foregoing reasons, we reverse that portion of the district court's decree pertaining to Judy's $40,000.00 separate property interest and the division of equity in the Las Vegas house and affirm the remainder of the decree. We remand this matter to the district court for a revised property distribution consistent with this order.

It is so ORDERED.


_____, C.J.
Agosti


_____, J.
Shearing


_____, J.
Becker

cc: Hon. Gloria S. Sanchez, District Judge, Family Court Division
Lyons Law Firm
Rhonda L. Mushkin, Chtd.
Clark County Clerk

---

[14]This change also reduces Judy's payment to Karl for $51,677.00 to equalize their community property.