IN THE SUPREME COURT OF THE STATE OF NEVADA

DEREATHA WATKINS,
Appellant,
vs.
BILL R. MURPHY,
Respondent.

No. 42692

FILED
JUL 2 5 2005
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court judgment in a partition and quiet title action. Eighth Judicial District Court, Clark County; Ronald D. Parraguirre, Judge.

Dereatha Watkins and Bill Murphy purchased the property located at 6332 Canyon Ridge Drive, Las Vegas, Nevada, as joint tenants with right of survivorship in 1992. Watkins was pregnant with the couple's child and gave birth to their daughter approximately five months after they moved into the home. Murphy and Watkins intended to get married and lived together in the home for approximately two and one-half years before separating. They remained separated for another three years and then resumed residing together until May 2001. Murphy and Watkins never married.

After Murphy and Watkins separated in May 2001, Watkins filed the present action seeking partition of the property, an order forcing the sale of the property, and distribution of the proceeds from the sale, plus attorney fees. Murphy counterclaimed seeking a declaratory judgment and to quiet title in his name.

Based on the evidence produced at trial, Murphy and Watkins qualified for a home loan together and agreed to take title as joint tenants



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with right of survivorship. Murphy and Watkins purchased the home for $147,400 while it was still under construction. With closing costs and prorated taxes, the total due at close of escrow was $153,787.91. Murphy paid the full down payment of $13,420.11.[1] In turn, Watkins paid for various items at move-in including new blinds, a security system, refrigerator, and washer and dryer, and the couple equally shared the costs of the lawn. Watkins paid the out-of-pocket costs for the birth of the couple's child.

While they were living in the home, Murphy and Watkins agreed to share equally the total cost of their monthly living expenses. Murphy paid the $1,300 monthly mortgage, and Watkins paid other monthly bills including basic utilities, insurance, daycare, and food. For the time they lived together, the couple's average monthly bills totaled approximately $1,250 to $1,500 per month.[2] However, when Watkins and Murphy were separated Watkins declined to contribute toward the mortgage, and Murphy paid child support and other bills for their daughter.

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[1]There remains a dispute as to whether the total down payment paid by Murphy totaled $13,420.11 or $13,620.11. However, for purposes of this appeal we accept the figure included in the district court's findings of fact and conclusions of law.

[2]According to the record the monthly expenditures included:

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| Daycare: | $400 to 450 per month |
| Food: | $600 to $800 per month |
| Utilities: | $200 per month |
| Insurance: | $50 per month |
| Total = | $1,250 to $1,500 per month |

The evidence at trial indicated that as of November 2002, the property appraised for $190,000, and the remaining loan balance was $120,785.56. Thus, the total equity in the home equaled approximately $70,000.

The district court, relying on equitable principles, ordered that Murphy was entitled to the return of the $13,420.11 down payment he paid and that the parties were to split equally the remaining equity in the home. Therefore, Watkins was to receive approximately $27,797.16, and Murphy would take sole title to the home. Murphy's counsel sought a stay of the order pending appeal. The district court directed counsel to file the appropriate motion and advised that it would require the posting of a cost bond. Subsequently, however, the district court placed the matter on calendar call for August 18, 2003, to further discuss the verdict rendered by the court.

At the August 18, 2003, hearing, the district court vacated its prior decision and ordered the parties to file post-trial briefs indicating the basis and legal authority supporting their positions. Following submission of post-trial briefs, the district court issued a final decision by minute order. The district court found that Murphy resided at the property from the time of purchase through the date of trial, a period of roughly eleven years. In addition, the district court found that for the fifty-four months that Watkins lived in the residence, their contributions were roughly proportionate. However, after Watkins moved out Murphy paid the mortgage expense, and Watkins refused to contribute. The district court further found that during the time Murphy was making the mortgage payment, there was no agreement between the parties regarding their respective property interests.

The district court determined that Murphy's sole contributions refuted any presumptions as to the parties' property interests created by the vesting of title as joint tenants with right of survivorship. Therefore, the district court ruled that the parties' course of conduct demonstrated that Murphy's sole mortgage payments were not intended to inure to Watkins, nor were they made for the couple's mutual benefit.

The district court noted that Langevin v. York[3] and Sack v. Tomlin[4] were controlling. Pursuant to the formula outlined in those cases, when co-tenants share unequally in the purchase of property, upon partition each party's respective share of the equity is in direct proportion to the amount that party contributed toward the purchase price.[5] Therefore, the district court found that Watkins was entitled to 28.58 percent of the home's equity less any obligations for contribution she owed to Murphy for payments made on the property. Based on that analysis, the district court determined that Watkins held no equity in the home and awarded Murphy sole ownership of the property. The district court directed Murphy to have the property title recorded in his name, relieving Watkins of any further obligations.

The district court entered its findings of fact and conclusions of law and judgment on December 11, 2003. On appeal, Watkins argues that the district court misapplied Nevada law and erred in concluding that Watkins was not entitled to any equity interest in the property.

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[3]111 Nev. 1481, 907 P.2d 981 (1995).

[4]110 Nev. 204, 871 P.2d 298 (1994).

[5]See Langevin, 111 Nev. at 1485, 907 P.2d at 984 (quoting Sack, 110 Nev. at 210, 871 P.2d at 303).

The primary issue in this case is whether the district court properly determined the respective interests of two unmarried cohabitants who held property as joint tenants with right of survivorship. Thus, the case involved the interpretation of an implied contract,[6] and the district court necessarily had to resolve questions of law and fact. We review questions of law de novo,[7] but when the issues on appeal involve the factual determinations of the trial court, we apply a more deferential standard of review and will defer to the findings of the district court.[8]

Watkins argues that the district court erred in relying on Sack[9] and Langevin[10] in rendering its decision and that Hay[11] and

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[6]See Hay v. Hay, 100 Nev. 196, 199, 678 P.2d 672, 674 (1984) (noting that when unmarried cohabitants agree to acquire and hold real property the trial court must determine whether the parties' course of conduct created "'"an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties."'" (quoting Warren v. Warren, 94 Nev. 309, 312, 579 P.2d 772, 774 (1998) (quoting Marvin v. Marvin, 557 P.2d 106, 110 (Cal. 1976))).

[7]Huntington v. MILA, Inc., 119 Nev. 355, 357, 75 P.3d 354, 356 (2003); Blaich v. Blaich, 114 Nev. 1446, 1447-48, 971 P.2d 822, 823 (1998); see also Dewrell v. Lawrence, 58 P.3d 223, 226 (Okla. Ct. App. 2002) (noting that the standard in a partition action is whether the trial court's decision is contrary to law or otherwise against the clear weight of the evidence).

[8]Las Vegas Downtown Redev. v. Crockett, 117 Nev. 816, 822, 34 P.3d 553, 557 (2001).

[9]110 Nev. 204, 871 P.2d 298.

[10]111 Nev. 1481, 907 P.2d 981.

[11]100 Nev. 196, 687 P.2d 672 (1984).

Western States Construction v. Michoff[12] suggest that Nevada's community property laws should apply by analogy. We disagree.

In Sack, we held that the Malmquist[13] formula is inapplicable to a case where unmarried cohabitants seek partition of real property held as tenants in common.[14] As we noted in Langevin, whether the parties hold title as joint tenants or tenants in common is not significant because Kershman, the authority relied on in Sack, involved the division of property held as joint tenants.[15] Furthermore, any distinction between joint tenancy and tenancy in common is irrelevant in a partition action because each joint tenant has the absolute right and power to sever the joint tenancy by a number of actions, including voluntary conveyance, involuntary alienation of their interest by execution, or by seeking judicial partition of the property.[16] Once severed, a joint tenancy loses the right of survivorship, the principal difference between the two estates.[17] As a

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[12]108 Nev. 931, 840 P.2d 1220 (1992).

[13]Malmquist v. Malmquist, 106 Nev. 231, 792 P.2d 372 (1990).

[14]Sack, 110 Nev. at 210, 871 P.2d at 303 (noting that the Malmquist formula is inapplicable when the parties are not married, do not hold themselves out as married, and own no community property).

[15]Langevin, 111 Nev. at 1485, 907 P.2d at 984; see also Kershman, 13 Cal. Rptr. at 292 (noting that, "'[p]roperty may be found to be other than that indicated by the deed when there is an oral or written agreement . . . or where such understanding may be inferred from the conduct and declarations of the [parties].'") (quoting Thomasset v. Thomasset, 264 P.2d 626, 637 (Cal. Ct. App. 1953)).

[16]Smolen v. Smolen, 114 Nev. 342, 344-45, 956 P.2d 128, 130-31 (1998).

[17]Id. at 344, 956 P.2d at 130.

result, the formula from Sack is applicable in situations where unmarried cohabitants unequally contribute to the purchase of real property—absent, of course, an express agreement otherwise. It is also not important whether the unmarried couple lived together under the pretense of marriage.[18]

We conclude that Watkins' arguments lack merit. First, Watkins and Murphy did not agree to pool their incomes and share equally in joint accumulations. Instead, they agreed to make their respective contributions disparately, with Murphy paying the monthly mortgage and Watkins paying the couple's other monthly bills. While they took title as joint tenants with the intention of getting married, no marriage ever occurred, and they did not hold themselves out as being married. As the district court noted, this course of conduct demonstrates a lack of agreement to share equally in the purchase of the property. Merely acquiring title as joint tenants in Nevada does not raise a presumption that unmarried cohabitants who plan to get married acquire that property as community property.[19]

During times when Watkins was not living in the house, she failed to contribute toward the mortgage or monthly bills, but Murphy paid child support and continued to pay 100 percent of the mortgage.

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[18]Sack, 110 Nev. at 210, 871 P.2d at 303.

[19]NRS 123.030 provides that, "[a] husband and wife may hold real or personal property as joint tenants, tenants in common, or as community property." In addition, as NRS 123.220 makes clear, all property acquired after marriage is community property unless otherwise provided by an agreement between the parties or judicial decree. Here Murphy and Watkins are not married and, therefore, absent an agreement otherwise Nevada's community property laws do not apply.

Thus, the conduct of the parties refutes any presumption created by their taking title as joint tenants with right of survivorship. As the district court noted, Murphy's intent in making the entire mortgage payment was not that one-half of those payments would inure to the benefit of Watkins.

Furthermore, we do not believe that the facts of this case square with our holding in Hay v. Hay.[20] In Hay, we held that when a party can prove the existence of an agreement, either expressed or implied, that as unmarried cohabitants the couple intended to acquire and hold property as if they were married, then the community property laws of this state apply by analogy.[21] As we noted in that case, each case must be evaluated on its own merits, "with consideration given to the purpose, duration and stability of the relationship and the expectations of the parties."[22] Murphy and Watkins were never married and never held themselves out as such. They had a child out of wedlock, but lived together for a total of only four and a half years out of eleven. Giving due consideration to the purpose, duration, and stability of their relationship, we conclude that it was not the expectation of the parties that Murphy's payments on the property would constitute a donative gift to Watkins during those times when the couple was not cohabitating and not sharing their expenses mutually.

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[20]100 Nev. 196, 678 P.2d 672 (1984).

[21]Id. at 199, 678 P.2d at 674.

[22]Id. (citing Omer v. Omer, 523 P.2d 957, 960-961 (Wash. Ct. App. 1974)).

Additionally, this case is not on all fours with Michoff.[23] In that case, an unmarried couple cohabitated for approximately nine years and built a successful construction business together.[24] As co-equal partners, they each provided valuable services to the operation of the business and designated the company stock as community property.[25] During the course of their relationship the couple held themselves out as husband and wife, filed joint tax returns, and the female partner changed her name to Michoff.[26] Based on these facts, we held that substantial evidence supported the conclusion that an implied contract existed between the parties to hold their property as though they were married.[27]

In contrast, Watkins and Murphy did not hold themselves out as being married, or agree to pool their assets and treat their mutually acquired property as a community asset. There is no evidence that they filed joint tax returns or otherwise entered into transactions as husband and wife. Finally, Watkins' argument that NRS 125.150(2) should apply by analogy is unpersuasive.

Therefore, we conclude that the district court did not err in relying on Sack and Langevin in this partition action, and the Sack formula is applicable to ascertain the parties' respective interests in the subject property.

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[23]108 Nev. 931, 840 P.2d 1220 (1992).

[24]Id. at 933-36, 840 P.2d at 1221-23.

[25]Id. at 936-39, 840 P.2d at 1223-25.

[26]Id. at 933-36, 840 P.2d at 1221-23.

[27]Id. at 938-39, 840 P.2d at 1224-25.

Application of the Sack formula

The district court awarded none of the equity in the property to Watkins. We review the district court's application of the Sack formula for plain error.[28] The district court based its findings of fact and conclusions of law on the calculations contained in Murphy's post-trial brief. However, based on the evidence produced at trial, we conclude that the calculations contained therein are incorrect.

Pursuant to Sack the first step is to "determine the respective ownership interests of the parties whether equal or otherwise," and then, upon the sale of the property, apportion the net proceeds according to the interest each party paid toward the purchase.[29] Then, any claims that one party may have against the other are deducted from that party's share.[30] Murphy states that Watkins contributed a total of $800 to $900 per month to the purchase of the property. However, this figure assumes that Watkins spent $150 to $200 per month on food, whereas, the testimony of both parties at trial indicated that Watkins spent that amount per week, not per month. This amounts to a discrepancy of $450 to $600 per month. Therefore, according to the record Watkins' total contribution was $1,250 to $1,500 per month.

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[28]Sack, 110 Nev. at 211, n.12, 871 P.2d at 303-04, n.12 (noting the contributions of each party in the record and computing the parties' respective interests); cf., Dewrell v. Lawrence, 58 P.3d 223, 226 (Okla. Ct. App. 2002) (noting that the applicable standard in a partition action is whether the trial court's decision is contrary to law or otherwise against the clear weight of the evidence).

[29]Id. (quoting Kershman, 13 Cal. Rptr. at 294).

[30]Id.

Because the parties in this case purchased the home together, computation of their respective contributions is straightforward. The district court determined that during the time they resided together their contributions were roughly proportionate. Therefore, out of the eleven years that the parties owned the home, Murphy paid the full amount of the mortgage for six and one-half years (seventy-eight months), and he and Watkins each paid half the mortgage for four and one-half years (fifty-four months).

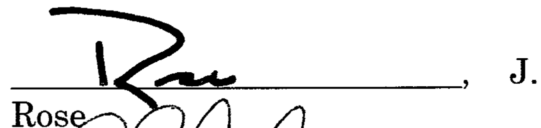
The required monthly mortgage payment was $1,300. Thus, the total paid towards the mortgage was $171,600. Including Murphy's initial down payment of $13,420.11, the total paid on the property comes to $185,020.11. Of that amount, Murphy paid $149,920.11 and Watkins paid $35,100.[31] Thus, Murphy will receive 149,920.11/185,020.11 or 81.03 percent of the equity in the home, and Watkins receives 35,100/185,020.11 or 18.97 percent.

As of the date of trial, the home appraised for $190,000, with a remaining loan balance of $120,785.56. Thus, the equity in the home at the time of partition was $69,214.44. Applying the above percentages, Murphy will receive $56,084.46 of that amount and Watkins the

[31]It is undisputed that Murphy paid the $13,420.11 down payment. The rest of the calculation is as follows: Murphy paid the full mortgage for 78 months (78 x 1,300 = 101,400) and half the mortgage for fifty-four months (54 x 1,300 / 2 = 35,100). Thus 101,400 + 35,100 = $136,500 to which we add his $13,420.11 down payment for a total of $149,920.11. Watkins paid one half of the mortgage for fifty-four months or a total of $35,100.

remaining $13,129.98.[32] Therefore, the district court erred in determining that Watkins was due none of the equity in the property as a result of her contributions. Accordingly we,

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for the entry of an order consistent with this decision.



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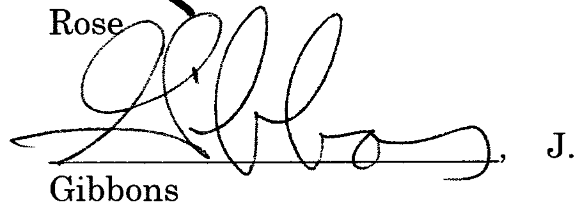
Rose



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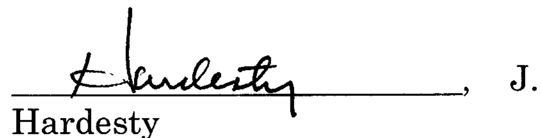

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Hardesty

cc: Eighth Judicial District Court Dept. 3, District Judge
Paul M. Gaudet
Charles J. Lybarger
Clark County Clerk

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[32]While the record reveals that the district court may not have properly credited Watkins for items that she provided for the home at the time of purchase, including a refrigerator, washer and dryer, window coverings, and a security system, Watkins did not raise the issue on appeal. Moreover, because the value of these items is not contained in the record, we are unable to account for these items as part of Watkins' contribution. The cost of the lawn and landscaping was also not included in this amount because the testimony conflicts over whether Murphy paid for the lawn or Watkins paid for half the amount, and the district court determined that Murphy and Watkins shared the cost equally.