IN THE SUPREME COURT OF THE STATE OF NEVADA

KATHY KLEIN,
Appellant/Cross-Respondent,
vs.
DANIEL F. KLEIN,
Respondent/Cross-Appellant.

No. 45164

FILED

SEP 28 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal and cross-appeal from a district court final judgment in a divorce action. Eighth Judicial District Court, Department E, Family Court Division, Clark County.

Before her marriage to respondent Daniel F. Klein, appellant Kathy Klein bought the Anza home for $87,000. Daniel presented evidence at trial that the Anza home was appraised at $181,500. The district court awarded Daniel a community interest in the Anza home and in Kathy's retirement account without including a rate of return to Kathy. During the marriage, but after Kathy filed for divorce, Daniel allegedly contributed money toward the purchase of the Parkdale home. With respect to Daniel's alleged Parkdale home purchase, the district court found that the funds, except for $4,000, were Daniel's separate property from an inheritance.

We conclude that (1) the district court did not abuse its discretion by awarding Daniel a community interest in the Anza property and Kathy's retirement account; (2) the district court abused its discretion by finding that the Parkdale home was Daniel's separate property; and (3) the district court did not abuse its discretion by denying Daniel's request for attorney fees.

06-19944

The district court did not abuse its discretion by awarding Daniel a community interest in the Anza home and the retirement account

The district court has "broad discretion in the distribution of community property."[1] The district court did not abuse its discretion by awarding Daniel a community interest in the Anza home and Kathy's retirement account. Under NRS 123.220, "[a]ll property, other than that stated in NRS 123.130, acquired after marriage by either husband or wife, or both, is community property unless otherwise provided." NRS 123.130 provides that all property owned by either spouse before the marriage or that is acquired after marriage "by gift, bequest, devise, descent or by an award for personal injury damages, with the rents, issues and profits thereof" is separate property. Unless a separate written agreement exists to indicate otherwise, all property acquired after a couple separates remains community property.[2]

Here, the district court exercised its discretion to apply the Malmquist v. Malmquist[3] formula in order to calculate the parties' separate and community interests in the Anza home. The district court found that although payments for the house came principally from Kathy's employment earnings, those earnings during marriage were community property. The couple used community funds to reduce the outstanding principal on the mortgage. The court further found that Daniel is entitled to a community interest in the appreciation of the Anza home.

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[1]Forrest v. Forrest, 99 Nev. 603, 606, 668 P.2d 275, 278 (1983).

[2]Id. at 607, 668 P.2d 279.

[3]106 Nev. 231, 792 P.2d 372 (1990).

Kathy contends that the Malmquist formula is inequitable because of the recent rapid appreciation of Clark County real estate. We disagree. The court has the discretion to use the formulas set forth in both Malmquist and Johnson v. Johnson,[4] as suggested by Kathy. However, Malmquist is a more recent case. The court did not abuse its discretion in applying the Malmquist formula to apportion the community and separate property interest of the Anza home. However, the record does not establish how the court calculated these interests pursuant to the Malmquist formula. Therefore, we reverse this portion of the divorce decree and remand this matter to the district court for further proceedings.

We also conclude that the district court did not abuse its discretion by making an equitable division of Kathy's 401(k) account. With reference to Kathy's argument to obtain a reasonable rate of return on the portion of her 401(k) that was her separate property before the marriage, the district court found that her account had not made a profit due to poor market conditions since her marriage to Daniel. Accordingly, we conclude that the district court made an equitable division of the 401(k) account and did not abuse its discretion.

The district court abused its discretion by concluding that the Parkdale home was Daniel's separate property

We conclude that Daniel did not meet his burden of proving by clear and convincing evidence that the Parkdale home was his separate property and that Kathy had no community interest in the home. The presumption that all property acquired after marriage is community

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[4]89 Nev. 244, 510 P.2d 625 (1973).

property may be rebutted by clear and convincing evidence.[5] The burden of rebutting the presumption is on the party claiming that the property was acquired by separate, rather than community, funds.[6] "Once an owner of separate property funds commingles these funds with community funds, the owner assumes the burden of rebutting the presumption that all the funds in the account are community property."[7] Further, "the opinion of either spouse as to whether the property is separate or community is of no weight whatsoever."[8]

Kathy presented evidence that Daniel used a total of $27,653.02, in the form of two separate checks, from his own bank account toward the purchase of the Parkdale home. Daniel claimed that the $23,653.02 check came from his inheritance and that only $4,000 came from his accumulated earnings. The district court found that Daniel's testimony regarding the purchase was not credible. Nevertheless, the district court found that only the $4,000 was community funds. The district court abused its discretion by concluding, based on less than clear and convincing evidence, that Daniel purchased the Parkdale home with separate funds. Accordingly, we reverse this portion of the divorce decree and remand this matter to the district court for further proceedings.

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[5]Forrest, 99 Nev. at 604, 668 P.2d at 277.

[6]Pryor v. Pryor, 103 Nev. 148, 150, 734 P.2d 718, 719 (1987).

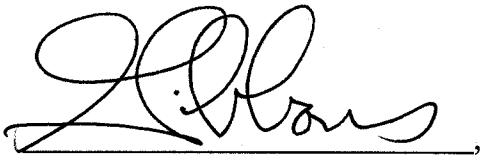
[7]Malmquist, 106 Nev. at 246, 792 P.2d at 381.

[8]Forrest, 99 Nev. at 605, 668 P.2d at 277.

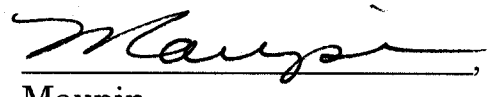
The district court did not abuse its discretion by denying Daniel's request for attorney fees and costs

Under NRS 125.150(3), "the court may award a reasonable attorney's fee to either party to an action for divorce if those fees are in issue under the pleadings." "A district court's award of attorney fees and costs will not be disturbed on appeal unless the district court abused its discretion in making the award."[9] The district court ordered each party to bear their own attorney fees and costs. The district court did not abuse its discretion by denying Daniel's request for attorney fees. Accordingly, we

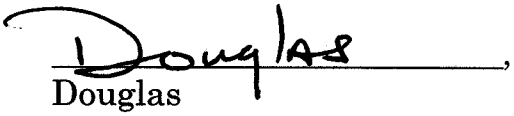
ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
Gibbons



_____, J.
Maupin



_____, J.
Douglas

cc: District Court, Department E, Family Division
E. Paul Richitt Jr., Settlement Judge
Bruce I. Shapiro, Ltd.
Daniel F. Klein
Clark County Clerk

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[9]U.S. Design & Constr. v. I.B.E.W. Local 357, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002).