IN THE SUPREME COURT OF THE STATE OF NEVADA

SHIEN TZE LEE JAMES,
Appellant,
vs.
DEWEY ARTHUR NEWMAN,
Respondent.

No. 51787

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from a district court divorce decree. Eighth Judicial District Court, Family Court Division, Clark County; N. Anthony Del Vecchio, Judge.

Appellant Shien Tze Lee James appeals the property division ordered in the divorce proceeding between James and respondent Dewey Arthur Newman. She first challenges the court's finding that Newman's California home retained its separate property character despite Newman's having re-titled it in joint tenancy during a refinance. She also claims that if the California home remained Newman's separate property, she was entitled to an interest in the home under Malmquist v. Malmquist. 106 Nev. 231, 792 P.2d 372 (1990). Finally, she challenges the court's finding that the Nevada home purchased with the proceeds from the sale of the California home but to which the parties took title as community property was Newman's separate property.

We conclude that substantial evidence supported the family court's finding that Newman's California home retained its separate property character after the refinance, and that the court properly declined to otherwise award James an interest in Newman's California home. However, we further conclude that the court erred in finding that

the Nevada home was Newman's separate property rather than community property, and thus, we reverse and remand so that the family court may dispose of the Nevada home according to NRS 125.150.

The parties are familiar with the facts, and we do not recount them here except as necessary for our disposition.

The family court's finding that Newman's California home retained its separate-property character was supported by substantial evidence

If the correct legal standard was applied, this court reviews the family court's property division findings for an abuse of discretion and will uphold any finding that is supported by substantial evidence. Kerley v. Kerley, 111 Nev. 462, 465, 893 P.2d 358, 360 (1995). "Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion." Schmanski v. Schmanski, 115 Nev. 247, 251, 984 P.2d 752, 755 (1999).

The correct legal standard under Nevada law is that "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." Id., at 250, 984 P.2d at 755. Because Newman re-titled his California home to joint tenancy in refinancing it, Newman had the burden to show by clear and convincing evidence that he did not intend a gift to James of a half-interest in the home. Id. at 250, 984 P.2d at 754. Whether a party has met that burden of proof depends on the parties' conduct at the time the separate property was placed in joint tenancy and the surrounding circumstances. See, e.g., id. at 250-51, 252-53, 984 P.2d at 754, 756; Peters v. Peters, 92 Nev. 687, 692, 557 P.2d 713, 716 (1976).

Here, the short duration of the parties' mid-life marriage, their cautious financial dealings with one another, and the testimony of both parties regarding the refinance provide substantial evidence to

support the family court's finding that Newman did not intend a gift to James of a one-half interest in his separate property home, despite having re-titled it into joint tenancy to secure refinancing. Thus, we affirm the district court's finding as to the California home remaining Newman's separate property.

The family court properly declined to award James an interest in the California home pursuant to Malmquist v. Malmquist

James contends that even if Newman's California home retained its separate property character after being re-titled in joint tenancy, the family court erred by not awarding her an interest in the home due to Newman's having used community funds to service the debt. She disputes whether the family court properly applied the allocation formula stated in Malmquist v. Malmquist, 106 Nev. 231, 792 P.2d 372 (1990). Malmquist governs apportionment when "separate property has increased in value through community efforts, or conversely, community property value has been enhanced by separate property contributions." Kerley v. Kerley, 111 Nev. 462, 466, 893 P.2d 358, 360 (1995). Malmquist apportionment requires the party seeking reimbursement—here, James—to bear the burden of providing adequate evidence for direct tracing. Malmquist, 106 Nev. at 246, 792 P.2d at 381. Because the family court's finding that James failed to meet her burden of proof is supported by the record, we uphold its order declining to award James an interest in the California home pursuant to Malmquist.

The family court's finding that Newman rebutted the statutory presumption that the Nevada home was community property was not supported by substantial evidence

"All property . . . acquired after marriage by either husband or wife, or both, is community property." NRS 123.220. However, this statutory presumption can be rebutted. Roggen v. Roggen, 96 Nev. 687,

689, 615 P.2d 250, 250 (1980). "[I]f there is clear and convincing evidence to support a lower court's finding that property purchased during marriage is separate property we will not reverse that determination on appeal." Todkill v. Todkill, 88 Nev. 231, 236, 495 P.2d 629, 631-32 (1972). In determining whether the statutory presumption has been rebutted, "[t]he opinion of either spouse as to whether property is separate or community is of no weight whatever." Peters v. Peters, 92 Nev. 687, 692, 557 P.2d 713, 716 (1976).

Newman offered little more than his own testimony at trial that he did not make James a gift when he titled the Nevada home, upon acquisition, as community property with right of survivorship. But this testimony, alone, is insufficient to rebut "the presumption created by the form of the deed," despite the home having been purchased with his separate property funds. Peters, 92 Nev. at 691, 557 P.2d at 715. Thus, we conclude that Newman did not offer the "[c]lear and certain proof [that] is required to rebut the presumption that property acquired during marriage is community property," Roggen, 96 Nev. at 689, 615 P.2d at 250, and the district court erred in finding that the Nevada home was Newman's separate property rather than community property. Accordingly, we reverse and remand so that the family court may dispose of the Nevada home according to NRS 125.150.

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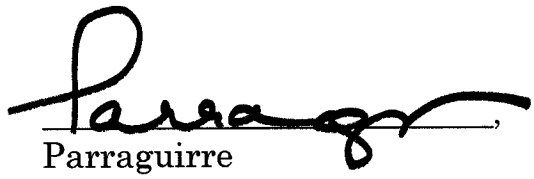
We therefore ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART and REMAND this matter to the district court for proceedings consistent with this order.



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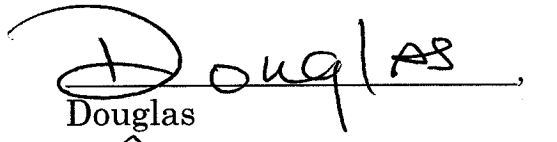

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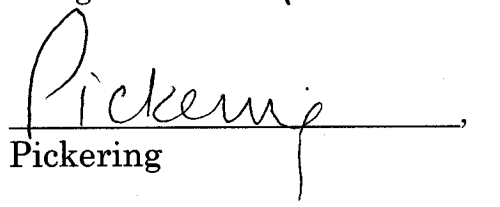

_____, J.
Pickering

cc: Eighth Judicial District Court Dept. K, District Judge, Family Court Division
Carolyn Worrell, Settlement Judge
Cuthbert E.A. Mack
Longabaugh Law Offices
Eighth District Court Clerk