# IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE JOHN SAWKA REVOCABLE TRUST DATED SEPTEMBER 28, 1999.

RAE DRYSTEK, SPECIAL ADMINISTRATOR OF THE ESTATE OF MARGARET SAWKA,
Appellant,
vs.
CARLENE MANNING, A/K/A CHARLENE MANNING, TRUSTEE OF THE JOHN SAWKA REVOCABLE TRUST,
Respondent.

No. 39862

FILED
FEB 18 2004
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

## ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from an order of the district court concerning the disposition of assets in the John Sawka Revocable Trust. The primary issue is the disposition of Margaret Sawka's share of community property.

John Sawka and Margaret Sawka were married in 1969. Both John and Margaret are now deceased. Margaret had two children from an earlier marriage, and John had three children from a previous marriage. On August 26, 1997, Margaret signed a general power of attorney in favor of John, granting John the power to sell, exchange, grant, transfer, or convey Margaret's real property.

Because Margaret was suffering from dementia, Dr. Robert Sarazen, Margaret's doctor, signed a document on January 29, 1999, indicating that Margaret was incapable "of managing or directing the



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management of benefits in . . . her own best interest" and unable "to manage funds or direct others how to manage funds."

On September 28, 1999, John created a separate trust named the John Sawka Revocable Trust (the trust) and began transferring various assets into the trust. After John's death on November 25, 2000, Margaret received $1,500 each month, pursuant to the trust, "FOR SUPPORT AND TO MAINTAIN HER LIFESTYLE." Prior to Margaret's death in December of 2001, Margaret lived in a nursing home only partially financed by the trust. By the terms of the trust, after Margaret's death, the remainder of the trust was to be distributed to John's three children.

After Margaret's death, Rae Drystek, John Sawka's sister and the special administrator for Margaret Sawka's estate, filed a Petition for Declaration of the Community and Separate Property of Margaret Sawka. John's daughter, Carlene Manning, is the successor trustee of the John Sawka Revocable Trust after John's death. The assets and property at issue include: (1) John's non-individual retirement account certificates of deposit (CDs); (2) John's Individual Retirement Accounts (IRAs); (3) John's bank account with the Nevada State Bank; (4) Margaret's CDs at California Federal Bank; (5) the residence located at 7711 Saint Whittier Court; (6) forty acres of property in San Bernardino; (7) the Dodge Truck; (8) loans made to Carlene Manning; and (9) loans made to Donald J. Sawka. Manning also argues that Margaret waived her right to her share of the community property under the trust because she received money from the trust.

The district court granted Drystek's petition for "the return of the sum of $42,500.00 [the money Margaret inherited from her sister], but

. . . denied [Drystek's petition] for the return of any additional property or community property." The court based its judgment on the fact that Drystek failed to prove that the property acquired during John and Margaret's marriage was community property. Drystek argues that the district court erred in ordering the return of all assets to the trust, except for Margaret's inheritance. Drystek argues that Margaret's estate was entitled to one-half of all assets acquired during the marriage, as Margaret's share of the community property. Drystek maintains that Manning had the burden to prove that property acquired during the marriage was John's separate property and failed to do so. We agree.

All property acquired during marriage, except by gift, devise, bequest, descent, or by an award for personal injury is presumed to be community property.[1] However, this presumption may be overcome by clear and convincing evidence to the contrary.[2] The party claiming that property acquired during marriage is separate property bears the burden to overcome the community property presumption.[3] This court will not overrule a district court's determination as to whether property is separate or community property if supported by substantial evidence.[4]

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[1]NRS 123.220; NRS 123.130(1); see also Norwest Financial v. Lawver, 109 Nev. 242, 245, 849 P.2d 324, 326 (1993); Kelly v. Kelly, 86 Nev. 301, 309, 468 P.2d 359, 364 (1970) (citing a long line of cases for the proposition that property acquired during marriage is community property).

[2]Norwest Financial, 109 Nev. at 245, 849 P.2d at 326.

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

[4]Id. at 150, 734 P.2d at 720; see also Neumann v. McMillan, 97 Nev. 340, 340, 629 P.2d 1214, 1215 (1981).

However, this court will not hesitate to overrule a district court's determination if it is not supported by substantial evidence.[5]

Power of Attorney

Manning argues that the August 26, 1997 power of attorney signed by Margaret assigned all of Margaret's property to John to do with as he chose. Neither the power of attorney nor John's subsequent actions supports this conclusion. Under the power of attorney, John was authorized to manage Margaret's separate assets and her share of the community assets, but not to appropriate them as his own. Furthermore, in the revocable trust John established, he stated "[i]t is the intent of the Settlor to create an inter vivos revocable trust distributing his separate property and his one half share of the community property." (Emphasis added.) Clearly, he recognized that Margaret's separate property and her one-half share of the community property were hers to distribute.

The district court also recognized that the power of attorney did not give Margaret's property to John. Although the court made no specific finding regarding the power of attorney, the court analyzed all the property on the basis of whether the evidence established that it was separate or community property.

John's non-individual retirement account certificates of deposit

John's non-IRA certificate of deposit accounts at California Federal Bank were opened during his marriage to Margaret. Thus, these accounts are presumptively community property. The only evidence to the contrary was that John had a Sears profit-sharing account prior to marrying Margaret, but there was no evidence to establish that the money

[5]Pryor, 103 Nev. at 150, 734 P.2d at 720.

from the profit-sharing account was used to open any of John's non-IRAs at California Federal Bank. Therefore, the district court's determination that John's non-IRA CDs were separate property was not supported by substantial evidence.

John's individual retirement accounts

The district court properly characterized John's profit-sharing plan and IRA accounts at California Federal Bank as John's separate property, because Margaret disclaimed her interest in John's profit-sharing account.

In general, "retirement benefits are divisible as community property to the extent that they are based on services performed during the marriage, whether or not the benefits are presently payable."[6] However, a married couple can "'opt out' of the statutory community property scheme" if they memorialize their agreement to opt out in writing.[7]

Here, there is substantial evidence that Margaret waived her right to any interest in the profit-sharing plan. On November 25, 1994, Margaret signed a designation of beneficiary form, disclaiming her interest in John's profit-sharing account number 2-505279-6 at America Savings Bank in Stockton, California, and she consented to the designation of Donald Sawka, John's son, as the primary beneficiary. On October 12, 1999, although Margaret may have been incompetent, she signed a designation of beneficiary form, disclaiming her interest in John's

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[6]Forrest v. Forrest, 99 Nev. 602, 607, 668 P.2d 275, 279 (1983).

[7]Hardy v. U.S., 918 F. Supp. 312, 317 (D. Nev. 1996) (citing NRS 123.190).

profit-sharing account number 45258. The fact that Margaret previously disclaimed any interest in John's other profit-sharing account supports the district court's conclusion that she intended the trust to be the primary beneficiary of this account. Finally, on February 11, 2000, John, serving as Margaret's attorney-in-fact, signed a designation of beneficiary form, and consented to the designation of the trust as primary beneficiary. Therefore, the district court's determination that Margaret's estate was not entitled to John's IRA and profit-sharing accounts was supported by substantial evidence.

John's Nevada State Bank account

There was no evidence offered to rebut the testimony that John opened the Nevada State Bank account during his marriage to Margaret with money he acquired during their marriage.[8] Therefore, the district court's determination that the Nevada State Bank account was separate property was not supported by substantial evidence.

Margaret's certificate of deposit at California Federal Bank

The district court ordered that Manning return $42,500 from the California Federal Bank CD account to Margaret's estate. Manning asserts that there was conflicting evidence concerning the withdrawal of funds from Margaret's CD account. Manning did not file a cross-appeal to challenge this determination. Therefore, this court has no jurisdiction to consider her arguments.[9]

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[8]Norwest Financial, 109 Nev. at 245, 849 P.2d at 326; see also NRS 123.220.

[9]NRAP 3A; Rust v. Clark Cty. School District, 103 Nev. 686, 688, 747 P.2d 1381-82 (1987).

The residence located at 7711 Saint Whittier Court

Drystek maintains that the 7711 Saint Whittier Residence (Whittier Residence) is community property. Manning asserts that Margaret executed a quitclaim deed in favor of John on December 30, 1998, and by doing so relinquished any interest in the property.[10] However, the quitclaim deed admitted at trial, which purported to transfer the Whittier Residence, identified a parcel number different than that of the Whittier Residence. Therefore, Manning's claim that the Whittier Residence had been quitclaimed to John was not supported by substantial evidence.

The forty acres in San Bernardino County

The only facts elicited during trial concerning the San Bernardino property indicated that John acquired the property during his marriage to Margaret, and thus it is presumed to be community property.[11] Manning did not offer evidence to rebut the presumption. Therefore, substantial evidence does not support the district court's finding that the San Bernardino property was John's separate property.

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[10]See Graham v. Graham, 104 Nev. 473, 474, 760 P.2d 772, 773 (1988) (stating that "[a] transfer of title from husband to wife creates a presumption of [a] gift"); see also Todkill v. Todkill, 88 Nev. 231, 237, 495 P.2d 629, 632 (1972).

[11]Norwest Financial, 109 Nev. at 245, 849 P.2d at 326; NRS 123.220; see also Forrest, 99 Nev. at 605, 668 P.2d at 277-78 (holding that where the deed to the property was not admitted during trial and little other evidence besides conclusory statements was admitted, the property had to be presumed community property).

Dodge Truck

In Drystek's petition, she stated, "Donald [John's son] has also wrongfully possessed two automobiles which are titled in Margaret's name, and which he has refused to return." In Drystek's affidavit, she stated that Donald was in wrongful possession of Margaret's 1995 Dodge truck. At trial, Manning testified that Donald had possession of the Dodge truck. There was no evidence offered that the truck was John's separate property. Therefore, the district court's determination that the Dodge truck was John's separate property is not supported by substantial evidence.

Loans made to Carlene Manning

Drystek alleges that during John and Margaret's marriage, John made loans to Manning with community property funds and eventually forgave the loans by providing in the trust that "[a]ny outstanding balance owed on real estate debt shall be forgiven by decedent's estate." Drystek contends that these loans constituted a gift and as such were improper because a spouse may only make a gift of community property with the consent of the other spouse.[12] Manning argues that Margaret consented to John's forgiving of the debt. Manning also argues that even if the loans were made with community property and not forgiven, Drystek does not have a claim against the trust, but only against the borrowee.

The record indicates that John loaned Manning money during his marriage to Margaret. The record does not indicate the source of the money. Without any evidence, the court must presume that the money

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[12]See NRS 123.230.

loaned was community property since it was loaned during John and Margaret's marriage. As such, since John forgave the loans at his death, the loans constituted gifts.

Under NRS 123.230(2), "[n]either spouse may make a gift of community property without the express or implied consent of the other." In Byrd v. Lanahan,[13] this court construed NRS 123.250(1)(b),[14] holding that "each spouse may dispose of one-half of the total of all community property."[15] During marriage, a spouse may set aside a gift by the other spouse of community property in its entirety.[16] After the death of the spouse who made a gift of community property, "the gifts by decedent . . . may now, after his death, be avoided as to one-half thereof, but no more."[17] Therefore, one-half of the amount owed at the time of John's death must be credited to Margaret's estate.

Alleged loans made to Donald J. Sawka

Drystek argues that John made three alleged loans to Donald Sawka, totaling $160,500, which were improper gifts of community property. The only evidence of loans to Donald was three deeds of trust not accompanied by any promissory notes.

Manning testified that John did not actually loan Donald money, but that the deeds were executed to protect John from creditors.

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[13]105 Nev. 707, 711-12, 783 P.2d 426, 429 (1989).

[14]NRS 123.250(1)(b) provides that a spouse may make a testamentary disposition of his one-half of the community property.

[15]Byrd, 105 Nev. at 712, 783 P.2d at 429.

[16]See Marvin v. Marvin, 557 P.2d 106, 115 (Cal. 1976).

[17]See In Re McNutt's Estate, 98 P.2d 253, 258 (Cal. Ct. App. 1940).

Given that neither promissory notes nor any other evidence of loans accompanied the deeds of trust, substantial evidence supports the district court's conclusion that John did not loan Donald money.[18]

Whether Margaret waived her right to her half of the community property when she received money from the trust.

Manning argues that Margaret waived her right to half of the community property interest from the trust because she received money from it. The trust states that '[i]t is the intent of the Settlor to create an inter vivos revocable trust distributing his separate property and his one half share of the community property." John made it clear that he did not intend to distribute Margaret's one-half of community property under the trust.[19]

It follows that John did not intend to force Margaret to elect between taking her interest under his trust or taking her one-half share of community property. Moreover, at the time John died, Margaret was in a nursing home suffering from dementia and was literally unable to consciously elect to take her distributions under the trust or to waive her statutory right to community property.[20] Therefore, Margaret did not waive her one-half share of community property when she received funds from the trust.

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[18]See Walston v. Twiford, 105 S.E.2d 62, 64 (N.C. 1958) (stating that a mortgage purporting to secure paying a debt is invalid if there is no debt); see also 54 Am. Jur. 2d Mortgages § 61 at 635 (1996).

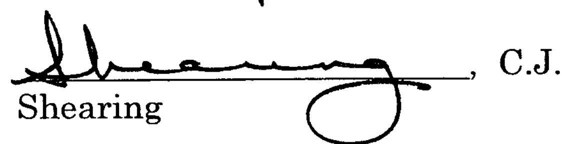
[19]See Reed v. Nevins, 425 P.2d 813, 815 (N.M. 1967); cf. In Re Condos' Estate, 70 Nev. 271, 273-74, 266 P.2d 404, 405 (1954).

[20]See Owens v. Andrews, 131 P. 1004, 1006 (N.M. 1913).

## Conclusion

We conclude that the district court improperly placed the burden of proof on Drystek as to the property acquired during John and Margaret's marriage. The burden of proof remains with the party asserting that the property acquired during marriage is separate property. Therefore, we reverse the judgment of the district court with respect to (1) John's non-individual retirement account certificates of deposit, (2) John's Nevada State Bank account, (3) the residence at 7711 Saint Whittier Court, (4) the forty acres in San Bernardino County, (5) the Dodge truck, and (6) the balance owed on the loans to Carlene Manning. Margaret's estate is entitled to one-half of the value of each of these items as her one-half share of the community property. We affirm the judgment of the district court with respect to (1) John's individual retirement accounts, (2) Margaret's certificate of deposit at California Federal Bank, and (3) loans to Donald Sawka. Finally, we remand this matter to the district court for proceedings consistent with this order.

It is so ORDERED.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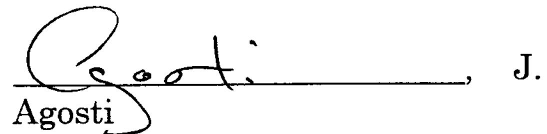
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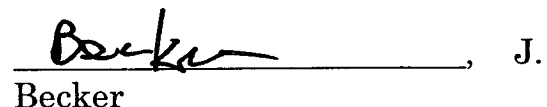
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cc: Hon. Stewart L. Bell, District Judge
Mont E. Tanner
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