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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/26/10
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE THE MARRIAGE OF:) No. 1 CA-CV 09-0624
)
ELAINE ROSENTHAL,) DEPARTMENT D
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules
) of Civil Appellate Procedure)
STEPHEN ROSENTHAL,)
)
Respondent/Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC2008-052680

The Honorable Michael D. Gordon, Judge

AFFIRMED

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W I N T H R O P, Presiding Judge

¶1 Stephen Rosenthal ("Husband") appeals from a decree of dissolution. The court concluded that Husband was not entitled

to reimbursement for the separate funds he used to pay the mortgage on marital community property. Husband argues the court erred in finding the payments were a gift to the community. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Husband and Elaine Rosenthal ("Wife") married on October 16, 1994. In September 1995, the parties purchased a house in Paradise Valley as "husband and wife" for \$761,000, using \$152,200 of Husband's separate funds as a down payment, and obtaining a joint mortgage in the amount of \$608,800.¹

¶3 In December 1995, the parties refinanced the house. Husband paid \$108,000 of his separate funds toward the mortgage and the parties obtained a new joint mortgage in the amount of \$500,000. In February 1996, the parties refinanced the house a second time. Husband paid \$40,000 of his separate funds toward the mortgage and the parties obtained a new joint mortgage in the amount of \$460,000. In April 1996, Husband paid off the entire balance of the joint mortgage with his separate funds. The parties and their children resided in this house throughout their marriage.

¹ The parties stipulated that the down payment was a gift to the community, and that the subject real property is a community asset.

¶14 Wife filed a petition for dissolution in September 2008. Husband asserted he was entitled to reimbursement for the \$608,800 of his separate funds used to pay off the mortgage indebtedness.

¶15 After a trial, the court made the following findings:

6. The Court agrees that the \$608,[8]00 was a gift to the community. The circumstantial evidence suggests that there was an absence of an enforceable agreement to the contrary.

7. That Wife is on the title (or not on the deed) is not dispositive, but one factor. The Court will equitably divide the property. The evidence does not support a finding that the parties agreed to keep the monies separate. It was a gift. *In re Marriage of Berger*, 680 P.2d 1217 (Ariz. Ct. App. 1983) (placing the burden of proof on the recipient). Here, there is not a preponderance of evidence (or, of course, clear and convincing evidence) that there was an agreement for reimbursement. [Husband] has failed to meet the burden of proof. Even if [Wife] had the burden of proof to prove it was a gift, the Court finds she met her burden of proof.

8. There was no agreement otherwise, and there cannot be an equitable lien. *Baum v. Baum*, 584 P.2d 604 (Ariz. Ct. App. 1978).

9. This is because there is a dearth of credible evidence that would otherwise reach the standard of proof that there was such an agreement regarding the property. According to [Husband], which the Court finds credible, that he subjectively believed that [Wife] should have known that the payment of the \$608,[8]00 lien was not a gift. The Court finds equally credible that there was no meeting of the minds. Thus, while [Husband] might have *subjectively* believed otherwise, the evidence is insufficient to support that [Wife] also agreed.

10. Accordingly, the Court finds that Father's request for a lien on the Community Marital Residence in the amount of \$608,800 must be denied and the house will be divided 50%/50%.

The court ordered the house to be divided equally. Husband timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

¶6 On appeal Husband contends the court erred 1) by concluding that his expenditure of \$608,800 of separate funds was a gift to the community, and 2) by failing to impose an equitable lien to reimburse him for his expenditures.

I. Finding of a Gift

¶7 This case presents both factual and legal questions. Determining whether a gift has been made is a question of fact which we review under a clearly erroneous standard. *Chirekos v. Chirekos*, 24 Ariz. App. 223, 227, 537 P.2d 608, 612 (1975); see also *Hrudka v. Hrudka*, 186 Ariz. 84, 94, 919 P.2d 179, 189 (App. 1995) ("The question of reimbursement is a factual issue of gift and subject to the clearly erroneous standard"). Whether the court applied the correct standard to the question of reimbursement is a legal question we review *de novo*. See *Mobilisa, Inc. v. Doe*, 217 Ariz. 103, 107, ¶ 9, 170 P.3d 712, 716 (App. 2007).

¶18 Husband relies on the family court's finding that his subjective belief that his expenditure of separate property was not a gift was "credible," and argues that the court misapplied the law by determining that, despite his intent, the expenditures were presumed to be a gift under *Baum*. See *Baum v. Baum*, 120 Ariz. 140, 146, 584 P.2d 604, 610 (App. 1978) (determining that "a spouse who [e]lects to expend separate property on community expenses is entitled to reimbursement from the community or separate property of the other spouse [o]nly if there is an agreement to that effect"). Husband contends that after determining that he lacked the subjective intent to make a gift to the community, the court should have applied the analysis in *Armer*, found that no gift had been made and ordered reimbursement. See *Armer v. Armer*, 105 Ariz. 284, 289, 463 P.2d 818, 823 (1970) (finding that a gift exists only when there is 1) donative intent to give a gift, 2) delivery of the gift, and 3) the vesting of irrevocable title upon delivery). Husband argues that since he both lacked the donative intent to make a gift and was able to trace the expenditures to his separate property, the court should have found that a gift had not occurred.

¶19 Assuming, without deciding, that the court should have applied the *Armer* standard and not the rule expressed in *Baum*,

we still affirm the court's finding that Husband's expenditures constituted a gift to the community.

¶10 No express words or actions are needed to show that a gift has been made to the community. See *In re Marriage of Berger*, 140 Ariz. 156, 162, 680 P.2d 1217, 1223 (App. 1983) (agreeing that "a gift 'need not be expressed but can be inferred', particularly in the context of a marital relationship"). Further, donative intent is not conclusively determined solely by the later-expressed subjective intent of the donor as Husband contends; rather, donative intent is determined by considering the totality of the surrounding circumstances. See *id.* (citation omitted) (finding that "donative intent is ascertained in light of all surrounding circumstances, however, and is not inferred simply because of a marital relationship between the parties"); accord *Neely v. Neely*, 115 Ariz. 47, 51, 563 P.2d 302, 306 (App. 1977). Accordingly, the fact that the court found that Husband did not believe he was making a gift is not dispositive of the issue of whether donative intent legally existed under the *Armer* standard.

¶11 In order to find that donative intent existed, there must be evidence that the donor "manifest[ed] a [c]lear intent to give to the party claiming as donee and give to the latter before death full possession and control of the property."

Neely, 115 Ariz. at 51, 563 P.2d at 306 (quoting *O'Hair v. O'Hair*, 109 Ariz. 236, 508 P.2d 66 (1973)). In this case, the parties agree that the home itself is community property and that the initial down payment on the home was a gift to the community. Nothing exists in the record to suggest that the subsequent expenditures by Husband were to be treated differently than the down payment. Further, each new loan was in the names of both parties and Husband was aware that his expenditures would benefit the community. Despite such knowledge, Husband never took any action to convey his apparent lack of donative intent to his wife. Both parties were named on the title to the house, each new deed of trust, and the deed of release. When considering the totality of the circumstances, the evidence strongly supports the finding that Husband objectively manifested a clear intent to make a gift regardless of his underlying, unexpressed subjective intent to the contrary.

¶12 Husband further argues that no gift was made because he never intended to transmute his separate property into community property. Husband relies on *Noble v. Noble*, 26 Ariz. App. 89, 546 P.2d 358 (1976), where that court found that separate property placed into a joint account held by a married couple remained separate because no evidence existed that the deposit was meant to be a gift. Husband argues that because he

can trace the expenditures to his separate property, the scenarios should be treated the same. We disagree.

¶13 As discussed above, the evidence in this case supports the conclusion that Husband made a gift; accordingly, his payments of the mortgage effectively transmuted his separate property into a gift to the community. Further, unlike the *Noble* case, the funds here were not merely transferred from one account to another, but were actually expended to pay a community debt, and thus were actually used to benefit the community.

¶14 Finally, Husband argues that, even if we affirm the court's finding that a gift was made, he still has an equitable right to reimbursement, as authorized by *Toth v. Toth*, 190 Ariz. 218, 946 P.2d 900 (1997). *Toth* presented a unique set of facts, specifically, a marriage that lasted only a few weeks, which warranted an unequal division of joint tenancy property. *Toth*, 190 Ariz. at 221-22, 946 P.2d at 903-04. The *Toth* court recognized that in a marriage of any significant duration, other equitable considerations would likely make unequal distribution based solely on reimbursement inappropriate. *Id.* at 222, 946 P.2d at 904. In determining what is equitable, a court may consider source of funds, duration of the marriage, and contributions to the marital relationship. *In re Marriage of*

Inboden, 223 Ariz. 542, 547, ¶ 18, 225 P.3d 599, 604 (App. 2010).

¶15 In this case, the parties were married for over thirteen years. During the marriage Wife mainly stayed home with the parties' children and took care of the myriad household and child-rearing responsibilities. Under these facts, we cannot conclude the court abused its discretion by ordering the house to be divided equally between the parties.

II. Equitable Lien

¶16 "The trial court's division of community property will not be disturbed on appeal absent a clear abuse of discretion." *Dopadre v. Dopadre*, 156 Ariz. 30, 32, 749 P.2d 939, 941 (App. 1988) (citation omitted). Nonetheless, we review all issues of law *de novo*. *Southwest Soil Remediation, Inc. v. City of Tucson*, 201 Ariz. 438, 442, ¶ 12, 36 P.3d 1208, 1212 (App. 2001).

¶17 Husband argues that he is entitled to an equitable lien to reimburse him for the expenditure of his separate property for the benefit of the community. Husband also contends that by denying him reimbursement, the court effectively makes his separate property rights subservient to community property rights.

¶18 In *Baum*, the court relied on California law and found that "a spouse who [e]lects to expend separate property on

community expenses is entitled to reimbursement from the community or separate property of the other spouse [o]nly if there is an agreement to that effect."² *Baum*, 120 Ariz. at 146, 584 P.2d at 610. The rule adopted in *Baum* was subsequently applied to scenarios involving dissolution and expenditures on real property. *Mori v. Mori*, 124 Ariz. 193, 199, 603 P.2d 85, 91 (1979) (finding that a spouse's expenditure of separate property used to make improvements on community property were presumed to be a gift to the community). Accordingly, any doubt about the *Baum* rule's applicability to real property was clarified in *Mori*.

¶19 Husband contends that, unlike the situation in *Baum* and *Mori*, his separate funds were never comingled and were easily traceable. Therefore, he argues, the court's denial of his request for an equitable lien was inappropriate. We do not agree that Husband's ability to trace his separate funds in this case requires an outcome different than that reached in *Baum* or *Mori*. In *Baum*, the court concluded that reimbursement for the expenditure of separate funds used to benefit the community

² Husband also points out that California, where the gift rule in *Baum* originated, has since mandated reimbursement for expenditures of separate property used to pay community debt absent a contrary agreement. See Cal. Fam. Code § 2640 (West 2010). The actions of the California legislature regarding the rule in *Baum* have no bearing on the determination of this case, as *Baum* is still valid law and has not been overturned by either Arizona statute or subsequent case law.

would be inappropriate even if "the trial court's ruling that the funds were not traceable was erroneous." *Baum*, 120 Ariz. at 146, 584 P.2d at 610; accord *Malecky v. Malecky*, 148 Ariz. 121, 123, 713 P.2d 322, 324 (App. 1985). While Husband cites to several cases in which reimbursement was ordered when the parties held property in joint tenancy, these cases are not binding here, as the property at bar was held as community property and not in joint tenancy. Accordingly, we find that the court did not abuse its discretion by finding that *Baum* prohibited Husband from being awarded an equitable lien for his expenditures.

¶20 Finally, Husband argues that application of the *Baum* rule is inconsistent with the general principle that courts must treat separate and community property rights equally. See *Porter v. Porter*, 67 Ariz. 273, 195 P.2d 132 (1948) (*declined to be followed on other grounds by Cockrill v. Cockrill*, 124 Ariz. 50, 61 P.2d 1334 (1979)); see also *Toth*, 190 Ariz. at 220, 946 P.2d at 902 (finding that "joint tenancy property and community property are to be treated alike only for dissolution purposes. For that purpose, the court should divide all such property equitably"). In particular, Husband points out that:

The rights of married persons in their separate property are as impregnable and as thoroughly fixed as their right in their community property.

Porter, 67 Ariz. at 282, 195 P.2d at 137. Husband contends that because an equitable lien is imposed when community funds are used to pay a separate obligation, then using separate funds to pay a community obligation should also create an equitable lien. See, e.g. *Tester v. Tester*, 123 Ariz. 41, 43, 597 P.2d 194, 196 (App. 1979) (community has a claim for reimbursement in the nature of an equitable lien when community funds are used to improve separate property); *Barnett v. Jedynak*, 219 Ariz. 550, 553-54, ¶ 14, 200 P.3d 1047, 1050-51 (App. 2009) (community entitled to equitable lien for making mortgage payments on separate property). He argues that *Porter* and *Toth* also require that he receive reimbursement, as failure to do so would make his separate property rights "subservient" to community property rights.

¶21 Unlike community property, a court has no authority to equitably divide separate property. A.R.S. § 25-318(A) (Supp. 2009). Thus, if community funds are used for the benefit of a separate property or obligation, the community receives no benefit from such contribution. Instead, only the separate property holder benefits. See *Potthoff v. Potthoff*, 128 Ariz. 557, 564, 627 P.2d 708, 715 (App. 1981) ("improvements become a part of the realty and acquire the characteristics, either separate or community, that the underlying real property enjoys"). In contrast, when separate funds are expended for the

benefit of community property or debt, the community as a whole benefits from the increase in value of such expenditures. As Husband was a member of the former marital community, he is entitled to an equitable share of the community property. Unlike the situations in *Tester* and *Barnett* where the community would have unfairly expended its assets without receiving any benefit, Husband here, as a member of the community, reaps the benefits of the increased value of the former family home.

¶122 Moreover, a spouse who contributes separate funds to community property is not precluded from being reimbursed. *Baum* only requires that the parties make an agreement for reimbursement. Further, even in absence of an agreement, a court may order reimbursement under equitable principles.³ *In re Marriage of Flower*, 223 Ariz. 531, 535-36, ¶ 16, 225 P.3d 588, 592-93 (App. 2010). Accordingly, to the extent a spouse does not intend to gift separate funds to the community by paying a community obligation or improving community property, that spouse should have a reimbursement agreement. Therefore, we reject Husband's argument that application of *Baum* is at odds with *Porter*, *Toth*, or any other case within the jurisdiction and

³ Equitable principles are evident in *Hrudka* where the court reimbursed the husband for his separate property expenditures on community property debts where the wife would not cooperate in payment of the debts. *Hrudka*, 186 Ariz. at 94, 919 P.2d at 189. Here, there is no evidence Wife refused to pay the mortgages or otherwise failed to contribute to the household, nor does Husband argue that he paid off the mortgages involuntarily.

uphold the court's finding that *Baum* bars Husband from acquiring an equitable lien.

III. Attorneys' Fees

¶23 Both parties request an award of attorneys' fees on appeal pursuant to A.R.S. § 25-324 (Supp. 2009). After considering the statutory factors and in the exercise of our discretion, we decline to award fees on appeal to either party. As the prevailing party, however, we award Wife her costs on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21(c).

CONCLUSION

¶24 For the aforementioned reasons, we affirm the family court's finding that Husband made a gift to the community and its denial of Husband's reimbursement claim.

_____/S/_____
LAWRENCE F. WINTHROP, Presiding Judge

CONCURRING:

_____/S/_____
PATRICIA K. NORRIS, Judge

_____/S/_____
PATRICK IRVINE, Judge