2013 IL App (5th) 120532-U

NO. 5-12-0532

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
LORI A. WEIN-CALDWELL,	)	Madison County.
	)	
Petitioner-Appellee,	)	
	)	
and	)	No. 10-D-832
	)	
KELLY L. CALDWELL,	)	Honorable
	)	Elizabeth R. Levy,
Respondent-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Spomer and Justice Cates concurred in the judgment.

ORDER

¶ 1 *Held*: Where the parties stipulated that the primary marital residence was a marital asset, and in addition to this stipulation, the trial judge determined that Kelly L. Caldwell intended to gift the marital estate with land and insurance proceeds used to construct the marital residence, the trial court's division of the equity in the home did not constitute an abuse of discretion, and we affirm.

¶ 2 FACTS

¶ 3 Kelly L. Caldwell and Lori Wein were married on February 11, 2006. For 15 years before the marriage, Kelly owned a home in Pocahontas. A fire destroyed the home. In 2002, Kelly bought out his first wife's interest in the property and received 100% of the insurance proceeds from the fire claim. The amount of the insurance proceeds exceeded $98,000. Kelly did not rebuild the home.

¶ 4 After Kelly and Lori were married, they decided to build a new home. A construction loan for the new home was in both of their names. Kelly did some of the construction work

on the home, while Lori organized the construction process. Lori contributed $22,000 to the construction costs, which was used to pay for a pole barn on the Pocahontas property. She also used nonmarital funds to finish out the garage with custom cabinets and painting. Kelly used his fire insurance proceeds as a down payment on the home when the construction loan was converted to a traditional mortgage. The mortgage was in both of their names. When Kelly and Lori secured the traditional mortgage on the home, the title resulting from the new home construction was in both of their names as joint tenants.

¶ 5 Kelly and Lori worked for the same company–A & H Mechanical in Fairmont City. They maintained two joint checking accounts that were used to pay for marital expenses. One account was dedicated to the mortgage, property taxes, and utilities. The second account was used for all other marital expenses. The two accounts were funded with marital earnings. There is no evidence in the record detailing this funding other than the fact that marital earnings were deposited into both checking accounts.

¶ 6 Three-and-one-half years after the marriage, Kelly and Lori separated. Lori moved to an address in Highland, while Kelly stayed in the Pocahontas home. Lori filed a petition to dissolve the marriage on July 30, 2010, citing irreconcilable differences as grounds, and asking for equitable distribution of marital assets and debts. On August 26, 2010, Kelly filed a counterpetition for dissolution of their marriage with similar allegations and requests.

¶ 7 On August 2, 2011, the trial court entered a judgment dissolving the parties' marriage pursuant to stipulations of the existence of grounds for the dissolution. On this same date, the trial court entered another order distributing some of the marital property pursuant to the parties' stipulations and reserving the issue of the marital home. The trial court found that Kelly and Lori were joint owners of the home. The order contained a handwritten stipulation of the parties about the marital home, which stated: "The parties stipulate that the real property is marital property." The balance of this order distributed all other marital and

nonmarital assets by agreement of the parties, along with any related debt.

¶ 8 Kelly and Lori each filed a position paper in the trial court about the distribution of the Pocahontas home. Lori's position was that while the property was nonmarital in character when they married, the property became commingled with marital property, and thus by law, the property is presumptively marital. *In re Marriage of Smith*, 86 Ill. 2d 518, 529, 427 N.E.2d 1239, 1244 (1981); *In re Marriage of Demar*, 385 Ill. App. 3d 837, 850, 897 N.E.2d 322, 333 (2008). The appraisal on the home when the parties obtained the traditional mortgage listed the property value at $340,000. Subsequently, the parties had the $20,000 pole barn added to the property. During the course of the divorce proceedings, two different appraisers valued the property. The estimated value of the home ranged from $275,000 to $295,000. Kelly contended that the actual value was less than the appraisals. Kelly argued that the marital home should not be equally divided because he owned the land prior to marriage, which was worth $79,000, and he put $98,000 down as the property's down payment. He also argued that he paid all mortgage payments during the marriage and separation, totaling $53,348. In conclusion, Kelly argued that his contribution to the marital home was greater than Lori's contribution, and that their marriage was of short duration. He suggested that the court award Lori equity of $16,902. Lori asked for an award of one-half of the equity less the mortgage balance. She contended that the parties' contributions to the construction of the home, as well as payment of all home-related expenses from marital bank accounts, were consistent with treatment of the asset as a marital asset. Lori pointed out her own financial contributions to the construction of the home, and the additional barn on the property. Depending on which appraisal the court used, Lori sought an award of $88,500 to $108,500 as her equitable share.

¶ 9 In prefacing the property division portion of the court's October 22, 2012, order, the court noted the parties' stipulation that the Pocahontas home was marital property. The court

utilized the most recent appraisal valuation of $295,000 for the property and determined that the amount of equity divisible between Lori and Kelly was $197,000. The court found that neither party was entitled to reimbursement "of the gifts of non-marital property that he/she made to the property and improvements *** inasmuch as no clear and convincing evidence was presented to rebut the presumption of gift." The court ordered that Lori should receive 40% of the equity, and that Kelly should receive the balance of 60% of the equity.

¶ 10 Kelly appeals from this order. He contends that there was no evidence that he gifted the nonmarital assets–the real estate plus the fire insurance proceeds–to the marital estate.

¶ 11 LAW AND ANALYSIS

¶ 12 The trial court's classification of property as either marital or nonmarital should not be disturbed on appeal unless the decision is clearly contrary to the manifest weight of the evidence. *In re Marriage of Smith*, 265 Ill. App. 3d 249, 253, 638 N.E.2d 384, 387 (1994); *In re Marriage of Schmitt*, 391 Ill. App. 3d 1010, 1017, 909 N.E.2d 221, 228 (2009). The trial court's property division is only constrained by reason and will not be overturned unless it can be shown that the trial court abused its discretion. *In re Marriage of Siddens*, 225 Ill. App. 3d 496, 500, 588 N.E.2d 321, 324 (1992). The issue for the reviewing court is not whether it necessarily agrees with the trial court's determination as to marital asset division, but whether the trial court acted arbitrarily without employing conscientious judgment, or if in view of all circumstances of the case, the trial court exceeded the bounds of reason so that no reasonable person would follow the trial court's position. *Id.*

¶ 13 Section 503(d) of the Illinois Marriage and Dissolution of Marriage Act requires marital property division in just proportions. 750 ILCS 5/503(d) (West 2010). However, proportional asset division does not require mathematical equality. *In re Marriage of Doty*, 255 Ill. App. 3d 1087, 1097-98, 629 N.E.2d 679, 686 (1994). The trial court may award an

unequal distribution of property so long as the court properly applies the section 503(d) guidelines. 750 ILCS 5/503(d) (West 2010); *In re Marriage of Doty*, 255 Ill. App. 3d at 1097-98, 629 N.E.2d at 686. The guidelines to be considered in determining a marital property division include the contribution of each spouse to the marriage, the duration of the marriage, the amounts and sources of each spouse's income, the age, occupation, vocational skills, employability, and needs of each spouse, the reasonable opportunity for each spouse's future acquisition of assets and income, whether the apportionment is in lieu of or in addition to maintenance, the tax consequences of the property division, the dissipation of marital or nonmarital property, any antenuptial agreement of the parties, and the value of the property set aside for each spouse. 750 ILCS 5/503(d)(1) through (12) (West 2010).

¶ 14 In the October 22, 2012, order, the trial court cited all applicable law on division of marital property and commented upon the fact that the division did not have to be mathematically equal. The trial judge also stated that Illinois case law favored equal property divisions unless statutory factors demonstrate that the equal division would be unjust. See *In re Marriage of Moll*, 232 Ill. App. 3d 746, 754, 597 N.E.2d 1230, 1235 (1992). The trial judge specially found three of the factors to be relevant in determining that equal division was inappropriate. The following factors did not support an equal award:

> "(1) the contribution of each party to the acquisition, preservation, or increase or decrease in value of the marital or non-marital property, including (i) any such decrease attributable to a payment deemed to have been an advance from the parties' marital estate *** and (ii) the contribution of a spouse as a homemaker or to the family unit;
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> * * *
>
> (4) the duration of the marriage;
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> * * *

(8) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties[.]" 750 ILCS 5/503(d)(1), (4), (8) (West 2010).

The trial court found that in considering these factors together, the fair and equitable division was a 40/60 split between Lori and Kelly.

¶ 15 In the trial court, Kelly had to prove to the court by clear and convincing evidence that he did not intend for his contribution of the land and the fire insurance proceeds to be a gift to the marital estate. *In re Marriage of Gattone*, 317 Ill. App. 3d 346, 352, 739 N.E.2d 998, 1003 (2000). He also bore the burden of proof to establish that he did not intend to gift a share of the home to Lori when the title was placed in both of their names. *Id.* This burden was particularly difficult because placing property in joint title presumptively supports the conclusion that the contributing spouse intended to make a gift to the marital estate. *Id.* Although the presumption is that a gift was intended, the court should consider several factors in determining whether the contributing spouse intended to make a gift. *Id.* Relevant factors include: the size of the gift in relationship to the size of the entire marital estate; who purchased the property; who made improvements to the property; who paid taxes on the property; when the property was purchased; and how financial dealings were handled within the marriage. *Id.* Overall, however, the primary consideration is the intention of the parties. *Scanlon v. Scanlon*, 6 Ill. 2d 224, 231, 127 N.E.2d 435, 438 (1955).

¶ 16 The trial court concluded that neither party rebutted the presumption that their nonmarital contributions were intended as gifts to the marital estate. Kelly argues that this conclusion is wrong, and that case law supports the opposite conclusion. He cites *In re Marriage of Wojcicki* in support of this argument.

¶ 17 In *In re Marriage of Wojcicki*, Robert and Arlene Wojcicki were married and lived together for four years before Arlene left and filed for dissolution of marriage. *In re*

Marriage of Wojcicki, 109 Ill. App. 3d 569, 571, 440 N.E.2d 1028, 1029 (1982). Robert was the sole owner of the home in which the Wojcickis lived during the marriage. *Id.* Robert also owned acreage in Wisconsin solely in his name, while Arlene owned a home in another town. *Id.* During the four years of marriage, Robert and Arlene constructed a building on the Wisconsin property. *Id.* The couple used marital money to fund the construction. *Id.* All monies received from rental properties and their salaries, except for $5,000, which Arlene used to pay off a personal loan, went into marital checking accounts. *Id.* at 571-72, 440 N.E.2d at 1029. During the marriage, Robert had both properties titled in joint tenancy with Arlene. *Id.* at 573, 440 N.E.2d at 1030. At the conclusion of the hearing on asset distribution, the court found that the home in which they lived during the marriage, as well as the Wisconsin property, were nonmarital in nature, and awarded both assets to Robert. *Id.* at 572, 440 N.E.2d at 1029-30.

¶ 18 Arlene argued that classification of the marital home and the Wisconsin acreage as nonmarital was incorrect. *Id.*, 440 N.E.2d at 1030. She argued that the properties became marital assets during the marriage pursuant to the concept of transmutation. *Id.* The appellate court stated: "where *** a spouse owning separate non-marital property performs the affirmative act of either transferring title into a form of joint ownership or augmenting the non-marital property by commingling it with marital property, such act creates the 'rebuttable presumption' of that party's intention to change the character of the property to marital." *Id.* at 572-73, 440 N.E.2d at 1030. Transmutation is not automatic simply because the property is in both parties' names. *Id.* If the property was acquired before the marriage by one of the parties, "the controlling presumption will be the common law presumption of gift which the 'donor' spouse may rebut with 'clear and convincing evidence.' " *Id.* at 573, 440 N.E.2d at 1030. The trial court accepted the husband's rationale for changing title to the property into joint tenancy–that doing so would facilitate transfer of the property upon the

death of either party, and that the change was not intended as a gift to the marital estate. *Id.* at 573-74, 440 N.E.2d at 1031. On appeal, the court found that the contributions in money and physical labor were mostly attributable to the husband, that the duration of the marriage was short, and that with respect to the Wisconsin property, the husband owned and improved the property for 21 years before the marriage. *Id.* at 574, 440 N.E.2d at 1031. The appellate court affirmed the lower court's finding that the husband did not intend to donate either property to the marital estate. *Id.* at 575, 440 N.E.2d at 1031-32.

¶ 19 We find that the facts of this case are distinguishable from the facts of *In re Marriage of Wojcicki*. Most importantly, we note that Kelly entered into a written stipulation in the trial court that the home was a marital asset. The stipulation of the parties ended the question of whether the Pocahontas home was a marital asset. Despite the stipulation, the trial court analyzed the character of the asset to determine whether a gift was intended in determining the appropriate asset division.

¶ 20 In this case, the construction loan was in both names, and with the final mortgage on the property, Lori's name was included on the title. Both parties contributed physical work towards the construction of the home. Both parties contributed money towards the construction of the home and the barn. Kelly put more money into the home construction than Lori did, as he owned the underlying property and had close to $100,000 in insurance proceeds.

¶ 21 Similar to the *In re Marriage of Wojcicki* case, the marriage was not a lengthy one, as Kelly and Lori separated 3½ years after the marriage. One notable distinction from the facts of *In re Marriage of Wojcicki* involves how the mortgage and home-related expenses were funded. After Kelly and Lori took out the mortgage on the home, all payments made towards the mortgage, taxes, and utilities on the property came from a joint bank account funded with marital money. Kelly claims that he made all of the mortgage payments but

provides no evidence supporting his claim. Details on the funding as to how much each party contributed to the joint accounts are not included in the record. We know that Kelly and Lori worked for the same employer, and both received paychecks. Kelly and Lori deposited their paychecks into two joint bank accounts. Without any specific evidence detailing each party's monetary contribution to the joint accounts, we conclude that the joint funding of all expenses associated with the marital home supports a finding that the property is a marital asset.

¶ 22 While transmutation is not an absolute concept in a situation where one party titles property in joint tenancy, we conclude that Kelly was not able to rebut the presumption that he donated the land and the fire insurance proceeds to the marital estate in order for the family to construct a new home. Similarly, Lori was not able to rebut the presumption that she gifted her money to the marital estate for completion of the garage and construction of the barn. While the land was there before the parties were married, because of the fire, the home that originally stood on the property was gone. Kelly and Lori built the new home and the barn as their marital home. Throughout that process, Lori's name was included on the loans and later added to the title of the completed residence. Unlike *In re Marriage of Wojcicki*, the home did not exist before the marriage. While Kelly owned the land before the marriage, Kelly and Lori specifically constructed the home as their marital home. Building a marital home was a joint goal. In determining the percentages to award, the trial court accounted for the length of the marriage as well as the contributions both made to the home. The division was not equal. Resolving the issue by awarding Lori 40% is appropriate under all of the circumstances. Kelly did not establish that the trial court's judgment was against the manifest weight of the evidence.

¶ 23 CONCLUSION

¶ 24 For the foregoing reasons, the October 22, 2012, judgment of the circuit court of

Madison County in awarding Lori $78,800 as her share of the equity in the marital home is hereby affirmed.

¶ 25 Affirmed.