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ORIGINAL

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

IN RE THE MARRIAGE OF:)
)
[redacted])
)
Petitioner/Appellant,)
)
vs.)
)
[redacted])
)
Respondent/Appellee.)

Case No. [redacted]

APPEAL FROM THE DISTRICT COURT OF
MUSKOGEE COUNTY, OKLAHOMA

HONORABLE NORMAN D. THYGESEN, TRIAL JUDGE

REVERSED AND REMANDED WITH DIRECTIONS

James R. Gotwals
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OPINION BY JERRY L. GOODMAN, JUDGE:

[redacted] (Wife) appeals the trial court's April 13, 2015, Decree of Divorce and Dissolution of Marriage from her Husband [redacted] and the May 13, 2015, order denying her an attorney's fee. Based on our review of the facts and applicable law, we reverse and remand the April 13, 2015, decree for further proceedings. We also reverse the May 13, 2015, attorney's fee order.

BACKGROUND

Wife filed a petition for divorce on October 3, 2012, to end her 41-year marriage to Husband. They have no minor children. Wife sought a division of marital property, alimony, and an attorney's fee. A temporary order was entered by consent of the parties on December 27, 2012, ordering, among other things, Husband to pay Wife $350.00 biweekly as "support alimony or advance distributions of property division."[1] On October 7, 2013, Husband filed an application for contempt citation against Wife, alleging she sold his crossbow in violation of the temporary orders.[2] The petition for divorce was tried in 2014, and on December 5, 2014, the trial court filed a letter ruling, which was not in

[1] R. 15.

[2] Wife pled not guilty and waived jury trial. The matter was to be set for trial upon application of the parties. After one setting and striking one court date, this matter appears to remain unresolved. Because an allegation of indirect contempt "is the willful disobedience of any process or order lawfully issued or made by [the] court" *Henry v. Schmidt*, 2004 OK 34, ¶ 12, 91 P.3d 651, 654, it is ancillary to Wife's claim for relief. Therefore, for purposes of determining this Court's jurisdiction, we find all issues between all parties have been resolved, the trial court's order is a final, appealable order pursuant to 12 O.S.2011, § 696.2, and this appeal is squarely before us.

appealable form. Wife filed a motion for new trial on December 15, 2014, which was denied in a minute order dated February 2, 2015. The trial court's minute order was later memorialized in appealable form and filed on April 13, 2015. A second order denying Wife's application for fees and costs was filed May 13, 2015. Wife appeals both orders.

STANDARD OF REVIEW

The issues preserved for appellate review involve property division, alimony, and an attorney's fee. We set out the appellate standards of review below.

ANALYSIS

I. Failure to Submit Findings of Fact

Wife's first issue is with the trial court's December 5, 2014, letter order. She argues reversible error occurred when the trial court did not include findings of fact and conclusions of law as Wife had requested, pursuant to 12 O.S.2011, § 611. We need not address this issue at length; the December 5, 2014, letter order was not an appealable order pursuant to 12 O.S.2011, § 696.2, was later superseded by the appealable decree filed April 13, 2015, which does contain findings of fact and conclusions of law. In addition, because we find other errors in the trial court's April 13, 2015, order, this issue is rendered moot.

II. Property Division

A. Standard of Review

Wife contends the trial court erred in its division of property.

> A divorce suit is one of equitable cognizance in which the trial court has discretionary power to divide the marital estate. The trial court must follow the provisions of 43 O.S. 2006 § 121 which require a fair and equitable division of property acquired during the marriage by the joint industry of the husband and wife. The trial court has wide latitude in determining what part of jointly-acquired property shall be awarded to each party. However, a marital estate need not necessarily be equally divided to be an equitable division because the words just and reasonable in § 121 are not synonymous with equal. An appellate court will not disturb the trial court's property division absent a finding of abuse of discretion or a finding that the decision is clearly contrary to the weight of the evidence.

Colclasure v. Colclasure, 2012 OK 97, ¶ 16, 295 P.3d 1123, 1128-29.

B. Misclassification of Property

Wife challenges the trial court's classification of two parcels of real property as Husband's separate property. The record reflects that Husband and Wife were both licensed real estate brokers from 1984 until 1989, and Husband's testimony at trial indicates that he knew the difference between title held in joint tenancy and tenants in common. On September 1, 1997, Husband's mother died, leaving him an inheritance.

i. 130-acre tract

Husband used some of that inheritance to purchase a 130-acre tract of land in Warner, Oklahoma. The January 24, 1998, real estate purchase contract required Husband to, "Print Buyer's name exactly as title will be taken."[3] Husband printed his name and that of Wife as buyers. The subsequent February 23, 1998, Warranty Deed reflects title was in the name of "Damon L. Drake and Teresa D. Drake, husband and wife, as joints tenants and not as tenants in common, with the right of survivorship... ."[4] Title to the 130 acres remained in said joint tenancy with the right of survivorship and not as tenants in common, and was never changed or disputed for the next 14 years, until after Wife filed for divorce. Only then, at his deposition, did Husband testify the property was always intended to be his separate property, that he never told Wife it was separate property, and the only reason he titled it as he did was because the closing agent told him to do so at the time of the closing, notwithstanding the fact that more than one month after executing the sales contract and one month before closing, he stated the property was to be entitled in his name and Wife's as joint tenants, and not as tenants in common, with right of survivorship.[5]

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[3] Exh. 11.

[4] Exh. 8.

[5] Days before trial, Wife located the closing agent, who now lived in Tennessee and was unavailable for trial. By affidavit, the agent said she never told Husband how to title the property. Wife's offer of this affidavit as an exhibit was rejected by the trial court, and Wife

ii. 80-Acre Tract

On May 9, 2002, Husband purchased another 80 acres, allegedly using proceeds from the sale of a café he inherited from his mother. This allegation was disputed by Wife, who produced a HUD document showing the tract was purchased using loan proceeds borrowed in both parties' names.[6] Their tax returns showed they received income from the café in 2002,[7] and the café was not sold until 2005, several years after the 80 acres were purportedly purchased with the sale proceeds.[8] The May 9, 2002, warranty deed was again titled "Damon L. Drake and Teresa D. Drake, husband and wife, as joints tenants and not as tenants in common, with the right of survivorship...."[9] Again, for the next 10 years, Husband never told Wife he intended the 80 acres to be his separate property, until Wife initiated divorce proceedings.

Based on this testimony, the trial court held Husband had overcome the presumption of a gift, even though title to both properties was in Husband and Wife as joint tenants, and not as tenants in common, with right of survivorship. The trial court then awarded Husband both the 130 acres and the 80 acres as his separate property. This was error.

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made an offer of proof. Husband later changed his testimony, stating he did not remember who told him to title the deed jointly.

[6] Exh. 10.

[7] Exh. 51.

[8] Exh. 48.

[9] Exh. 8.

We find donative intent was established when Husband voluntarily placed title to the two properties in joint tenancy, and not as tenants in common, with right of survivorship; his mere statement, after years of silence, that the property was his separate property, does not overcome the presumption of a gift.

In *Larmon v. Larmon*, 1999 OK 83, 991 P.2d 536, the Oklahoma Supreme Court held:

> Gifts of realty are governed by the principles of personal property law. An essential element of a gift is the donor's intent gratuitously to pass the title to donee. A transfer by one spouse of separate property to another does not by itself erase the separate character of the asset (or the real property transferred). The original ownership regime must be respected unless there is proof of an interspousal gift.
>
> Oklahoma's extant jurisprudence allows a rebuttable presumption of a gift where title to separately held real estate is placed by one owner-spouse in both spouses' names as joint tenants. If a joint tenancy deed facially effects an unconditional transfer, it is deemed to be a presumptive interspousal gift, whose effect can be overcome by clear and convincing evidence of a contrary intent.

Larman, id., at ¶¶ 8-9, at 540–41. Further,

> It has long been the rule in Oklahoma that when spouses own property in joint tenancy, regardless of the source of the funds used for purchasing the property, a gift of the property to the marital estate is presumed. *Shackelton v. Sherrard*, 1963 OK 193, 385 P.2d 898, 900. The party seeking to rebut that presumption must present clear and convincing evidence that no gift was intended. *Chastain v. Posey*, 1983 OK 46, 665 P.2d

> 1179. More recently, the Oklahoma Supreme Court has clarified this holding to require a party seeking to rebut the gift presumption to present clear and convincing evidence of a purpose for placing the property in joint tenancy which is collateral to intending a gift. *Larman v. Larman*, 1999 OK 83, ¶ 9, 991 P.2d 536. ...

Bartlett v. Bartlett, 2006 OK CIV APP 112, ¶ 7, 144 P.3d 173, 177.

> "The presumption that property held in joint tenancy form is marital property is a strong one, which can only be overcome by clear and convincing evidence. A presumption may be attacked by the introduction of evidence sufficient to support a finding of the nonexistence of the presumed fact; where the presumption is a strong one, the weight of the evidence to rebut it must be great." *In re Marriage of Smith*, 265 Ill.App.3d 249, 202 Ill.Dec. 738, 638 N.E.2d 384, 388 (1994). Generally, "if one spouse has caused his or her separate property to be transferred to both spouses jointly, mere self-serving testimony that it was not intended as a gift is entitled to little weight." *Coleberd v. Coleberd*, 933 S.W.2d 863, 870 (Mo.App.1996), citing *Clark v. Clark*, 919 S.W.2d 253, 255 (Mo.App.1996) (emphasis added). See also *Rutland v. Rutland*, 652 So.2d 404, 406 (Fla. 5th DCA 1995), receded from on other grounds, *Anson v. Anson*, 772 So.2d 52 (Fla. 5th DCA 2000)(en banc) ("[t]he husband's conduct evidencing joint ownership simply cannot be overcome by the mere unsubstantiated claim, raised for the first time during a dissolution proceeding, that he never intended a gift to the wife at the time of the conveyance").

Bartlett, ¶ 8, 177.

> Thus, we must first examine the record to find any competent evidence to support the conclusion that title to separately held assets had been placed by one owner-spouse in both spouses' names as joint tenants. If such

> evidence exists, the presumption of an interspousal gift operates as a matter of law, and that asset loses its separate character and becomes joint marital property subject to division. The presumption can be rebutted, however, by clear and convincing evidence that there was no intent to "invest the spousal grantee with an interest in the property, but rather [title was transferred] for a purpose that is clearly collateral to any intended change in the existing ownership regime," *Larman*, 1999 OK 83 at ¶ 10, 991 P.2d at 541, or where fraud and special agreement to the contrary are present. *Shackelton v. Sherrard*, 1963 OK 193, 385 P.2d 898. We further note it is reversible error for the trial court to ignore the operation of the presumption of an interspousal gift and characterize the property as the separate property of one party or the other. *Chastain v. Posey*, 1983 OK 46, 665 P.2d 1179.

Beale v. Beale, 2003 OK CIV APP 90, ¶ 12, 78 P.3d 973, 976.

In this connection, Husband testified as follows:

> Q Okay. So in the 10 years since you acquired both those pieces of property, up until the date this divorce was filed, have you had any discussions with [Wife] that these properties were claimed by you as separate, ever?
> A No.
> ...
> Q Sir, is there any evidence, whatsoever, other than your unilateral statement, that you intended for this property to be your separate property?
> A No.[10]

Upon review, we find Husband's "unsubstantiated claim, raised for the first time during a dissolution proceeding, that he never intended a gift to the wife at the time of the conveyance," *Bartlett*, *supra*. at ¶ 8, at 177, did not meet the clear and

[10] R. Transcript, vol. III, October 30, 2014, p. 80, ll. 17-21, p. 81, ll. 11-14.

convincing standard required to overcome the presumption of an interspousal gift to Wife. The trial court's finding to the contrary was erroneous. The trial court's order in this regard is reversed and remanded with directions. Upon remand, the trial court shall determine the value of these parcels before dividing them equitably between the parties.

This holding also renders moot Wife's assertion of error regarding whether the trial court erred in failing to allow Wife to introduce the testimony of the real estate agent who allegedly told Husband to put the title in both names.

iii. Certificate of Deposit

Wife next argues the trial court erred in its division of a Bank of America certificate of deposit. The trial court's April 13, 2015, order awarded "Bank of America Certificate of Deposit in the amount of $22,402" to Husband.[11, 12]

Husband testified the CD was originally in his name;[13] was purchased with money left over from the sale of his mother's café after her death;[14] and that he put

[11] This entry was followed by a handwritten addendum: "(added pursuant to Court instr.)."

[12] This is contrary to Wife's assertions in both her appellate brief in chief and reply brief that, "Nor did the trial court make an affirmative finding that the Bank of America CD was [Husband's] separate property." Reply Brief, March 23, 2016, p. 10. See also, Brief in Chief, December 14, 2015, p. 17.

[13] Transcript, October 30, 2014, p. 74, ll. 14, 15.

[14] *Id.* p. 73, ll. 21, 22.

the CD into his and Wife's name as joint owners in 2004[15] because she nagged him to do so.[16]

Wife testified she no longer had the CD,[17] as she had used the funds to pay her attorney's fee[18] and she did not know the source of the funds used to originally purchase it.[19]

The trial court's award of a now non-existent joint marital asset to Husband was error. Upon remand, when the trial court recalculates the total marital estate subject to equitable division, the value of this CD shall be included because it was part of the marital estate at the time the divorce was filed.

C. General Division of Property

Wife next asserts the overall division of marital property was inequitable.

> A trial court's division of marital property is of equitable cognizance and will not be disturbed unless found to be clearly contrary to the weight of the evidence and thus an abuse of discretion. *Carpenter v. Carpenter*, 1982 OK 38, 645 P.2d 476. We will review the record to determine if the findings of the trial court are supported by the evidence. *Forristall v. Forristall*, 1992 OK CIV APP 64, 831 P.2d 1017. We will indulge in the presumption the trial court's equity-based decision was correct and affirm the order. *Hillcrest Med. Ctr. v. State ex rel. Dept. of Corrections*, 1983 OK 101, 675 P.2d 432. The complaining party has the burden to show the trial

[15] *Id.* ll. 22, 24.
[16] *Id.* p. 75, l.5.
[17] Transcript, August 19, 2014, p. 15, l. 23.
[18] *Id.* l. 25.
[19] *Id.* p. 17, l. 18.

> court abused its discretion in dividing the marital estate. *Martin v. Martin*, 1952 OK 52, 240 P.2d 1057. The marital estate need not be divided equally, but merely equitably. *Silverstein v. Silverstein*, 1987 OK CIV APP 87, 748 P.2d 1004. Even if the trial court has before it conflicting evidence regarding the number, value, possession, and disposition of contested items of property, we will defer to the trial court's judgment, absent clearly contrary evidence. "The trial court is entitled to choose which testimony to believe as the judge has the advantage over this Court in observing the behavior and demeanor of the witnesses. The court's judgment need not rest upon uncontradicted evidence." *Mueggenborg v. Walling*, 1992 OK 121, ¶ 7, 836 P.2d 112, 114. The trial court, being in the best position to evaluate the demeanor of the witnesses and to gauge the credibility of the evidence, will be given deference as to the conclusions it reaches concerning those witnesses and that evidence. *Id.*

Beale v. Beale, 2003 OK CIV APP 90, ¶ 6, 78 P.3d 973, 975.

We agree with Wife's assertion the estate was inequitably divided and therefore, because of our holdings above, the value of the marital estate must be recalculated then equitably divided. Further, any items found by the trial court to be the premarital property of either party shall be awarded to them free of any claims of the other.

D. Alimony

> In divorce actions, the trial court is vested with wide discretion in awarding alimony. On appeal, the court will not disturb the trial court's judgment regarding alimony absent an abuse of discretion or a finding that the decision is clearly contrary to the weight of the evidence.

> Alimony is an allowance for the maintenance of a party. In awarding alimony, although each case depends on its own facts and circumstances, the amount must be reasonable. Oklahoma defines support alimony as a need-based concept, with a purpose of cushioning the economic impact of the post-marriage transition and readjustment to gainful employment. Demonstrated need is shown by the totality of proof of the spouse's financial condition.
>
> Support alimony is based on a consideration of relevant factors including: demonstrated need during the post-divorce economic readjustment period; the parties' station in life; the length of the marriage and the ages of the spouses; the earning capacity of the parties as well as their physical condition and financial means; the accustomed style of living of the parties; evidence of a spouse's own income-producing capacity and the time needed to make the post-divorce transition for self-support.

Hutchings v. Hutchings, 2011 OK 17, ¶¶ 14-16, 250 P.3d 324, 327 (footnotes omitted).

> On appeal, the court will not disturb the trial court's judgment regarding alimony absent an abuse of discretion or a finding that the decision is clearly contrary to the weight of the evidence.

Id. at ¶ 14, at 324.

The trial court's order, citing *Hutchins*, noted Wife had been previously paid $49,000.00 in alimony and denied that additional support was due because Wife failed to prove her need for alimony. Wife's brief on appeal states the "CD at

$22,400.00 and $19,000.00 in alimony already paid—is simply insufficient...."[20] The trial court's decision regarding alimony appears to be based in part on its calculation of the marital estate, which this Court found to be erroneous. Upon remand, the trial court shall revisit the issue of alimony in light of the determinations concerning marital property made herein.

III. Trial-Related Attorney's Fee and Costs

Wife contends the trial court erred when it denied her a trial-related attorney's fee and costs. The trial court conducted a hearing on Wife's motion for a trial-related fee and denied the request in an order filed July 9, 2015.

Because we are remanding the matter to recalculate the marital estate and its equitable division, the trial court's order regarding an attorney's fee, arising in part from that erroneous order, is reversed without prejudice to either party to reassert on remand.

IV. Appeal-Related Fee

Wife's December 14, 2015, brief-in-chief requests an appeal-related attorney's fee and appeal-related costs. This is denied. No longer may a request for appeal-related fees be in an appellate brief. Such requests must be done by separate motion prior to mandate being issued. See, Okla.Sup.Ct.R. 1.14, 12

[20] As set out above, Wife had sought one-half of the CD as divisible marital property, but acknowledged she had spent all of the CD during the course of the litigation.

O.S.2011 and Supp.2013, and *In Re Amendments to Oklahoma Supreme Court Rules*, 2013 OK 67.

Wife subsequently filed a separate motion for an appeal-related attorney's fee and costs on March 28, 2016, in compliance with Okla.Sup.Ct.R. 1.14, 12 O.S.2011 and Supp.2013. That motion is granted. On remand, the trial court is directed to conduct a *Burk*[21] hearing to determine a reasonable appeal-related attorney's fee and appropriate appeal-related costs.

CONCLUSION

The trial court's April 13, 2013, order is reversed and the matter is remanded to the trial court for further proceedings.

The trial court's July 9, 2015, attorney's fee order is reversed and remanded for further proceedings.

Wife's motion for an appeal-related attorney fee is granted. Wife's motion for appeal-related costs is granted. These issues are remanded to the trial court for further proceedings.

REVERSED AND REMANDED WITH DIRECTIONS.

FISCHER, P.J., and RAPP, J., concur.

May 1, 2017

[21] *State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659.