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SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

THOMAS KLOPPENBURG,
Plaintiff-Appellant,

v.

ARLEAN P. KLOPPENBURG,
Defendant-Appellee.

Supreme Court Case No.: CVA13-006
Superior Court Case No.: DM0055-08

OPINION

Cite as: 2014 Guam 5

Appeal from the Superior Court of Guam
Argued and submitted on October 21, 2013
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.¹

MARAMAN, J.:

[1] Plaintiff-Appellant Thomas Kloppenburg (“Thomas”) appeals from an Interlocutory Judgment of Divorce and a Final Decree of Divorce dissolving the marriage between Thomas and Arlean P. Kloppenburg (“Arlean”). Thomas argues that the trial court mischaracterized the community or separate property nature of several pieces of real property located in Oregon, and as a result of these mischaracterizations, the court erroneously divided the properties between the parties. Arlean concedes the trial court’s error in the characterization of the properties, but argues that for all but one of the properties, the ruling of the court can be upheld on other grounds.

[2] For the reasons set forth below, we reverse and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] Thomas and Arlean were married in Reno, Nevada, on July 8, 1994. They separated on June 17, 2002. On January 31, 2008, Thomas filed a Complaint for Divorce in the Superior Court of Guam, citing irreconcilable differences. Arlean filed an Answer and Counterclaim on March 3, 2008, alleging—in addition to the parties’ irreconcilable differences—extreme cruelty, willful desertion, willful neglect, and habitual intemperance on the part of Thomas. At the time of trial, the parties’ only child together had reached the age of majority; thus, there were no issues regarding child custody or child support.

[4] Before trial, Thomas’s attorney filed a Revised Trial Memorandum in which he asserted that the parties owned three pieces of property in Oregon as joint tenants with the right of

¹ The signatures in this opinion reflect the titles of the Justices at the time this matter was considered and determined.

survivorship. However, during his opening statement to the court the following day, Thomas's attorney informed the court that he erred in characterizing all of the properties as joint tenancy properties. He proffered that the evidence at trial would show that except for one piece of property purchased by the parties prior to marriage, the other properties, although acquired during the marriage, were the sole property of Thomas, having been acquired through the use of property he owned prior to marriage.

[5] The following evidence was presented at trial:

[6] Prior to their marriage, the parties purchased a 20-acre parcel of land in Williams, Oregon ("185 Findley Road") and took title to the property in both their names "not as tenants in common, but with the right of survivorship . . ." Appellant's Excerpts of Record ("ER") at 220 (Pl.'s Ex. Lists, Ex. 9 (Warranty Deed), Jan. 11, 2012); Transcripts ("Tr.") at 13-15, 29 (Bench Trial, Jan. 12, 2012).

[7] Thomas purchased three other parcels of Oregon property prior to the marriage: a five-acre parcel he purchased on his own in 1989 for \$18,000.00 ("500 East Fork"), on which he placed a motor home; an adjoining parcel he purchased on his own in 1990 for \$30,000.00 ("507 East Fork"); and an adjoining parcel he, along with his brother, Travis, purchased in 1991 or 1992 for around \$45,000.00 ("506 East Fork").²

[8] Thomas testified that during the marriage, he traded or sold off his East Fork properties in order to acquire other Oregon property. First, he sold 507 East Fork for \$50,000.00 and rolled the equity into the purchase of two parcels of property: a one-acre parcel with a house on 145 Norton Road and an 11-acre parcel on 20424 Williams Highway (collectively, "145 Norton Road"). The two parcels were purchased in a single transaction for \$203,000.00, and Thomas is

² During cross-examination, Thomas erroneously referred to 507 East Fork as 506 East Fork, and to 506 East Fork as 513 East Fork. He clarified the proper designations during re-direct.

the sole title owner. The balance of \$153,000.00 (after credit for the \$50,000.00 from the sale of 507 East Fork) was financed through Wells Fargo, leaving Thomas with a mortgage of \$861.00 per month. Thomas paid the mortgage with the proceeds from the rental of the house on 145 Norton Road for \$550.00 per month and the rental of the mobile home on 500 East Fork for \$350 per month.

[9] Subsequently, and still during the marriage, Thomas traded in a “lateral equity exchange” his five-acre 500 East Fork parcel for a neighboring 0.17-acre parcel that held an auto center (“20690 Williams Highway”). The rent of \$450.00 per month from the auto center was used toward the mortgage on 145 Norton Road. This property is titled in Thomas’s name alone.

[10] In 2008, Thomas and Travis sold 506 East Fork.

[11] Arlean did not present evidence to contradict Thomas’s testimony regarding the acquisition of the various Oregon properties.

[12] The trial court issued its Findings of Fact and Conclusions of Law, granting Thomas a divorce on the grounds of irreconcilable differences. The trial court awarded “Oregon Tax Lot 38-05-26-00-000107-00 to [Arlean] as her sole and separate property.” RA, tab 105 at 6 (Finds. Fact & Concl. L., May 17, 2012). The trial court further ordered the parties to submit a valuation and proposed recommendation for distribution of 185 Finley Road, 145 Norton Road, and 20690 Williams Highway.

[13] Several months later, the trial court issued an Addendum to Findings of Fact and Conclusions of Law, wherein the court stated:

[Thomas] and [Arlean] acquired the 185 Findley Road property in July 1993, one year prior to [their] marriage and the parties hold this property as joint tenants “with rights of survivorship”. [Thomas] testified on January 12, 2012 that the 145 Norton Road and the 2069[0] Williams Highway properties are held in joint tenancy “with rights of survivorship” and acquired these after the parties were married.

RA, tab 114 at 4 (Addendum to Finds. Fact & Concl. L., Jan. 4, 2013) (citing RA, tab 99 (Revised Trial Mem., Jan. 11, 2012); Tr. (Bench Trial, Jan. 12, 2012)). Accordingly, the trial court awarded to each party undivided one-half interests in each of the properties.

[14] Subsequently, the trial court issued an Interlocutory Judgment of Divorce wherein Arlean was awarded, *inter alia*, Oregon Tax Lot 38-05-26-00-000107-00 as her sole and separate property, and undivided one-half interests in 185 Findley Road, 145 Norton Road, and 20690 Williams Highway. Thomas was awarded as his separate property undivided one-half interests in 185 Findley Road, 145 Norton Road, and 20690 Williams Highway. The court issued a Final Decree for Dissolution of Marriage the same day. Thomas timely filed his Notice of Appeal.

II. JURISDICTION

[15] This court has jurisdiction over an appeal from a final decree of divorce pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw current through Pub. L. 113-74 (2014)) and 7 GCA §§ 3107 and 3108(a) (2005).

III. STANDARD OF REVIEW

[16] The trial court's characterization of property in a marital dissolution as community or separate is reviewed *de novo*. *Babauta v. Babauta*, 2011 Guam 15 ¶ 18 ("*Babauta I*") (citing *Hart v. Hart*, 2008 Guam 11 ¶ 24).

[17] The trial court's findings of fact after a bench trial are reviewed for clear error while its conclusions of law are reviewed *de novo*. *Id.* ¶ 19 (citing *Mendiola v. Bell*, 2009 Guam 15 ¶ 11). A finding of fact is clearly erroneous where it is not supported by substantial evidence, and this court is left with a definite and firm conviction that a mistake has been made. *Babauta v. Babauta*, 2013 Guam 17 ¶ 17 ("*Babauta II*") (citing *In re Guardianships of Moylan*, 2011 Guam 16 ¶ 12).

IV. ANALYSIS

[18] Thomas argues that the trial court clearly erred in its characterization and distribution of the Oregon properties. He argues that Oregon Tax Lot 38-05-26-00-000107-00, which the trial court awarded to Arlean as her sole and separate property, is actually 185 Findley Road, which the trial court awarded to the parties each an undivided one-half interest as joint tenants. Appellant's Br. at 5, 7 (May 28, 2013). Thomas asserts that the latter award is correct, as the property was purchased by the parties prior to marriage as joint tenants with the right of survivorship. *Id.* Thomas also argues that the trial court clearly erred in determining that the other Oregon properties—145 Norton Road and 20690 Williams Highway—are held by the parties as joint tenants. *Id.* at 6-8.

[19] Arlean concedes that the trial court erred in its double-award of Oregon Tax Lot 38-05-26-00-000107-00, also known as 185 Findley Road, and she agrees that the property is owned by the parties as joint tenants with the right of survivorship. Appellee's Br. at 6-8 (June 28, 2013) ("Defendant-Appellee does not dispute that the 185 Findley Road property is the same as Oregon Tax Lot 38-05-26-00-000107-00 and any confusion is a result of the parties['] failure to clarify for the court."). While Arlean also concedes that the trial court erred in determining that 145 Norton Road and 20690 Williams Highway are held by the parties as joint tenants, she argues that the distribution of these properties should be upheld on the grounds that Thomas failed to rebut the presumption that these two properties are community property. *Id.* at 6-9.

A. Whether the Trial Court Mischaracterized the Parties' Properties.

[20] It is clear from the record that the trial court erred in its characterization of the Oregon properties. First, the tax documents in the record show that Oregon Tax Lot 38-05-26-00-000107-00 is indeed the same property as 185 Findley Road. ER at 290-91 (Pl.'s Add'l Exs., Ex.

22 (Real Property Tax Statements)); RA, tab 110 (Submission of Attachments (Real Property Tax Statements)). The evidence concerning 185 Findley Road supports the court's later finding that the property is held by both parties as joint tenants. The property was purchased by both parties prior to marriage and titled in the names of both parties "not as tenants in common, but with the right of survivorship" ER at 220 (Pl.'s Ex. Lists, Ex. 9 (Warranty Deed)); *see also Babauta I*, 2011 Guam 15 ¶ 21 ("Property acquired by either spouse before marriage is the separate property of the acquiring spouse." (citing 19 GCA § 6101(a)(1) (2005)); *cf.* 19 GCA § 6101(a)(8) ("*Separate property* means: . . . each spouse's undivided interest in property owned in whole or in part by the spouses as co-tenants in joint tenancy"). Given this evidence, we have a definite and firm conviction that a mistake was made when the trial court awarded 185 Findley Road first to Arlean as her sole separate property and then awarded the same property to both parties as joint tenants. The evidence clearly supports the latter finding that each party has an undivided one-half interest in 185 Findley Road as joint tenants with the right of survivorship, and the trial court is instructed to make this correction on remand.

[21] Second, the evidence does not support the trial court's finding that 145 Norton Road and 20690 Williams Highway are held by the parties as joint tenants. The documentary evidence shows that both properties are titled in Thomas's name alone. *See* ER at 294-99 (Pl.'s Add'l Exs., Exs. 24-26) (Real Property Tax Statements for 145 Norton Road and 20424 Williams Highway (collectively, "145 Norton Road")). It is apparent that the trial court based its finding of joint tenancy on the assertions made in Thomas's Revised Trial Memorandum filed prior to trial, as the court cites to this memorandum to support this finding. RA, tab 114 at 4 (Addendum to Finds. Fact & Concl. L.) (citing RA, tab 99 (Revised Trial Mem.)). However, during his opening statement, Thomas's attorney brought the erroneous characterization to the trial court's

attention and informed the court that the evidence would instead show that the properties were in fact the sole separate property of Thomas and titled in his name alone. Tr. at 3-4 (Bench Trial, Jan. 12, 2012). Whether or not Thomas adequately rebutted the presumption of community property as to these two parcels, the evidence clearly does not support the trial court's finding of joint tenancy, as the supporting documentation to the properties name Thomas as the sole owner. ER at 292-99 (Pl.'s Add'l Exs., Exs. 23-26 (Real Property Tax Statements)).

[22] We now address whether the trial court's award of 145 Norton Road and 20690 Williams Highway can be upheld on the grounds that Thomas failed to rebut the presumption of community property.

B. Whether Thomas Failed to Rebut the Presumption that the Properties are Community Rather than Separate Property.

[23] "Property acquired during the marriage by either husband or wife, or both, is presumed to be community property." 19 GCA § 6105(a) (2005). The spouse asserting the separate character of property acquired during the marriage has the burden of overcoming this presumption. *Babauta I*, 2011 Guam 15 ¶ 30 (quoting *See v. See*, 415 P.2d 776, 779 (Cal. 1966) (en banc)). The presumption of community property can be overcome through the tracing of the property to a separate source. *In re Marriage of Mix*, 536 P.2d 479, 484 (Cal. 1975) (en banc).

"If the property, or the source of funds with which it is acquired, can be traced, its separate property character remains unchanged. But if separate and community property or funds are commingled in such a manner that it is impossible to trace the source of the property or funds, the whole will be treated as community property"

Id. at 483 (quoting *Patterson v. Patterson*, 51 Cal. Rptr. 339, 345 (Ct. App. 1966)). Whether or not the presumption of community property is overcome is a question of fact for the trial court.

Id. at 484 (citations omitted).

[24] Property acquired by either spouse before marriage is separate property. 19 GCA § 6101(a)(1). “*Property* includes the rents, issues and profits thereof.” *Id.* § 6101(e). Thomas asserts that 145 Norton Road and 20690 Williams Highway are his sole separate property because the source of the two properties can be traced to separate property he owned prior to the marriage. Thomas presented evidence at trial that prior to the parties’ marriage, he owned three Oregon properties aside from 185 Findley Road, the property he jointly owned with Arlean. He testified that prior to the marriage, he owned 500 East Fork and 507 East Fork in his name alone, and 506 East Fork with his brother, Travis. Tr. at 16-17, 32-35 (Bench Trial, Jan. 12, 2012).

[25] Thomas then presented evidence that during the marriage, he sold or traded two of his East Fork properties in order to acquire the properties at issue in the appeal. He testified that he sold 507 East Fork for \$50,000.00 and rolled over the equity into the purchase of 145 Norton Road, Tr. at 38, 80-81 (Bench Trial, Jan. 12, 2012), and that he used the rents from 145 Norton Road and 500 East Fork to pay the remaining mortgage on 145 Norton Road, *id.* at 81-82. The documentary evidence supports Thomas’s testimony that the \$50,000.00 from the sale of 507 East Fork was used towards the purchase of 145 Norton Road. ER at 282-83 (Pl.’s Ex. Lists, Ex. 19 (Owner’s Sale Agreement and Earnest Money Receipt)). As far as the source of the mortgage payments for 145 Norton Road, the only evidence is Thomas’s testimony that he used the rents from his separate properties to pay the mortgage. Tr. at 19, 38-41, 81-82 (Bench Trial, Jan. 12, 2012). Arlean did not present contradictory evidence to dispute Thomas’s testimony.

[26] Thomas also testified that he traded 500 East Fork in a “lateral equity exchange” for 20690 Williams Highway (i.e., the auto center property). Tr. at 18-19, 40-41 (Bench Trial, Jan. 12, 2012). From our review of the trial exhibits, there is no documentary evidence of this trade. The tax documents for 20690 Williams Highway, however, list Thomas as the only property

owner. ER at 293 (Pl.'s Add'l Exs., Ex. 23 (Real Property Tax Statement)). Arlean did not otherwise contradict Thomas's testimony concerning his acquisition of the property. See Brett R. Turner, 1 *Equit. Distrib. of Property* § 5:63 & nn.6, 8 (3d ed. 2005) ("As a matter of law, a majority of the cases affirm trial court decisions which accept undocumented tracing testimony. . . . Indeed, if there is some degree of supporting evidence and no conflicting evidence at all, the court may err by finding the link not proven.").

[27] Here, the trial court did not address the issue of whether Thomas overcame the presumption of community property as to 145 Norton Road or 20690 Williams Highway. Instead, relying upon Thomas's erroneous characterization of the properties in his Revised Trial Memorandum rather than upon the evidence presented at trial, the court determined that both properties are held by the parties as joint tenants. RA, tab 114 at 4 (Addendum to Finds. Fact & Concl. L.) (citing RA, tab 99 (Revised Trial Mem.)). The record may be sufficient for this court to determine that Thomas overcame the presumption of community property by adequately tracing 145 Norton Road and 20690 Williams Highway to his separate property. However, it is more appropriate for the trial court to decide the issue in the first instance given the factual nature of the inquiry, including the weighing of Thomas's credibility.

V. CONCLUSION

[28] We hold that the trial court committed clear error in awarding 185 Findley Road first to Arlean as her sole separate property, and then to both parties as joint tenants. On remand, the court is to clarify that Oregon Tax Lot 38-05-26-00-000107-00 is the same property as 185 Findley Road and enter a finding that the parties own the property according to the deed, with each party having an undivided one-half interest in the property "not as tenants in common, but with the right of survivorship" ER at 220 (Pl.'s Ex. Lists, Ex. 9 (Warranty Deed)).

[29] Furthermore, the trial court clearly mischaracterized 145 Norton Road and 20690 Williams Highway as being held in joint tenancy, when the documentary evidence and Thomas’s testimony show that the property is held in Thomas’s name alone. The issue of whether or not Thomas overcame the presumption of community property as to these properties by sufficiently tracing the properties to his separate source was not addressed by the trial court. Although the evidence in the record may be sufficient for this court to determine the issue, given the deference to the trial court to make factual findings and the need to weigh Thomas’s credibility, we remand to the trial court the issue of whether Thomas rebutted the presumption of community property by tracing from separate assets. In making such determination, the trial court need not reopen the record and receive new evidence nor shall it allow the parties to introduce new arguments. Instead, the trial court is to rely on the evidence and arguments presented at trial.

[30] For the foregoing reasons, we **REVERSE** and **REMAND** for further proceedings not inconsistent with this opinion.

Original Signed - **Robert J. Torres**
By

ROBERT J. TORRES
Associate Justice

Original Signed - **Katherine A. Maraman**

KATHERINE A. MARAMAN
Associate Justice

Original Signed - **F. Philip Carbullido**
By

F. PHILIP CARBULLIDO
Chief Justice

I do hereby certify that the foregoing is a full true and correct copy of the original on file in the office of the clerk of the Supreme Court of Guam

MAR 24 2014

By: IMELDA B. DUENAS
Assistant Clerk of Court
Supreme Court of Guam