[Cite as *Rank v. Rank*, 2010-Ohio-5717.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Evon L. Rank,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-273 (C.P.C. No. 09DR01-234)
Thomas E. Rank,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 23, 2010

Grossman Law Offices, and *Jeffrey A. Grossman,* for appellee.

Jeffrey A. Brown, for appellant.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations

CONNOR, J.

{¶1} Plaintiff-appellee, Evon L. Rank, filed a complaint for divorce from her husband, defendant-appellant, Thomas E. Rank, in the Franklin County Court of Common Pleas, Division of Domestic Relations on January 23, 2009. In response, Mr. Rank filed an answer and counterclaim.

{¶2} The parties were married on December 3, 1994. Both parties had been residents of the state of Ohio for more than six months and were residents of Franklin County for more than 90 days preceding the filing of the complaint. Accordingly, the trial court had jurisdiction over the action and the parties. These issues are undisputed.

{¶3} The parties stipulated to facts and presented to the court for a final hearing on the disputed issues on January 28, and February 2, 2010. The dispute primarily concerned income-producing rental properties located at 2771-2773 Cooper Ridge Road ("Cooper Ridge") and 6582-6584 Hawksway Court ("Hawksway"). On March 5, 2010, the trial court issued a decision and judgment entry granting the parties a divorce and dividing the parties' property. Mr. Rank has timely appealed and raises the following assignments of error:

> APPELLANT'S FIRST ASSIGNMENT OF ERROR
>
> The Court erred in the characterization of the $110,000.00 of value in the Cooper Ridge Rental Property as the separate property of Mrs. Rank, where the finding is not supported by credible evidence.
>
> APPELLANT'S SECOND ASSIGNMENT OF ERROR
>
> The Court erred in the characterization of $40,000.00 of the value of the Hawksway rental property as the separate property of Mrs. Rank, where the finding is not supported by credible evidence.

{¶4} In both assignments of error, Mr. Rank argues that the trial court erred in designating property as the separate property of Ms. Rank, rather than marital property subject to division. At issue, therefore, is whether the trial court erred in reaching its designations.

{¶5} In a divorce proceeding, a trial court must "determine what constitutes marital property and what constitutes separate property." R.C. 3105.171(B). Generally, "marital property" includes all real and personal property owned by either or both spouses that was "acquired by either or both of the spouses during the marriage[.]" R.C. 3105.171(A)(3)(a)(i). Marital property also includes the income and appreciation on separate property that occurred during the marriage due to the labor, monetary, or in-kind

contribution by either or both spouses. R.C. 3105.171(A)(3)(a)(iii). Conversely, "separate property" is, inter alia, all real and personal property that the trial court finds to have been acquired by one spouse before the marriage. R.C. 3105.171(A)(6)(a)(ii). The party seeking to have an asset classified as separate property must show, by a preponderance of the evidence, that an asset or set of assets is traceable and is separate. *Peck v. Peck* (1994), 96 Ohio App.3d 731.

{¶6} The mere form of ownership is not the determinative factor in distinguishing separate property from marital property. R.C. 3105.171(H). Rather, the inquiry generally focuses on the traceability of the property. *Bell v. Bell*, 2d Dist. No. 2002 CA 13, 2002-Ohio-5542, ¶13, citing *Price v. Price*, 11th Dist. No. 2000-G-2320, 2002-Ohio-299, ¶27. Indeed, "[t]he commingling of separate property with other property of any type does not destroy the identity of the separate property as separate property, except when the separate property is not traceable." R.C. 3105.171(A)(6)(b).

{¶7} Appellate review of a trial court's designation of property as marital or separate is under a manifest weight of the evidence standard. *Gibson v. Gibson*, 3d Dist. No. 9-07-06, 2007-Ohio-6965, ¶26, quoting *Eggerman v. Eggerman*, 3d Dist. No. 2-04-06, 2004-Ohio-6050, ¶14, citing *Henderson v. Henderson*, 3d Dist. No. 10-01-17, 2002-Ohio-2720, ¶28. Under this review, a trial court's determination will not be reversed so long as it is supported by some competent, credible evidence. *Eggerman* at ¶14, citing *DeWitt v. DeWitt*, 3d Dist. No. 9-02-42, 2003-Ohio-851, ¶10; see also *Myers v. Garson*, 66 Ohio St.3d 610, 1993-Ohio-9 (a reviewing court must not substitute its judgment for that of the trial court where some competent, credible evidence supports the judgment). Further, in conducting this review, an appellate court must presume that the findings of the trier of fact are correct. *Corrigan v. Illuminating Co*., 122 Ohio St.3d 272, 2009-Ohio-

2524, ¶34, citing *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶24, quoting *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Indeed, the trier of fact "is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use those observations in weighing the credibility of the testimony." *Barkley v. Barkley* (1997), 119 Ohio App.3d 155, 159, citing *In re Jane Doe I* (1991), 57 Ohio St.3d 135.

{¶8} With regard to Mr. Rank's first assignment of error, the Cooper Ridge property is a two unit rental property with a present value of $168,500. Ms. Rank owned this property prior to the marriage. The value at the time of marriage was $110,000. During the marriage, Mr. Rank undertook to maintain, rehabilitate, and remodel the Cooper Ridge property. The fact that Mr. Rank was not a titled owner on the Cooper Ridge property was a contentious issue amongst the parties through their marriage. As a result, only two months before Ms. Rank moved out of the marital home, she executed and recorded a quitclaim deed transferring ownership from herself individually to herself and Mr. Rank as joint tenants with rights of survivorship.

{¶9} In the trial court's judgment entry, it designated as marital property the increase in value of $58,500 during the course of the marriage. The parties do not dispute this designation. Instead, the dispute regards the remaining $110,000 in value of the Cooper Ridge property.

{¶10} Mr. Rank argues that the trial court erred in concluding that $110,000 of the Cooper Ridge property was Ms. Rank's separate property. Specifically, he argues that no credible evidence supports this conclusion. He references the quitclaim deed that transferred title from Ms. Rank individually to Ms. Rank and Mr. Rank together as joint tenants with rights of survivorship. Further, he references the circumstances surrounding

the execution of the deed. He argues that the act of executing the deed demonstrated Ms. Rank's donative intent to convert the Cooper Ridge property from separate property to marital property. He cites Ms. Rank's history of working as a real estate agent in support of the position that Ms. Rank knew the implications of her actions. He argues that Ms. Rank cannot now deny having had the donative intent with any sort of credibility. He argues that courts should be skeptical of testimonial denials that contradict express, written words in a deed.

{¶11} It is well-settled that a spouse can change the nature of property, and its designation as separate or marital property, through conduct performed during the marriage. *Smith v. Smith*, 10th Dist. No. 07AP-717, 2008-Ohio-799, ¶14, citing *Moore v. Moore* (1992), 83 Ohio App.3d 75, 77. One such way comes in the form of an inter vivos gift from the donor spouse to the donee spouse. *Bell* at ¶15, quoting *Helton v. Helton* (1996), 114 Ohio App.3d 683, 685-86.

> The essential elements of an *inter vivos* gift are "(1) an intention on the part of the donor to transfer the title and right of possession of the particular property to the donee then and there and (2), in pursuance of such intention, a delivery by the donor to the donee of the subject-matter of the gift to the extent practicable or possible, considering its nature, with relinquishment of ownership, dominion and control over it."

Id. quoting *Bolles v. Toledo Trust Co*. (1936), 132 Ohio St. 21, paragraph one of the syllabus. To constitute a valid inter vivos gift, the transfer must be "immediate, voluntary, gratuitous and irrevocable." Id. citing *Smith v. Shafer* (1993), 89 Ohio App.3d 181, 183, citing *Saba v. Cleveland Trust Co*. (1926), 23 Ohio App. 163, 165. "The donee has the burden of showing by clear and convincing evidence that the donor made an inter vivos gift." Id. citing *In re Fife's Estate* (1956), 164 Ohio St. 449, 456. The key issue in the analysis is typically whether the donor spouse had the requisite donative intent to transfer

an interest to the donee spouse at the time of the transfer. *Neighbarger v. Neighbarger*, 10th Dist. No. 05AP-651, 2006-Ohio-796, ¶26, citing *Hippely v. Hippely*, 7th Dist. No. 01 CO 14, 2002-Ohio-3015; see also *Helton*, supra.

{¶12} In the instant matter, Mr. Rank argues that the evidence demonstrates Ms. Rank's donative intent to complete the transfer. In support, he cites cases that we find to be distinguishable from the instant matter. First, he cites a case decided on grounds unrelated to the issue of donative intent. See *Neighbarger* at ¶26 ("[W]e do not agree with appellant's argument that the trial court erred by not determining whether appellant had the requisite donative intent to give the farm to appellee as a 'gift.' * * * [S]uch an analysis does not apply where the question is simply whether property was 'acquired' by one spouse prior to marriage for purposes of R.C. 3105.171(A)(6)(a)(ii)."). Because *Neighbarger* was decided on grounds unrelated to the issue of donative intent, we find unpersuasive Mr. Rank's argument that *Neighbarger* requires a reversal.

{¶13} Mr. Rank then cites cases in which the trial courts found that the requisite donative intent was established by the donee. See *McCoy v. AFTI Properties, Inc*., 10th Dist. No. 07AP-713, 2008-Ohio-2304, ¶10 ("both the trial court and magistrate determined that the transfer of property in the deed was a gift"); see also *Helton* at 687 ("the testimony in the case before us supports the trial court's finding that Mr. Helton intended to transfer a present possessory interest."). As a result, the manifest weight analyses in these cases began at the diametrically opposite starting point. That is, we must find competent, credible evidence supporting the trial court's finding that donative intent was lacking, whereas the courts in *McCoy* and *Helton* found evidence supporting the finding that donative intent was established. For this reason, *McCoy* and *Helton* are distinguishable.

{¶14} At its most basic level, Mr. Rank's first assignment of error solely challenges the credibility of Ms. Rank's testimony during the final hearing. He argues that she lacked credibility when she testified that she did not intend to transfer property rights by executing the quitclaim deed. However, the trial court clearly found this testimony to be credible. Indeed, it formed the basis for holding that $110,000 of the value of the Cooper Ridge property was Ms. Rank's separate property. The trial court reached this credibility determination after having observed Ms. Rank's demeanor, gestures, and voice inflections. See *Barkley* at 159, citing *In re Jane Doe I*. As an appellate court, we must presume that the trial court's factual findings were correct. See *Corrigan* at ¶34, citing *Wilson* at ¶24, quoting *Seasons Coal Co*. at 80. Mr. Rank has given us no persuasive reason to overcome this presumption. As a result, the trial court did not err when it concluded that $110,000 of the value of the Cooper Ridge property was the separate property of Ms. Rank. We therefore overrule Mr. Rank's first assignment of error.

{¶15} Mr. Rank's second assignment of error concerns the Hawksway property. The parties decided to purchase the Hawksway property during their marriage. However, they did not have a sufficient down payment at the time. As a result, Ms. Rank approached her father, Lewis L. Lineburgh, who provided $40,000 to help finance the purchase. The parties presented different positions as to how the $40,000 should be classified. Ms. Rank believed it was a gift to her, while Mr. Rank believed it was a loan evidenced by a promissory note that Ms. Rank signed. The parties stipulated that Mr. Lineburgh refused to accept repayment of the funds and instructed them to enjoy it.

{¶16} The trial court found Mr. Rank's testimony to be credible and consequently found that the $40,000 was a loan. Based upon the parties' stipulations, the trial court further found that the loan was forgiven. Importantly, however, because the note was

only signed by Ms. Rank, the trial court held that the forgiveness of the indebtedness was a gift only to Ms. Rank. As a result, the trial court concluded that $40,000 of the value of the Hawksway property was the separate property of Ms. Rank.

{¶17} On appeal, Mr. Rank again argues that the trial court erred in reaching this determination. He again argues that the trial court's conclusion is not supported by competent, credible evidence. Specifically, Mr. Rank argues that the Hawksway property was a marital venture intended to produce marital income. He relies exclusively upon the stipulation that Mr. Lineburgh refused to accept repayment of the funds and indicated that "they" should enjoy it. This stipulation, however, has no bearing on the traceability of the $40,000 and the character of Ms. Rank's separate property interest. Further, as we just outlined, the competent, credible evidence in the record clearly supports the trial court's finding. As a result, we overrule Mr. Rank's second assignment of error.

{¶18} Having overruled both of Mr. Rank's assignments of error, we affirm the judgment rendered by the Franklin County Court of Common Pleas, Division of Domestic Relations.

Judgment affirmed.

FRENCH and McGRATH, JJ., concur.