[Cite as *Winhoven v. Winhoven*, 2015-Ohio-2793.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

DEBORAH WINHOVEN	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 2014-CA-137
	:	
v.	:	Trial Court Case No. 12-DR-868
	:	
MARK WINHOVEN	:	(Civil Appeal from Clark County
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 10th day of July, 2015.

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HALL, J.

{¶ 1} Mark Winhoven appeals from the trial court's October 22, 2014 final judgment and divorce decree that, among other things, ended his marriage to

plaintiff-appellee Deborah Winhoven and divided their property, including the marital residence.

{¶ 2} In his sole assignment of error, Mr. Winhoven contends the trial court erred in finding that the marital residence was Ms. Winhoven's separate property and that he was entitled to only one-half of the increase in the home's equity during the marriage. Although Ms. Winhoven solely owned the residence prior to the parties' marriage, Mr. Winhoven notes that she executed a quitclaim deed from herself to both herself and Mark Winhoven, "for their joint lives remainder to the survivor," (Plaintiff's Exhibit D), on June 5, 2006, in order to refinance the mortgage on the property. The parties were married nearly a year later on May 12, 2007. Thereafter, the parties both executed a new quitclaim deed, also to refinance the mortgage, from both of them as unmarried individuals to both of them as married individuals, "for their joint lives, remainder to the survivor," (Plaintiff's Exhibit H), on April 7, 2008, which was about a year after they were married. In light of these conveyances, Mr. Winhoven claims the parties were equal owners of the residence and were entitled to share equally in all equity.

{¶ 3} The pertinent factual background is accurately summarized in the trial court's judgment entry as follows:

> In 1987, Ms. Winhoven and her prior husband, Doug Sowder, purchased the lot located at 960 Whaley Road, New Carlisle, Ohio (Exhibit A). In 1988, they built a house on this property and thereafter in 2004, they divorced. Ms. Winhoven was awarded this residence in her divorce with Mr. Sowder.
>
> In 2005, the parties in this case began seeing each other and in

2006 they began living together at this residence. The parties were later married on May 12, 2007.

While the parties were living together but before they got married, they made arrangements to refinance this property with New Carlisle Federal. To this end, an appraisal for the property took place in May of 2006 which estimated the fair market value of the premises to be $275,000.

The closing took place on June 5, 2006 and, at that time, Ms. Winhoven executed a quit claim deed transferring ownership of the subject premises into both parties' names, as unmarried individuals. The prior mortgage indebtedness in favor of New Carlisle Federal in the sum of $35,483.00 as well as the second mortgage indebtedness in favor of Security Bank in the sum of $70,233.00 were paid off and the parties received the sum of $13,068.57 in cash proceeds which they used to build a pole barn for Mr. Winhoven's semi-truck and related accessories.

Both of the parties signed off on the new promissory note and mortgage in favor of New Carlisle Federal and the amount of their new loan was $125,000.

* * *

In 2008, the parties, once again, decided to refinance this property, primarily in order to obtain a more favorable interest rate. On March 27, 2008, the property was appraised with a fair market value of $310,000 (Exhibit F).

> In April, 2008, the parties did refinance the subject premises (see Exhibit G). At that time, they also executed a new quit claim deed from both of them, as unmarried individuals, to both of them as married individuals (see Exhibit H).
>
> On September 17, 2012, Ms. Winhoven filed her Divorce Complaint in the within matter and during the pendency of this litigation, the subject premises was once again appraised on May 10, 2013, with a fair market value of between $225,000.00 and $265,000 (see Exhibit I).

(Doc. #30 at 5-6).

{¶ 4} Based on the evidence presented, the trial court found that the equity in the home was approximately $150,000 when it was refinanced and placed in both parties' names in June 2006 before the marriage. (*Id*. at 5). The trial court further found that, at the time of the divorce proceedings, the home's equity had increased to $157,000. (*Id*. at 6). The trial court reached this figure by determining the home's fair market value at the time of the divorce to be $245,000 and by then subtracting the outstanding mortgage balance of $88,000. (*Id*.).

{¶ 5} As relevant here, the dispute below concerned how to divide the $157,000 in home equity. The trial court set forth the parties' respective arguments as follows:

> From her perspective, Ms. Winhoven contends that this residence, and its current equity, represents her separate pre-marital property and that it should be awarded to her, free and clear of any claims or interests by Mr. Winhoven. To this end, she contends that she successfully traced this asset as being her separate pre-marital property and that there was no

> donative intent on her part to convert it from separate to marital property, regardless of the form in which ownership is currently held. Specifically, she contends that the deed which was executed at the closing in 2006 was executed in order to obtain the refinancing which the parties used the proceeds from to build the pole barn to house Mr. Winhoven's truck and accessories. Similarly, she contends that the subsequent deed executed in April of 2008 was also executed in order to obtain the refinancing which took place at that time, in order to accomplish a more favorable interest rate.
>
> Mr. Winhoven, on the other hand, contends that the aforementioned deed transfers as well as the acts involving him co-signing on the debts secured by the subsequent mortgages on the subject premises represent a gift to him of one-half of all equities in the subject premises. Therefore, he proposes that Ms. Winhoven pay him one-half of the existing net equity in the subject premises or, in the alternative, he proposes to purchase the property from her and pay her one-half of the existing net equity. Both of the parties contend that they are pre-approved for refinancing.

(*Id*. at 6-7).

{¶ 6} The trial court proceeded to find (1) that the home equity of approximately $150,000 existing at the time of the June 2006 deed transfer and initial refinancing was Ms. Winhoven's separate property, (2) that Ms. Winhoven's intent in placing Mr. Winhoven's name on the deeds in 2006 and 2008 was to facilitate refinancing, not to

provide him with a gift of one-half of the home equity, (3) that Ms. Winhoven's testimony on the foregoing issue was credible whereas Mr. Winhoven's was not, (4) that equity in the marital residence had increased by $7,000 during the marriage due in part to "Mr. Winhoven's contributions to the marital residence, by way of mortgage payments, labor, and other in-kind efforts," and (5) that Mr. Winhoven was entitled to one-half of the $7,000 increase in home equity during the marriage. (*Id*. at 7-9).

{¶ 7} On appeal, Mr. Winhoven challenges the trial court's conclusion that the $150,000 in pre-marital home equity as of June 2006 was Ms. Winhoven's separate property. In support, he argues (1) that the home became equally owned by the parties pursuant to R.C. 5302.11 and R.C. 5302.17 when Ms. Winhoven placed his name on the deed in June 2006 as joint tenants with survivorship rights almost a year before their marriage and (2) that R.C. 3105.171, which defines marital and separate property and governs the division of property in divorce proceedings, had no applicability. (Appellant's brief at 4-8). Finally, Mr. Winhoven asserts that even if we look beyond the four corners of the 2006 deed to determine Ms. Winhoven's intent, the evidence supports a finding that she conveyed him an interest in the residence either as an inter vivos gift or, alternatively, for valid consideration. Either way, he insists that the evidence does not support a finding that all pre-marital equity was Ms. Winhoven's separate property.

{¶ 8} Upon review, we disagree with Mr. Winhoven that the trial court erred in finding all pre-marital equity to be Ms. Winhoven's separate property. Quit-claim deeds are addressed in R.C. 5302.11, which provides that such a deed "has the force and effect of a deed in fee simple to the grantee[.]" Survivorship deeds are addressed in R.C. 5302.17, which provides: "A deed conveying any interest in real property to two or more

persons, and in substance following the form set forth in this section, when duly executed in accordance with Chapter 5301 of the Revised Code, creates a survivorship tenancy in the grantees[.]" Finally, R.C. 5302.20 addresses the creation and effect of a survivorship tenancy. It provides that "[i]f two or more persons hold an interest in the title to real property as survivorship tenants, *each survivorship tenant holds an equal share* of the title during their joint lives unless otherwise provided in the instrument creating the survivorship tenancy." (Emphasis added) R.C. 5302.20(B). However, R.C. 5302.20(C)(5) also provides that if title to real property is held by two survivorship tenants who are married, and they get a divorce, the survivorship aspect terminates and they become tenants in common. In that event, "[t]he interest of each tenant in common of that nature shall be equal *unless otherwise provided in the instrument creating the survivorship tenancy or in the judgment of divorce*[.]" (Emphasis added.) *Id*.

{¶ 9} Mr. Winhoven argues that the case law respecting deeds prevents Ms. Winhoven from contesting the transfer of a one-half interest to him before they were married. Real-property law precludes a party from introducing extrinsic evidence about one's intent when making a deed of conveyance to avoid its legal effect. *See*, *e.g.*, *Robbins v. Cray*, 20 Ohio Law Abs. 531, 534 (2d Dist. 1935) (AIt has long been recognized in Ohio that evidence outside the deed cannot be introduced to contradict or change its legal effect in the creation or modification of the estate.@); *Shehy v. Cunningham*, 81 Ohio St. 289, 293, 90 N.E. 805, 806 (1909) (AThus a will, a deed, or a covenant in writing, so far as they transfer or are intended to be evidence of rights, cannot be contradicted or opposed in their legal construction, by facts >aliunde.= * * * A party is estopped by his deed. He is not to be permitted to contradict it. So far as the

deed is intended to pass a right or to be the exclusive evidence of a contract, it concludes the parties to it.@) Accordingly, it is well settled that " 'a deed's language is conclusively presumed to express the parties' intention absent "uncertainty" in the language employed.' " *Cartwright v. Allen*, 12th Dist. Fayette No. CA2011-10-25, 2012-Ohio-3631, ¶ 21, quoting *37 Robinwood Assoc. v. Health Indus., Inc*., 47 Ohio App.3d 156, 157, 547 N.E.2d 1019 (10th Dist.1988). "If an intention to convey land is apparent from an examination of the four corners of a deed, a court must give effect to that intention." *Whitt v. Whitt*, 2d Dist. Greene No. 02-CA-93, 2003-Ohio-3046, ¶ 9.

{¶ 10} On the other hand, the foregoing often-quoted case law deals with terms other than the share of the estate conveyed. *Robbins* involved terminology in the deed as to whether the conveyance was a purchase or a gift because the right to statutory inheritance of ancestral land from a widow, at that time, depended upon whether real property came to her by purchase or by gift or devise. *Shehy* also dealt with the inability to contradict the consideration clause of a deed. The *Shehy* syllabus states: "The consideration clause in a deed is conclusive." *Cartwright* involved a deed executed by Cartwright in 2008 as trustee of his trust, which had been revoked in 2005. The court held the deed was of no legal effect because the revoked trust could not be the title holder of the property, and the actual intention of the grantor with respect to the purported conveyance could not be introduced in contradiction of the deed. *Robinwood* involved who should be responsible for real estate taxes when a prior option to purchase had language different from that contained in the deed. Extrinsic evidence was not permitted. Finally, *Whitt* involved whether a grantor of a quitclaim deed also intended to release dower rights. Therefore, none of the above cases dealt with whether the

intended share of a property conveyed can be demonstrated by evidence outside the deed.

{¶ 11} Case law addressing whether outside evidence of the respective share of a conveyance can be explained by evidence outside the deed reveals mixed results. In *Thrasher v. Watts*, 2d Dist. Clark No. 2012 CA 50, 2013-Ohio-2581, this court found, in an action for partition, only a rebuttable presumption that unmarried parties held equal interests in property by virtue of their joint and survivorship deed. This court reasoned:

> Where a deed is silent, there is a rebuttable presumption that the parties took equal interests in the property. *Bryan v. Looker*, 94 Ohio App.3d 228, 231, 640 N.E.2d 590 (3d Dist.1994). Thus, courts are permitted to look beyond the deed to determine each party=s equitable interest in the subject property. Specifically, the presumption of equality can be rebutted by evidence demonstrating unequal contributions toward the purchase price, and on that showing a presumption arises that the parties intended to share the property in proportion to the amounts they contributed. *Spector v. Giunta*, 62 Ohio App.2d 137, 141, 405 N.E.2d 327, 330 (6th Dist.1978).

Id. at & 12. In finding a rebuttable presumption of equality in the face of a silent deed, *Thrasher* cited *Bryan*, which cited *Spector*, which cited *Huls v. Huls*, 98 Ohio App. 509, 130 N.E.2d 412 (1st Dist. 1954). In *Huls*, the First District held that when a deed is silent as to the respective shares of the grantees, the law rebuttably presumes equal shares. *Id.* at 511-512. Notably, however, *Huls* predated R.C. 5302.20(B), which, as

indicated, provides that A[i]f two or more persons hold an interest in the title to real property as survivorship tenants, each survivorship tenant holds an equal share of the title * * * unless otherwise provided in the instrument creating the survivorship tenancy.@ But then *Huls* also predated R.C. 5302.20(C)(5), which provides that upon a divorce "[t]he interest of each tenant in common of that nature shall be equal unless otherwise provided in the instrument creating the survivorship tenancy or in the judgment of divorce[.]" *Id*. The issue we addressed in *Thrasher*, that a silent deed only creates a rebuttable presumption of equal ownership for joint tenants, is often cited in partition cases, both before and after the passage of R.C. 5302.20(B). *See*, *e.g*., *Rardin v. Estate of Bain*, 7th Dist. Carroll No. 08CA853, 2009-Ohio-3332; *Stone v. Stone*, 3d Dist. Hardin No. 6-04-12, 2006-Ohio-1996; *CitiFinancial, Inc. v. Blosser*, 6th Dist. Fulton No. F-00-026, 2001 WL 672179 (June 15, 2001) (a foreclosure case involving a question of proportional interest that the appeals court called "in essence, a request for partition"); *Neubert v. Cassidy*, 9th Dist. Medina No. 2954-M, 2000 WL 202106 (Feb. 16, 2000).

{¶ 12} Divorce cases on the issue appear mixed. In *Jackson v. Jackson*, 5th Dist. Fairfield No. 12 CA 11, 2012-Ohio-6074, the wife, prior to the marriage, purchased a lot with $52,500 of her funds. The property was deeded by general warranty deed jointly into both parties' names, she testified, so that they could obtain financing to build a house. They began building at about the time of their marriage which was over three months after the joint deed. Several years later she filed for divorce. The trial court found the value of the unimproved lot was wife's separate premarital property although the residence was marital property. The court of appeals, without addressing the presumption of equal ownership issue, referred to the statutory definitions of marital and

separate property and simply concluded that "the trial court's classification of the lot as appellant's separate property was not against the manifest weight of the evidence." *Id*. at ¶ 43. We interpret *Jackson* as standing for the proposition that a joint pre-marital deed does not preclude a domestic relations court from recognizing unequal contributions toward acquisition of the jointly titled property, and dividing the property accordingly. Conversely, in *Burge v. Preuss*, 4th Dist. Athens No. 04CA35, 2005-Ohio-1054, Preuss solely owned 40 acres with a cabin valued at $36,000.00 from a prior marriage. Burge moved in and made substantial improvements. Five years before they were married, Preuss executed a survivorship deed for the property to herself and Burge. Six years after their marriage, Burge filed for divorce. The trial court had found that the $36,000.00 was traceable to Preuss as her separate property. On appeal, the court indicated that "Preuss no longer could claim the 40 acres and improvements as her separate property upon marrying Burge in 1995 unless the [1990] deed was ineffective for some reason." *Id*. at ¶ 12. The court questioned why the property was not equally divided as marital property and remanded the case for the trial court to determine the effect of the 1990 deed. Thus, the result in *Preuss* is the opposite of that in *Jackson,* and implies that the joint deed could be controlling.

{¶ 13} Notwithstanding the conflicting case law, we believe R.C. 5302.20(C)(5), which none of the cases cite, effectively recognizes the ability of a domestic relations court to divide real property consistent with R.C. 3105.171(B), which itself mandates an equitable division of marital and separate property. As noted above, R.C. 5302.20(C)(5) provides that if title to real estate is held by married survivorship tenants who divorce, the survivorship tenancy terminates and they become tenants in common. In that

circumstance, "[t]he interest of each tenant in common of that nature shall be equal unless otherwise provided * * * in the judgment of divorce[.]" Here, the judgment of divorce *did* otherwise provide. We therefore conclude, consistent with the result if not the reasoning in *Jackson*, that the trial court did not err by determining that the pre-marital equity was Ms. Winhoven's separate property. This conclusion also is consistent with R.C. 3105.171(H), which provides that "the holding of title to property by one spouse individually or by both spouses in a form of co-ownership does not determine whether the property is marital property or separate property."

{¶ 14} In reaching the foregoing conclusion, we recognize that R.C. 3105.171(A)(6)(a)(ii) provides for "separate property" to include "[a]ny real or personal property or interest in real or personal property that was acquired by one spouse prior to the date of marriage." Ms. Winhoven plainly acquired the marital residence prior to the parties' marriage. There is no dispute, however, that she also executed a valid deed conveying an interest in that property to Mr. Winhoven prior to the marriage. Her June 2006 quit-claim deed created a survivorship tenancy and made the then-unmarried couple joint titled owners of the property. On the other hand, if the parties had never married but separated, either could have filed a partition action at which time the partition court, consistent with the partition jurisprudence we have cited, could consider that the deed only raised a rebuttable presumption of equality, resulting in unequal distribution. In a similar way, we believe R.C. 5302.20(C)(5) gave the trial court discretion to avoid an equal division of the pre-marital equity despite the fact that Ms. Winhoven had conveyed an interest in the property to Mr. Winhoven.

{¶ 15} In exercising its discretion, the trial court could look to R.C. 3105.171(H),

which generally provides that title to property in the name of one spouse individually or in the name of both spouses does not determine whether it is marital or separate. The cases are legion in which courts, relying on R.C. 3105.171(H), have allowed a spouse to testify about a lack of donative intent and avoid the legal effect of a conveyance to the other spouse during the marriage. *See, e.g.*, *Snyder v. Snyder*, 2d Dist. Clark No. 2002-CA-6, 2002 WL 1252835 (June 7, 2002); *Geuy v. Geuy*, 2d Dist. Champaign No. 97-CA-22, 1998 WL 211894 (May 1, 1998).[1] In light of R.C. 5302.20(C)(5), the trial court had the authority to allow Ms. Winhoven to provide such testimony here and to make what it found to be an equitable division based on her testimony.

{¶ 16} In addition to his argument about the legal effect of the pre-marital deed, Mr. Winhoven also contends that the trial court's factual determination, that Ms. Winhoven did not intend to gift one half of the equity in her home to Mr. Winhoven, is against the manifest weight of the evidence. For a manifest weight analysis a court of appeals "weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered." *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012–Ohio–2179, 972 N.E.2d 517, ¶ 20, *quoting Tewarson v. Simon*, 141 Ohio App.3d 103, 115, 750 N.E.2d 176 (9th Dist.2001). "In weighing the evidence, the court of appeals must always be mindful of the presumption in favor of the finder of fact. * * * '[E]very reasonable intendment and every reasonable presumption must be made in

[1] This court's opinions in *Snyder* and *Geuy* are merely illustrative of numerous similar cases relying on R.C. 3105.171(H) and allowing a spouse to testify about a lack of donative intent when a property interest is conveyed to the other spouse *during* the marriage.

favor of the judgment and the finding of facts' " Id. at ¶ 21. (citation omitted). Moreover, the credibility of witnesses is left to the discretion of the trial court. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). We have reviewed the evidence and are unable to conclude that the trial court abused its discretion in finding Ms. Winhoven's testimony credible or in finding Mr. Winhoven's testimony not credible. Based on that conclusion and our independent weighing of the evidence, we do not believe the trial court's resolution of this issue presents "the exceptional case in which evidence weighs heavily against the [judgment]." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 17} The only remaining issue is Ms. Winhoven's assertion that equity favors awarding her the entire $150,000 in pre-marital home equity regardless of how the property is labeled or whether Mr. Winhoven had an interest in it. (Appellee's brief at 14-16). Ms. Winhoven maintains that a court should disperse a spouse's separate property to that spouse unless doing so would be inequitable. R. C. 3105.171(B) states: "the court shall divide the marital and separate property equitably between the spouses, in accordance with this section." Because we have concluded that the trial court had the authority to find the pre-marital equity was Ms. Winhoven's separate property, and that it was properly awarded to her, we need not address her secondary argument further.

{¶ 18} Based on the reasoning set forth above, we overrule Mr. Winhoven's assignment of error. The trial court's judgment is affirmed.

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FROELICH, P.J., and FAIN, J., concur.

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