

21CA1057 Marriage of Wuestneck 6-02-2022

COLORADO COURT OF APPEALS

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Court of Appeals No. 21CA1057  
El Paso County District Court No. 18DR30754  
Honorable Marla Prudek, Judge

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In re the Marriage of

Amy Lee Wuestneck,

Appellee,

and

Timothy Wuestneck,

Appellant.

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JUDGMENT REVERSED AND CASE  
REMANDED WITH DIRECTIONS

Division V  
Opinion by JUDGE FREYRE  
Fox and Gomez, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(e)**  
Announced June 2, 2022

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Law Office of Dailey & Pratt, LLC, Lisa M. Dailey, Joel M. Pratt, Colorado Springs, Colorado, for Appellee

Law Office of Patricia M. Perello, Patricia Perello, Colorado Springs, Colorado, for Appellant

¶ 1 Timothy Wuestneck (husband) appeals the permanent orders entered on the dissolution of his marriage to Amy Lee Wuestneck (wife). Husband argues that the district court erred when distributing the parties' property and debt by classifying the marital home as wife's separate property, awarding wife all of her retirement benefits, and allocating credit card debt and a 2017 tax debt to him. Because we agree with husband's first contention involving the classification of the marital home, we reverse the judgment on that basis and remand the case for the district court to reconsider the entire property and debt distribution. We do not address husband's other contentions.

### I. Background

¶ 2 After a hearing, the district court entered a decree ending the parties' twenty-one-year marriage and permanent orders distributing their property and debt.

### II. Timeliness of the Appeal

¶ 3 Initially, we deny wife's request to dismiss the appeal as untimely. A motions division of this court previously granted husband's motion to extend time and accepted his late notice of appeal, which was filed on July 16, 2021, twenty-eight days after

the June 18, 2021, deadline to appeal. *See* C.A.R. 4(a). We decline to revisit the motions division's decision.

¶ 4 We reject wife's argument that we lack jurisdiction to consider the late filed appeal. Under C.A.R. 4(a), an appellant must file a notice of appeal within forty-nine days of the entry of the judgment being appealed. However, this court may extend the time to appeal for an additional thirty-five days on a showing of excusable neglect for the late filing. *Id.* Because husband filed his notice of appeal within this eighty-four-day period, we have jurisdiction to accept the late notice and, based on the motions division's decision to do so, we address the appeal on the merits. *See id.*; *Heotis v. Colo. Dep't of Educ.*, 2016 COA 6, ¶ 24.

### III. Property and Debt Distribution

¶ 5 Husband contends that the district court erred by classifying the marital home as wife's separate property rather than as marital property. We agree.

#### A. Legal Standards

¶ 6 The classification of property as marital or separate presents a legal issue that is based on the district court's factual findings. *In*

*re Marriage of Morton*, 2016 COA 1, ¶ 5. We defer to the court’s factual findings and independently review its legal conclusions. *Id.*

¶ 7 All property acquired by either spouse during their marriage is presumed marital regardless of whether title is held individually or jointly. § 14-10-113(3), C.R.S. 2021. This presumption can be overcome by evidence establishing that one of the exceptions under section 14-10-113(2) applies, *In re Marriage of Balanson*, 25 P.3d 28, 36 (Colo. 2001), including for property that was gifted to only one spouse. See § 14-10-113(2)(a); *In re Marriage of Vittetoe*, 2016 COA 71, ¶ 34. Whether a donor and a recipient intended a transfer to be a gift is a question of fact for the district court, *Vittetoe*, ¶ 34, and as long as the court’s decision is supported by the record, we do not disturb it. See *In re Marriage of Cardona*, 2014 CO 3, ¶ 9.

#### B. Analysis

¶ 8 The district court found that wife’s parents assisted her in purchasing the parties’ marital home in 2006 and the parents then immediately gifted their interest in the home to wife alone. Accordingly, the court set aside the home to wife as her separate property.

¶ 9 We conclude — for two reasons — that the court erred in classifying the home.

¶ 10 First, wife purchased the home *with* her parents during the marriage. All three were identified as co-buyers and co-borrowers on the mortgage. Thus, *wife's* portion of the purchase is marital notwithstanding that her parents then also transferred *their* interest in the home to her as a gift. See § 14-10-113(2), (3).

¶ 11 Second, the record does not support that wife's parents ever obtained an interest in the home to give to her. Wife initially testified that she purchased the marital home, which the parties then lived in during the marriage, in 2006 with her parents and that her parents gifted their interest in it to her at the closing of the sale and did not include husband in the gift. She clarified on cross-examination, however, that her parents had helped her get a loan for the home, but they did not contribute any money to the purchase because no down payment was required for the loan, and the title to the home was always in her name only. The purchase documents in the record support wife's testimony. Wife's parents did not testify, and no documents evidencing a transfer or gift from them to wife appear to be in the record.

¶ 12 Therefore, by wife’s own account, although her parents helped her get a loan, they never owned an interest in the home that they could have gifted to her. Nor did they contribute anything to it. Instead, wife alone owned the home at all times, and she paid the mortgage. Accordingly, the home is a marital asset. *See id.*

¶ 13 The court further found, and wife argues, that she alone was always on the title to the home, and husband was never added to it over the many years during the marriage that she owned the home. However, the form in which title is held is not dispositive in determining whether property is marital. *In re Marriage of Martinez*, 77 P.3d 827, 828-29 (Colo. App. 2003). Rather, “property acquired by *either* spouse” during a marriage is presumed to be marital property “*regardless of whether title is held individually.*” § 14-10-113(3) (emphasis added).

¶ 14 Wife also argues that she alone made the mortgage payments and husband did not contribute, although she acknowledges that he paid the utilities and other household bills, and husband testified that he paid everything but the mortgage, including to replace the carpet in the home and for a water heater. Contrary to wife’s argument, the record reflects that *both* parties failed to make

these agreed payments at times during the marriage. Wife testified that the utilities had been shut off twice in 2018 for nonpayment, but also that she had to withdraw \$17,361 from her retirement account to keep the mortgage from being foreclosed.

¶ 15 Nonetheless, the funds that wife earned during the marriage and then used to pay the mortgage on the home were *marital* funds, not her separate funds. *See In re Marriage of Sewell*, 817 P.2d 594, 596 (Colo. App. 1991) (“[C]ompensation which is either received or fully earned during a marriage is marital property subject to equitable distribution.”); *see also In re Marriage of Burford*, 26 P.3d 550, 558-59 (Colo. App. 2001). Thus, the evidence that wife contributed her *marital* earnings toward the home during the marriage does not support that the home was her separate property.

¶ 16 In sum, the court erred in classifying the parties’ marital home as wife’s separate property. Its findings that wife’s parents gifted the home to her lack record support. Therefore, we reverse this portion of the judgment and remand the case for the court to reclassify and redistribute the home as marital property and to reconsider the entire property and debt division based on this

change in the marital estate. *See Balanson*, 25 P.3d at 42; *In re Marriage of Krejci*, 2013 COA 6, ¶ 18.

¶ 17 The court must reconsider the overall division based on the parties' economic circumstances at the time of the remand proceedings. *See In re Marriage of Wells*, 850 P.2d 694, 695-99 (Colo. 1993); *see also* § 14-10-113(1)(c) (when dividing marital property, a court considers the parties' economic circumstances at the time the property division is to become effective). Thus, although the court may rely in part on the evidence from the previous hearing, it must also give the parties an opportunity to present evidence concerning their current economic circumstances.

¶ 18 Based on our disposition of this issue, we do not address husband's other contentions. *See In re Marriage of Seewald*, 22 P.3d 580, 586 (Colo. App. 2001) (deficiencies in defining a marital estate preclude a reviewing court from evaluating the property division to determine whether it is equitable).

#### IV. Conclusion

¶ 19 The judgment is reversed, and the case is remanded for further proceedings as instructed herein.

JUDGE FOX and JUDGE GOMEZ concur.