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SUPREME COURT OF APPEALS

OF WEST VIRGINIA

Davis, J., dissenting:

The majority's opinion remands this case to afford the husband another opportunity to prove that which he failed to prove the first time. I disagree with the majority's decision to remand the case to consider the intent of the husband when he offered no evidence that would overcome the presumption of a gift of the premarital residence. The circuit court granted Ms. Duncan one-half interest in the premarital residence of Mr. Stuck. Based on the facts of this case, I would affirm the circuit court's decision.

The facts of this case show that one day prior to their marriage, the parties entered into identical prenuptial agreements that protected the separate property they had acquired prior to marriage. Six months after the parties' marriage, Mr. Stuck conveyed by deed his premarital residence into the names of both parties as joint tenants with rights of survivorship. We have previously held:

Where, during the course of the marriage, one spouse transfers title to his or her separate property into the joint names of both spouses, a presumption that the transferring spouse intended to make a gift of the property to the marital estate is consistent with the principles underlying our equitable distribution statute.

Syl. pt. 4, *Whiting v. Whiting*, 183 W. Va. 451, 396 S.E.2d 413 (1990). Subsequently, we elaborated on our holding when we stated "[t]his presumption is rebuttable only by clear, cogent, and convincing evidence that a gift was not intended or that the transaction under scrutiny was the result of coercion, duress, or deception." Syl. pt. 3, in part, *Burnside v.*

Burnside, 194 W. Va. 263, 460 S.E.2d 264 (1995). Further,

The presumption of a gift to the marital estate may not be rebutted by evidence that merely reflects the motivation for making the gift or an uncommunicated and subjective state of mind of the transferring spouse or that, when viewed alone, can be considered inconsistent with the intent to maintain the property as separate.

Syl. pt. 4, *id.*

The majority's Opinion in this case states: "Pursuant to *Whiting* and *Burnside*, if Mr. Stuck is able to prove that he never intended to make a gift to the marital estate, then the real estate at issue must be deemed his separate property and not be subject to equitable distribution." No. 32727, slip op. at 5 (December 1, 2005) (per curiam). While I agree with the majority's statement, I disagree with its application to the facts of this case because Mr. Stuck did not prove that he never intended to make a gift to his wife. By deed dated March 14, 2001, Mr. Stuck clearly and unequivocally expressed his intent that his premarital residence, which was previously his separate property, instead be marital property.

"Most courts accept that separate property can be transmuted into marital property if the owning spouse designates joint title[.]" *Burnside*, 194 W. Va. at 266, n.3, 460 S.E.2d at 267, n.3 (internal citations omitted). "There is general agreement that the transfer of separately owned property into joint ownership changes the character of the ownership interest in the property so transferred from nonmarital to marital so that the property is subject to equitable distribution." *Whiting*, 183 W. Va. at 457, 396 S.E.2d at 419 (internal

citations omitted). In its discussion, this Court in *Burnside* reasoned that evidence of the reasons for a gift does not refute the fact that a gift was made in the first place. Therefore, the fact that Mr. Stuck claimed the conveyance was for purposes of providing his wife a place to live in case of his death, absent more, is not enough to rebut the presumption of a gift. The family court judge found the deed to be the controlling document, and found that the wife had an equitable interest in the residence, and further found that the witness testimony offered by Mr. Stuck was an attempt to alter the clearly written deed. Thus, the family court and the circuit court found that the premarital estate was gifted by Mr. Stuck to Ms. Duncan and should be equitably distributed. Applying our deferential standard of review, I do not believe this finding is an abuse of discretion or clearly erroneous.

For the reasons stated, I dissent. I am authorized to state that Justice STARCHER joins me in this dissenting opinion.