

Real Property at Dissolution of Marriage in Arizona: Separate Funds, Buy-Out, and Equal Division. A Case Analysis of *Schoenherr v. Carey*, 1 CA-CV 23-0087

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Abstract

This essay is a case analysis of *Schoenherr v. Carey*, 1 CA-CV 23-0087 FC, (Ariz. Ct. App. Nov. 7, 2023). *Schoenherr* is a memorandum opinion published by the Arizona Court of Appeals. Arizona is one of the United States' fastest growing states in both population and GDP. *Schoenherr* provides a look at how modern courts in the state of Arizona examine unique divorce cases concerning property division among the vast influx of migrants and the resulting higher caseloads. The issues before the court centered on the division of real property at dissolution, the noncontributing party buying out the contributing party's interest in the property, and the reimbursement of separate funds used to purchase the property prior to marriage.

Keywords

Family Law, Current Family Law in the United States, Family Law in Arizona, Arizona Family Law, Divorce Law, Dissolution of Marriage, Property Division

1. Introduction

Like many other laws, marriage laws within the United States can be rather intricate. For example, the marriage process itself, while often a straightforward undertaking in many nations, is subject to the individual requirements of each state. They are also subject to federal laws although these are extraordinarily minimal compared to many other legal areas. However, among all the laws governing the 50 states and Washington D.C., there does exist a generalized pro-

cedure that can relatively easily be carved out.

This generalized procedure can be quickly deduced into the following: 1) The requirements for marriage are satisfied. 2) A marriage license is applied for and obtained. 3) The marriage ceremony, which usually takes place not less than a week after the license is granted, is held and is solemnized.

After the ceremony is conducted, the couple will then share and enjoy a host of legal privileges that they otherwise wouldn't possess. Some of these benefits include rights of survivorship, property rights, government benefits, tax benefits, and spousal privilege. As to the minimal federal laws regarding marriage "the only federal law about marriage is that a marriage in one state is valid in every other state." (Buckner, 2023)

Likewise, laws concerning divorce, or dissolution, can be equally intricate. States have requirements such as residency or mandatory marriage counseling that must be met in order for a petition for dissolution to move forward. A general sequence of events for dissolution would begin with a spouse filing a petition for dissolution. The petition would include the requested distribution of assets and debts but may also entail other items such as a request for child support or spousal maintenance. Next, the responding spouse would file an answer where he or she may contest the petitioner's pleadings or potentially agree on some issues. Third would be a settlement conference. If the settlement conference was to be unsuccessful and the spouses could not agree on the division of assets or debts or any other requests, a trial would then follow. The trial would conclude with a judge's decree that the parties would either accept as the end of the matter or alternatively file an appeal. In Arizona, such an appeal would need to be filed within 30 days of the judgment being entered.

2. Community Property States and Common Law Property States

States are divided into two main categories of property division during a divorce. These are community property states and common law property states. Distinguishing between these categories are important because "Whether property is classified as community property or as common law property affects rights of ownership, rights to income from property, rights and duties of management and control, rights to make lifetime gifts, property rights in the event of divorce, and rights to dispose of property at death" ("*Community Property States Versus Common Law Property States*", 2000).

In common law property states, which are the vast majority in the U.S., marital property, that is "all property acquired during the marriage" ("*Equitable Distribution Legal FAQs*", 2023) is distributed equally among the spouses. Thus, these states are also often called equitable distribution states. The general rule in these states is that property acquired during the marriage belongs to the acquiring spouse separately absent any agreement to hold that property jointly with the other spouse.

In community property states, which are currently only nine states in total and mostly found along the west coast, the general rule is that all property acquired during marriage by either spouse automatically becomes the property of both spouses. There are exceptions to the general rules in both community property and common law property states and they too vary. One exception seen in both types of states concerns property that is owned by a spouse prior to marriage. This property will usually continue to remain the owning spouse's property even after marriage. However, in community states, that property cannot later be commingled with the marital property as it will then become part of the community. Other common exceptions include property acquired by "gift, bequest, devise or descent, or property otherwise provided for in a written agreement" ("[Equitable Distribution Legal FAQs](#)", 2023). Written agreements include both prenuptial and postnuptial agreements and so long as they are legally valid, they are almost always binding on the spouses.

Arizona is a state bustling with opportunity as it has witnessed record migration and economic output over the last five to ten years. With divorce on the rise, this case analysis will examine how modern courts in Arizona assess a specific type of property distribution, real property, during the dissolution of marriage. The case serves to provide a snapshot of a crucial component of family law in a community property state during a period of sweeping change.

As was previously stated, divorce laws in the U.S. can be intricate and this is even more true with property division in community property states, "the rules of community property can be quite complex" ("[Comparing Common Law and Community Property States](#)", 2017). This case also gives a glimpse at whether Arizona courts allow for a spouse to buy-out the other's interest in the specific scenario found within *Schoenherr*. Here, separate funds were used by one of the parties to acquire a mortgage on a home prior to marriage. Later, both spouses used the home during the marriage and the mortgage was placed in both spouses' names. In short, the property in question was commingled, that is "A fund or asset in which the money paid into it is a mix of separate and community funds such that it cannot be distinguished as to what part is community and what is separate" ("[Commingled - Legal Definition for Family Law in Arizona](#)", 2024).

3. Analysis of *Schoenherr v. Carey*

In Arizona, can real property purchased with separate funds prior to marriage and then titled in both spouse's names after marriage be bought-out by the non-contributing spouse at dissolution? Can the contributing spouse be reimbursed? An initial response to these questions in absence of an in-depth familiarity with these legal issues may be no, and then possibly, respectively. However, in the memorandum decision *Schoenherr v. Carey*, 1 CA-CV 23-0087 FC, (Ariz. Ct. App. Nov. 7, 2023), the Arizona Court of Appeals held that the non-contributing spouse could buyout the contributing spouse based on an equal distribution of value with no right of reimbursement.

This case is based upon Shirley Jean Schoenherr and Thomas Craig Carey who married in 2007 and shared no children. Prior to marrying, the parties obtained a mortgage for a home in Lake Havasu City (“home”) and they shared the home until 2022. Neither party contended that the home was not community property.

In 2022, Thomas obtained an order of protection against Shirley. She then left the home and Lake Havasu City for Pinetop Arizona. She soon after filed for dissolution of marriage. After moving out, Shirley moved for temporary orders allowing her to reside in the home citing health issues. She also argued that the home was designed to cater specifically to her health problems. However, she withdrew the motion after Thomas demurred.

After the superior court entered its decree in December of 2022, Shirley appealed based on the division of the home and the court’s denial of costs and attorney’s fees. The decree allowed for Thomas to buy out Shirley’s interest in the home and pay her one half of its value so long as he paid Shirley by May of 2023. If Thomas had failed to pay Shirley by this date, the court ordered the home to be sold and the parties would equally divide the proceeds.

Thomas’ testimony concluded that he intended to refinance the mortgage in his name and use an advance from his inheritance to assist him with the process. The court noted Thomas’ intention of solely owning the home was consistent with all of his earlier filings. Further, it noted that Shirley did not dispute Thomas’ testimony, nor did she show an intent to buy out Thomas’ share prior. Shirley felt that she was entitled to more than one half of the home’s value as compensation for her expenditure of her separate funds to purchase the home prior to the marriage.

The trial court denied both parties costs and fees. Shirley and Thomas requested that the court award the costs and fees as they accused the other of acting unreasonably. Thomas’ accusation stemmed from Shirley having the utilities disconnected at the home after she moved out, her refusal to accept his settlement offer, and her lack of standing to move for temporary orders to return to the home. Shirley’s accusation of Thomas acting unreasonably stemmed from him withdrawing \$30,000 from a joint account while she was incarcerated and preventing Shirley from living in a trailer that the two owned by not disclosing its location to her. The court highlighted that Shirley’s pretrial statement did not include factual details showing this, however, and the trial court found that both parties had acted reasonably, “did not knowingly present false claims” and “had no substantial financial disparity” (*Schoenherr v. Carey, 2023*).

Shirley’s appeal contended that the trial court erred first because it didn’t allow her to have the option to buy Thomas out. Second, because it refused to award reimbursement of her separate funds. The court affirmed the trial court and rested its analysis on several legal precedents and Arizona statutes.

As to Shirley’s first argument regarding the trial court not providing her the option to buy Thomas’ interests out in the home, the court held that she waived this argument because she didn’t raise it until the appeal and because she offered

no explanation, citations, or authority to support her argument. Here, the court cited *Odom v. Farmers Ins. Co. of Ariz.*, 216 Ariz. 530, 535 ¶ 18 (App. 2007): “Generally, arguments raised for the first time on appeal are untimely and deemed waived”, and *In re Aubuchon*, 233 Ariz. 62, 64-65 ¶ 6 (2013): “arguments not supported by adequate explanation, citations to the record, or authority.” (*Schoenherr v. Carey*, 2023)

The court further concluded that the trial court was well within its discretion to hold that Thomas could buy out Shirley’s interest. It underlined that apart from Shirley’s failure to contest Thomas’ testimony, Shirley had never alleged that she could afford to buy Thomas out: “The superior court must “divide the community [property] equitably, though not necessarily in kind,” A.R.S. § 25-318 (A), and it has discretion to do so. *Meister v. Meister*, 252 Ariz. 391, 396 ¶ 13 (App. 2021)” (*Schoenherr v. Carey*, 2023)

As to Shirley’s second argument concerning reimbursement of her separate funds, the court determined that Shirley had also waived it. It stated that she failed to mention reimbursement at any point during the pretrial filings, the trial itself, or in her motion to amend. Thus, because her first mention of reimbursement was not until the appeal, the court found it was likewise waived.

Apart from being waived, the court pointed out as a matter of law that Shirley had no claim to reimbursement due to the rebuttable presumption of creating a gift derived from the marriage and the home being titled in both parties’ names. Shirley cited *Stevenson v. Stevenson*, 132 Ariz. 44 (1982) to support her claim, but the court showed that the same case simultaneously defeated it: “In fact, *Stevenson* itself instructs that “when real property is paid for by one spouse and taken jointly in both spouses’ names, a rebuttable presumption arises that the contributing spouse has made a gift of one-half the property to the other spouse” (*Schoenherr v. Carey*, 2023).

Citing *Valladee v. Valladee*, 149 Ariz. 304, 307 (App. 1986), the court determined that Shirley’s intent to not create a presumption of a gift was irrelevant: “To overcome a presumption of gift, the contributing spouse must present “clear and convincing evidence to the contrary.”, “[T]estimony of the hidden intentions of one of the parties” is insufficient to rebut the presumption” (*Schoenherr v. Carey*, 2023).

Last, as to the award of attorney’s fees and costs, Shirley also contended an abuse of discretion by the trial court. Here, the court stated that an abuse of discretion by a court occurs when the record is lacking adequate evidence to support its decision. Further, the court found that there was no absence of such evidence. It additionally stated that appellate courts gave deference to trial courts regarding costs and attorney’s fees because it is in the best position to review financial records, observe the conduct of the parties, and assess their arguments. Thus, the *Schoenherr* court concluded that there was no abuse of discretion by the trial court in this instance either.

In reviewing the points of law in this case it is of special interest that the court

did not focus on the differences between community property and jointly held property. This is of particular interest because the court cited *Valladee v. Valladee*, 149 Ariz. 304, 307 (App. 1986) favorably. The difference between the two was clearly distinguished by the *Valladee* court and was especially relevant as to when separate funds used to purchase real property could be reimbursed to the contributing party “Generally, where the subject property is community property, reimbursement of separate funds is not allowed under *Baum* without a prior agreement between the parties. However, where the property is held in joint tenancy, the law of joint tenancy applies and may permit reimbursement to the contributing co-tenant. The first issue to be addressed, then, is whether the presumption of a gift when one spouse places separate property in joint tenancy creates a gift to the community or to the other spouse individually as a joint tenant.” *Id.*

It is possible, here, that because neither party contested the home as being community property, the court chose not to focus on these two types of property ownership. Or, because there was no common obligation or liability between Thomas and Shirley, nor agreement between the two, as is required for reimbursement with jointly held property and community property respectively as per the court in *Valladee* (also see *Inboden v. Inboden*, 223 Ariz. 542 (Ariz. Ct. App. February 25, 2010), *Kay v. Kay*, 2007 Ariz. App. Unpub. LEXIS 899 (Ariz. Ct. App. December 20, 2007), and *Vizquel v. Vizquel Gonzalez*, 2022 Ariz. App. Unpub. LEXIS 988 (Ariz. Ct. App. November 22, 2022)). Alternatively, perhaps the reason for this is much simpler and does indeed reflect some degree of strain on the court as a result of the recent mass influx of people into the state.

4. Conclusion

In conclusion, the *Schoenherr* court affirmed the trial court in full and held that real property partially purchased with the separate funds of one spouse can indeed be bought out at half value by the non-contributing spouse. Although, the unique facts in this case admittedly likely created that possibility. If Shirley had raised her desire to buy Thomas out at trial, or at any point prior to her appeal, and shown that she could afford to do so, she likely would have been given the option to buy Thomas out at equal value as well. Nevertheless, a properly drafted and executed prenuptial agreement would have defined the intentions and protected the interests of both parties concerning assets and debts. It also would have likely eliminated any litigation between the two stemming from the divorce.

However, as to a spouse being compensated for their expenditure of separate funds to acquire real property, it is clear from the present case and precedents that upon placing the property in both names of the spouses, the presumption of a gift is formed. Here, the court determined the home to be community property as a result. Regardless of the property type, the presumption of a gift is most often deemed to make the property equal in value at dissolution. Further, although

the presumption is a rebuttable one, Shirley failed to adequately rebut that presumption inevitably resulting in her not being reimbursed.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

References

- (1 November 2000). Community Property States versus Common Law Property States. *Wiggin and Dana LLP*.
<https://www.wiggin.com/publication/community-property-states-versus-common-law-property-states/>
- (2017). Comparing Common Law and Community Property States. *Bolton Legal*.
<https://www.boltonlegal.com/blog/2017/02/comparing-common-law-and-community-property-states/>
- (October 2023). Equitable Distribution Legal FAQs. *Justia*.
<https://www.justia.com/family/divorce/docs/equitable-distribution-faq/>
- Buckner, S. (18 July 2023). State Laws on Marriage. *Findlaw.com*.
https://www.findlaw.com/family/marriage/state-laws-on-marriage.html?DCMP=google:ppc:TRLNA:21219027752:697350442485:164461573914&HBX_PK=&sid=1013436&source=google~ppc&tsid=latlppc&gad_source=1&gclid=Cj0KCQjwxqayBhDFARisAANWRnSNTf7jfGuBv0bTGcCvgGkJftpREcKJ9XoipHC_ZpxG8lrHJBgB0T4aAlNsEALw_wcB
- Commingled - Legal Definition for Family Law in Arizona. *State 48 Law Firm - Divorce, Custody, and Family Law Attorneys in Arizona*.
<https://state48law.com/glossary/commingled/>
- Inboden v. Inboden*, 223 Ariz. 542 (Ariz. Ct. App. February 25, 2010).
- Kay v. Kay*, 2007 Ariz. App. Unpub. LEXIS 899 (Ariz. Ct. App. December 20, 2007).
- Schoenherr v. Carey*, 1 CA-CV 23-0087 FC, (Ariz. Ct. App. Nov. 7, 2023).
- Valladee v. Valladee*, 149 Ariz. 304, 307 (App. 1986) Favorably.
- Vizquel v. Vizquel Gonzalez*, 2022 Ariz. App. Unpub. LEXIS 988 (Ariz. Ct. App. November 22, 2022).

Bibliography

- Article: Marriage Equality? First, Justify Marriage (If You Can), 1 *drexel l. Rev.* 485.
- Casenote and Comment: Rebutting the Pro-Community Presumption by Way of Total Recapitulation: *Zemke v. Zemke*, 31 *idaho l. Rev.* 1123.
- 4 Thompson on Real Property, Thomas Editions § 37.10 (2024).