

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2007-001772

04/02/2008

HONORABLE KRISTIN HOFFMAN

CLERK OF THE COURT

D. Glab

Deputy

KATHLEEN ECHOLS

MICHAEL E HURLEY

v.

TROY NYQUIST

TERESA H FOSTER

ROBERT B HUNTER
REALTY EXECUTIVES
7600 N 16TH ST SUITE 100
PHOENIX AZ 85020

ONE DAY TRIAL TO THE COURT
ORDER FOR APPOINTMENT OF SPECIAL COMMISSIONER
FOR SALE OF REAL PROPERTY

Plaintiff's exhibits 1 through 7 are marked for identification.

9:39 a.m. This is the time set for trial to the Court. Plaintiff is present with counsel, Michael E. Hurley. Defendant is present with counsel, Teresa H. Foster.

A record of the proceeding is made by CD/videotape in lieu of a court reporter.

Plaintiff's case:

Kathy Echols is sworn and testifies.

Plaintiff's exhibit 7 is received in evidence.

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Plaintiff's exhibits 1 and 2 are received in evidence.

Plaintiff's exhibit 3 is received in evidence.

Plaintiff's exhibit 6 is received in evidence.

Plaintiff's exhibit 4 is received in evidence.

Plaintiff rests.

Defendant's case:

Troy Nyquist is sworn and testifies.

Defendant's exhibit 8 is marked for identification.

Defendant's exhibit 8 is received in evidence.

Defendant rests.

Closing arguments.

IT IS ORDERED taking the matter under advisement.

11:18 a.m. Hearing concludes.

LATER:

The Court took this matter under advisement after trial to the Court. The Court has considered the testimony of the parties, the evidence admitted and the argument of counsel.

Plaintiff seeks partition and sale of real property the parties hold in joint tenancy with right of survivorship. She seeks an equal distribution of the proceeds of the sale of the real property. Defendant does not want the real property to be partitioned and wants any equity in the real property to be distributed in accordance with the source for the funds utilized to acquire and maintain the real property. Since Defendant made the majority of the house payments, he seeks credit for a proportional amount of the equity in the real property. Plaintiff claims that the

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parties had an agreement to pool resources in order to live in and maintain the real property they occupied with their respective children. Defendant denies that claim.

Findings of Fact

The evidence shows that the Defendant acquired the real property as his sole and separate property. Plaintiff made certain mortgage and utility payments before she moved into the home in October 2001 and before the property was placed in joint tenancy. The parties became engaged in December 2001. The parties refinanced the house in May 2002 and Defendant quitclaimed the property to Plaintiff and Defendant in joint tenancy with right of survivorship when the house was refinanced. In connection with the refinancing, the parties took \$13,000.00 in equity out of the property. Those funds were used in part to start Defendant's new business and in part for home repair and improvement. During the time the parties lived together, Defendant made the majority of the house payments. Plaintiff made all the electricity, water, phone, and cable payments and paid for home improvements including repairs or replacement of the swimming pool filter and motor and plumbing services to repair a clogged sewer line on more than on occasion. Plaintiff regularly paid for pool chemicals and tree trimming. She also paid for the bulk of the food the parties ate and the expenses of birthday parties of Defendant's daughter. Plaintiff testified that she spent an amount in excess of the house payment each month paying for utilities, food and miscellaneous expenses. The parties had no joint bank accounts, credit card accounts or car loans. The parties broke off their engagement in June 2005 after Defendant refused to refinance the house so that Plaintiff could obtain a down payment for a new car when her fifteen year old car broke down. The parties continued to live together in the house until January 2007, when Defendant had Plaintiff excluded after he obtained an Order of Protection. After the engagement was broken and until she was excluded, Plaintiff continued to pay utility payments and other expenses although she no longer provided food for Defendant. Defendant testified that Plaintiff refused to move out claiming that it was her house too and that she had an interest in any increase in value of the home.

The evidence further shows that the amount due on the mortgage is approximately \$91,000.00, that many mortgage payments have been made late which has hurt the credit of both Plaintiff and Defendant, and that the house needs repairs to the pool, Nebraska room, treatment for termites and perhaps repair for termite damage. Defendant refuses to put any money into the house to do these repairs until this litigation is complete. The pool is currently green and the front yard consists of weeds and dirt. Defendant continues to reside in the home, and has, with the exception of a period of a few weeks when he lived elsewhere, continued to do so continuously since the time Plaintiff was excluded from the home. Defendant has obtained another Order of Protection and Plaintiff continues to be excluded from the home.

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Plaintiff claims that the parties had an agreement to pool resources and that they held the home for a common purpose. Defendant claims that they did not.

The Court finds that the parties, through their actions, demonstrated an agreement to jointly pay those expenses necessary to hold and maintain the property at issue so that they could live there together. There was a common effort to pay those expenses necessary to maintain their home ownership with each party paying certain of the necessary expenses. Each party contributed money and services necessary to further the life they and their respective children shared and to further their continued ownership, enjoyment and maintenance of the real property. Their division of who paid for what expenses is not unlike that of many married couples who each pay certain of their joint expenses. The property was held and maintained "through joint common effort for a joint common purpose." *Carroll v. Lee*, 148 Ariz. 10, 14, 712 P. 2d 293, 297 (1986).

Conclusions of Law

The Court finds that Defendant made a gift of a one-half interest in the property to Defendant when he placed the property in joint tenancy with right of survivorship. The Court finds that at the time the property was placed in joint tenancy, the parties had a valid implied agreement to combine efforts to maintain their ownership of and to make repairs to and improvements to the property. The fact that Defendant has changed his mind about the agreement at a later date does not make the original agreement invalid.

The Court finds that Plaintiff is the owner of an undivided one-half interest in the real property at issue. The Court finds that it is not practical to physically divide the real property. The Court finds that partition and sale of the real property is the appropriate remedy in this case.

IT IS ORDERED that the property shall be partitioned by sale and that the net proceeds of the sale shall be divided equally between the Parties.

IT IS ORDERED that Plaintiff may submit an application for attorney's fees pursuant to Rule 54 (g), Ariz.R.Civ. P.

IT IS ORDERED:

1. APPOINTMENT. **Robert B. Hunter, 7600 N. 16th St., Suite 100, Phoenix, AZ 85020**, is appointed as Special Real Estate Commissioner for Sale of Real Property. Said Real Property is located at **5225 West Sierra Street Glendale, AZ 85304**. Legal description is **Lot 95, Parkview West Unit One, according to Book 190 of Maps, Page 14, records of Maricopa County, Arizona**.

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2. **INSURANCE.** The Special Commissioner shall maintain a policy of Errors and Omissions Insurance consistent with the amount the Special Commissioner was required to have in place when he or she was authorized to act as a Special Commissioner plus the amount of any increases ordered by the Presiding Court by Administrative Order issued from time to time.

3. **COOPERATION AND ACCESS.** The parties and their attorneys shall cooperate in good faith in providing access to the property by the Special Commissioner. The party in possession of the premises shall provide the Special Commissioner with a key to the property within 48 hours after a request by the Special Commissioner. The Special Commissioner shall attempt to give reasonable notice to the parties before gaining access to the premises at reasonable times.

4. **MARKET ANALYSIS AND APPRAISAL.** The Special Commissioner shall, within ten days of being granted access to the premises, cause a market analysis of said property to be made, and shall deliver copies of said market analysis to the parties and (if applicable) to the parties' attorneys. Within ten days after receipt of the market analysis, either party may provide written comments about the market analysis to the Special Commissioner, and either party or the Special Commissioner may request an appraisal. The cost of the appraisal shall be paid by the requesting party or parties upon demand. The Special Commissioner shall have no obligation to obtain an appraisal unless the parties advance the appraisal fee except in those cases when the Special Commissioner is requesting the appraisal. In such cases, the Special Commissioner shall advance the appraisal fee to be reimbursed from the proceeds of sale after close of escrow. The Special Commissioner shall select an appraiser agreed to by both parties except that if the parties are unable to agree, the Special Commissioner shall select an independent appraiser.

5. **LISTING.** The subject real property shall be listed for sale in a commercially reasonable manner at the value estimated by the market analysis or, if applicable, at the appraised value. The parties shall execute and deliver a listing agreement substantially consistent with the current model listing agreement approved by Arizona Association of Realtors, and shall so deliver said listing agreement within three (3) days of presentation by the Special Commissioner. As used in this Order, the term "commercially reasonable manner" includes, but is not limited to [a] listing the property on the Multiple Listing Service (hereinafter, MLS), [b] stating a fair description of the properties' features, and [c] a statement of terms the sellers and the Special Commissioner will, and (as appropriate) will not, consider. If either party fails or refuses to execute the listing agreement as presented, the Special Commissioner may sign for them. The listing shall contain a provision that "the sale is subject to Court approval".

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6. **REPORTS.** The Special Commissioner shall upon request by either party or the Court report, in writing, the efforts made to sell the property. The Special Commissioner shall deliver copies of said report to both parties and (if applicable) their counsel, every 30 days. Said report shall include recommendations, if any, for changes to the offering terms. The report shall not be filed directly with the Court, however, either party may submit any or all reports for the Court's consideration in further proceedings.

7. **OFFERS.** The parties shall consider all written offers for purchase of the subject real property. Approval of terms of offer shall not be unreasonably withheld; approval, rejection, or counter-offer shall be made timely and in the manner necessary to consummate an arms-length real property transaction.

8. **CHANGES.** The Special Commissioner shall determine if reasonable changes are necessary to the terms of listing the property for sale if, after a period of not less than 90 days from the date of first publication in the MLS, the property remains unsold. As applied herein, "unsold" means the parties have not accepted a written offer for sale. The Special Commissioner shall make a recommendation in writing to the parties, and, if applicable, to their attorneys. If either party fails, neglects or refuses to deliver a written approval to/of changes to the terms of listing recommended by the Special Commissioner, the Special Commissioner or either party may petition the Court for hearing. Pending hearing, changes to the terms of listing suggested by the Special Commissioner shall be the terms which the property is offered for sale; the MLS listing shall note stated terms under these conditions to be "subject to Court approval". If neither party has requested a hearing within ten (10) days of mailing to their last known address or delivery of notice of the change recommended by the Special Commissioner, the recommendation shall be deemed accepted by the parties, and the phrase "subject to Court approval" may be removed from the MLS.

9. **COURT APPROVAL.** If the Special Commissioner receives a written offer to purchase the subject real property that the parties, or either of them, reject, the Special Commissioner may petition the Court for an accelerated hearing and for acceptance of the offer. If, after accelerated hearing, the Court determines the offer should be accepted, the Court may direct the Special Commissioner or the Clerk of Court, pursuant to Rule 89, Arizona Rules of Family Law Procedure, to make, execute and deliver the appropriate documents for consummation of sale. The Court shall impose sanctions against the party having unreasonably withheld approval of sale.

10. **PROCEEDS.** Net proceeds of sale shall be impounded by the title company engaged by the Special Commissioner, pending written agreement of the parties or Order of the Court.

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11. COMMISSION. Upon close of escrow, the Special Commissioner and the selling broker shall be paid a commission consistent with the reasonable and customary fees paid to Realtors in similar transactions in Maricopa County, Arizona.

12. PURCHASE BY PARTY. In the event either party wishes to purchase the subject real property, the purchasing party shall submit an offer to the other party in writing and provide a copy to the Special Commissioner. No party shall reject an offer unless that party can make a factual showing as to a reasonable basis for the rejection. All such offers that are rejected may be submitted to the Court for approval. In the event of an owner purchase or property withdrawal from sale based upon an agreement of the parties, Special Commissioner compensation shall be paid as follows:

a. Offers made and accepted prior to an executed listing agreement that are approved by the Court or agreed to by the parties shall result in a reasonable fee for the time expended, including preparation of the market analysis;

b. Agreements to sell by the parties or agreements approved by the Court after the listing agreement shall subject the offering owner to payment of a fee to the Special Commissioner. The fee shall be the greater of one percent (1%) of the total selling price or a reasonable hourly fee for the efforts expended by the Special Commissioner based upon reasonable hourly rates to be approved by the Court. In all such cases, the out-of-pocket expenses of the Special Commissioner shall be paid directly by the purchasing owner. All such fees and costs shall be paid from the proceeds of sale. In the event the proceeds of sale are insufficient to pay the Special Commissioner costs and fees, those fees shall be paid by the purchasing owner prior to close of escrow.

c. If, after receipt by the Special Commissioner of a bona fide offer to purchase the real property from a third party, either owner makes a written offer to purchase the real property, which offer is approved by the Court, the purchasing owner shall pay a commission to the Special Commissioner in the amount of three and one-half percent (3.5%) of the total selling price. A bona fide offer means an offer from a qualified purchaser presenting commercially reasonable terms. Payment of the Special Commissioner's fee shall be part of the Court's Order of approval requiring the payment as a contingency to the close of escrow.

13. SANCTIONS. The Court may impose additional sanctions for a party's unreasonable behavior under this order, including, but not limited to, adding an additional one percent (1%) of the selling price as compensation for services rendered as Special Commissioner, over and above the reasonable and customary fees paid for similar services not involving a Special Commissioner within Maricopa County. Other sanctions may include contempt, an award of attorney's fees, or removal from the premises.

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All parties representing themselves must keep the Court updated with address changes. A form may be downloaded at: <http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter>.

IT IS FURTHER ORDERED signing this minute entry as a formal order of this Court pursuant to Rule 81, Arizona Rules of Family Law Procedure.

DONE IN OPEN COURT this date: April 2, 2008.

/S/ KRISTIN HOFFMAN

Judge of the Superior Court