

FILED

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

AUG 13 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 322742

IN RE:

DAMIAN A. SCHWARZ

PETITIONER

AND

SUSAN M. SCHWARZ

APPELLANT

OPENING BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The trial court erred by entry of Provisions 2.8 and 2.9 of the Findings of Fact and Conclusions of Law, incorporating Exhibit A attached thereto, in which the trial court determined that Mr. Schwarz had a separate interest in the Charles Schwab IRA Account Number 5129 in the amount of \$159,189.44, rather than determining that the account was entirely community property. (CP 120, 124-5)
2. The trial court erred by entry of Provisions 2.8 and 2.9 of the Findings of Fact and Conclusions of Law, incorporating Exhibit A attached thereto, in which the trial court determined that the AIG (Western National Life) IRA in the name of Mrs. Schwarz was community property and not the separate property of Mrs. Schwarz. (CP 120, 124-5)
3. The trial court erred by entry of Provisions 2.8 and 2.9 of the Findings of Fact and Conclusions of Law, incorporating Exhibit A attached thereto, in which the trial court determined that the Bank of America IRA in the name of Mrs. Schwarz was community

property and not the separate property of Mrs. Schwarz.

(CP 120, 124-5)

- 4, The trial court erred by entry of Provisions 2.8 and 2.9 of the Findings of Fact and Conclusions of Law, incorporating Exhibit A attached thereto, in which the trial court determined that the D.A. Davidson Investment Account Number 6087 was community property and not the separate property of Mrs. Schwarz.

(CP 120-,124-5)

5. The trial court erred by entry of Provisions 2.8 and 2.9 of the Findings of Fact and Conclusions of Law, incorporating Exhibit A attached thereto, in which the trial court determined that an equalization payment in the amount of \$38,249.00 should be paid by Mrs. Schwarz to Mr. Schwarz. (CP 120, 124-5)

6. The trial court erred by entry of Provision 3.2 of the Decree of Dissolution, incorporating Exhibit A attached thereto, in which the trial court awarded Mr. Schwarz \$159,189.44 of the Charles Schwab IRA Account Number 5129 as his separate property.

(CP 128, 130-131)

7. The trial court erred by entry of Provision 3.3 of the Decree of Dissolution, incorporating Exhibit A, attached thereto, in which the trial court did not award to Mrs. Schwarz a one-half interest in the entire account balance of the Charles Schwab IRA Account Number 5129. (CP 128, 130-131)
8. The trial court erred by entry of Provision 3.2 of the Decree of Dissolution, incorporating Exhibit A, attached thereto, in which the trial court awarded Mr. Schwarz one-half the D.A. Davidson Investment Account Number 6087. (CP 128, 130-131)
9. The trial court erred by entry of Provision 3.3 of the Decree of Dissolution, incorporating Exhibit A, attached thereto, in which the trial court did not award to Mrs. Schwarz all of the D.A. Davidson Investment Account Number 6087. (CP 128, 130-131)
10. The trial court erred by entry of Provisions 3.2 and 3.3 of the Decree of Dissolution, incorporating Exhibit A, attached thereto, in which the trial court ordered Mrs. Schwarz to pay Mr. Schwarz an equalization payment in the amount of \$38,249.00. (CP 128, 130-131)

11. The trial court erred in denying the motion for reconsideration filed by Mrs. Schwarz and denied in the Order on Motion for Reconsideration. (CP 151-2)

Although not incorporated into the Findings of Fact and Conclusions of Law, Mrs. Schwarz also assigns error to the findings set forth in the trial court's Memorandum Decision. (CP 99-107)

12. The trial court erred in finding that Mr. Schwarz met the legal standards necessary to establish that the Charles Schwab IRA Number 5129 was primarily his separate property and erred in awarding \$159,189.44 from the account to Mr. Schwarz as his separate property. (CP 102)
13. The trial court erred in finding that a community property presumption existed as to the AIG/Western National IRA and that Mrs. Schwarz failed to overcome that presumption. (CP 103)
14. The trial court erred in finding that a community property presumption existed as to the Bank of America IRA and that Mrs. Schwarz failed to overcome that presumption. (CP 104)
15. The trial court erred in finding that the funds in the D.A. Davidson account were commingled to the extent that the entire account

should be considered community, erred in finding that any community contributions were made to this account and erred in awarding one-half the account to Mr. Schwarz rather than awarding the entire account to Mrs. Schwarz as her separate property. (CP 104)

ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Whether the trial court erred in concluding that Mr. Schwarz met his burden of proof in establishing a separate interest in the Charles Schwab IRA Account Number 5129.
2. Whether the trial court erred in concluding that Mrs. Schwarz did not meet her burden of proof in establishing that the AIG/Western National IRA was her separate property.
3. Whether the trial court erred in concluding that Mrs. Schwarz did not meet her burden of proof in establishing that the Bank of America IRA in her name was her separate property.
4. Whether the trial court erred in concluding that Mrs. Schwarz did not meet her burden of proof in establishing that the D.A.

Davidson Investment Account Number 6087 was her separate property.

5. Whether the trial court erred in concluding that an equalization payment in the amount of \$38,249.00 from Mrs. Schwarz to Mr. Schwarz was just and equitable.

STATEMENT OF THE CASE

Mr. and Mrs. Schwarz were married on September 18, 1999. (CP 120) They separated on July 22, 2012. (CP 120). There were no children of the marriage. (CP 121). At the time of trial in this matter, Mr. Schwarz was 59 years old and Mrs. Schwarz was 52 years old. (CP 99)

Mr. Schwarz testified at trial that at the time of marriage, he owned a home at 2904 West Riverview Drive in Spokane, Washington. (RP 44, lines 1-11). He further testified that at at the time of the marriage he operated a business known as AAA Computer Web that was later incorporated in 2001 as ACW Solutions, Inc. (RP 25, lines 1-20). Mr. Schwarz also testified that he had two Charles Schwab accounts in his name at the time of marriage, (designated as account numbers 3736, (RP 62, lines 20-25, RP 63, lines 1-18) and 5129 (RP 63, lines 21-25,)), various bank accounts, (RP 56, lines 11-25, RP 57, lines 1-3), two vehicles and other items of personal property. (RP 52, lines 2-25).

Mrs. Schwarz testified at trial that at the time of marriage she had personal property, a Washington Mutual bank account valued at \$49,719.35 as of August 26,1999, (RP 220, lines 9-25, RP 221, lines

1-15), a Washington Mutual IRA valued at \$5,770.21 as of July 12, 1999, (RP 265, lines 9-25, RP 266, lines 1-20), an AG Edwards & Sons account valued at \$45,180.59 as of June 25, 1999, (RP 299, lines 17-25, RP 300, lines 1-25, RP 301, lines 1-23), a WM Financial Services Account valued at \$6,339.18 as of March 31, 1999, (RP 305, lines 22-25, RP 306, lines 1-25, RP 307 lines 1-25, RP 308, lines 1-20), Cabletron Stock, valued at \$10,902.47 as of June 2, 1999, (RP 293, lines 2-25, RP 294, lines 1-13), a Cabletron Systems Inc. 401(k) valued at \$14,975.59 as of October 1, 1999, (RP 275, lines 13-25, RP 276, lines 1-12), a New York Life Insurance policy with a cash value of \$8,136.77, (RP 226, lines 18-25, RP 227, lines 1-22), and was owed cash from her mother's estate in the amount of \$39,192.10. (RP 224, lines 19-25, RP 225, lines 1-25, RP 226, lines 1-6). Mrs. Schwarz also testified that she was owed \$15,000.00 from Mr. Schwarz for a business loan made to him prior to marriage. (RP 309, lines 20-23

During the parties' marriage they resided in the home owned by Mr. Schwarz prior to marriage. (RP 44, lines 16-18). The parties made improvements to the home during the marriage. (RP 45, lines 12-14). Mrs. Schwarz testified that more than \$20,000.00 of her pre-marital funds

was spent on the remodel. (RP 191, 15-20).

Mrs. Schwarz testified that the pre-marriage balance in her Washington Mutual bank account totaled \$49,719.35. (RP 221, lines 14-15). She further testified that the only significant deposits to that account after the parties marriage included \$39,112.10 she inherited from her mother's estate, \$8,136.77 she received from cashing in her pre-marriage New York Life Insurance policy and a \$26,369.47 transfer from her D.A. Davidson account, which represented a partial return of an earlier \$56,000.00 deposit to that account. (RP 220-229, RP 232-243). Mrs. Schwarz provided additional testimony regarding the transfer of the Washington Mutual account to a Bank of America account and the use of some of the Bank of America funds to complete the remodel on Mr. Schwarz's separate property home. (RP 244-257; RP 256 lines 4-24)

Mrs. Schwarz also testified that during the marriage she made contributions to the Washington Mutual IRA that she owned prior to marriage and the source of the funds for those contributions was the separate funds of Mrs. Schwarz. (RP 268, lines 3-16, RP 269, lines 10-18). Mrs. Schwarz then testified that the Washington Mutual IRA was

closed and all funds were deposited into an IRA with AIG. (RP 270, 18-25). Mrs. Schwarz then testified that AIG became Western National, where the IRA funds were on deposit at the time of trial. (RP 270 -274)

Mrs. Schwarz also testified that Mr. Schwarz repaid the pre-marriage loan of \$15,000.00 she made to his business by transferring a Charles Schwab account into her name. (RP 309, lines 20-25, RP 310, lines 1-3). She further testified that she added 500 shares of separate property Cisco Stock to that account and then later transferred all of the holdings in this Charles Schwab account into her D.A. Davidson Investment Account. (RP 310, lines 4-25, RP 311-315 ending at line 17). Mrs. Schwarz then testified that she made an additional deposit of \$56,000.00 to the D.A. Davidson Investment Account from her separate funds approximately one year after the parties' marriage. (RP 308, lines 22-25)

Mrs. Schwarz then testified that her separate property funds held with WM Financial Services and AG Edwards & Sons were transferred into her D.A. Davidson Investment Account. (RP 299-308)

Mrs. Schwarz then testified that the Bank of America IRA in her name was established by a deposit from her separate funds, then held by

Bank of America. (RP 290, lines 14-25, RP 291-292)

Regarding the 401(k) in her name, Mrs. Schwarz testified that she began contributing to the account during the parties marriage. (RP 286, lines 19-25, RP 287-9). She further testified that she continued to make contributions to the account after the parties separation. (RP 289, 1-20). Mrs. Schwarz also testified about the roll-over of her pre-marital 401(k) accounts into the D.A. Davidson roll-over IRA in her name.

Mr. Schwarz testified that he established an account with Charles Schwab, (designated as account number 5129), prior to marriage. Mr. Schwarz further testified that he was unable to obtain a statement from Charles Schwab listing a balance in the account prior to marriage. (RP 141, 8-12). Mr. Todd Carlson, a Certified Public Accountant, testified about three contributions made during the marriage between 2006 and the date of separation. (RP109, lines 6-19).

Mr. Schwarz also testified that during the marriage he mailed \$34,000.00 in cash and gold to his ex-wife in California to assist with his daughter's education in Washington State. (RP 97, lines 16-25, RP 98 lines 2-3) Mr. Schwarz testified that the source of the funds for the cash

and gold were from cash distributions from ACW Solutions. (RP 72, 9-18)

Both parties provided additional testimony about other assets, the characterization of which were not significantly disputed. In addition to the testimony of the parties, the trial court considered exhibits submitted by the parties regarding each of the assets in dispute.

Regarding the Bank of America account in Mrs. Schwarz's name, the trial court was satisfied that Mrs. Schwarz had clearly and convincingly proven that the funds were her separate property and had not been commingled during the marriage. (CP 101)

Regarding the Charles Schwab Account Number 5129, in the name of Mr. Schwarz, the trial court concluded that it was satisfied that \$159,189.44 could be traced to contributions of Mr. Schwarz prior to marriage. (CP 102)

Regarding the Western National IRA in the name of Mrs. Schwarz, the trial court concluded that the community property presumption applied and that Mrs. Schwarz failed to rebut the presumption. (CP 103)

Regarding the D.A. Davidson rollover IRA in the name of Mrs. Schwarz, the trial court concluded that Mrs. Schwarz provided no

evidence to support her proposed division of that D.A. Davidson rollover IRA but did agree that a portion of the account was the separate property of Mrs. Schwarz and a portion was community property. (CP 103)

Regarding the Wells St. John 401(k) in the wife's name, the trial court found that the wife failed to provide a present value calculation regarding contributions made during the parties' separation and therefore concluded the entire account was community property. (CP 103-4)

Regarding the Bank of America IRA in the wife's name, the trial court concluded that Mrs. Schwarz did not rebut a community property presumption regarding that account and designated the entire account as community property. (CP 104)

Regarding the D.A. Davidson Investment Account in the name of Mrs. Schwarz, the trial court found the account to be "hopelessly commingled" and to attempt to segregate separate contributions from community contributions would be an "exercise in futility." The trial court designated the entire account as community property. (CP 104)

Regarding the \$34,000.00 in cash and gold, the trial court stated that "the wife's position in that the husband's entire story regarding gold and cash sent to his former wife is illogical and even ridiculous is

appropriate." However, the court did conclude that the cash and gold were the separate property of Mr. Schwarz. (CP 105-6)

After making additional findings and awards regarding the remaining assets, the trial court determined that Mr. Schwarz had separate property assets of \$404,693.08 and was awarded community property assets of \$107,952.20. The trial court then determined that Mrs. Schwarz had separate property assets of \$48,927.99 and was awarded community property assets of \$184,450.51. Based on those figures, the trial court ordered an equalization payment from Mrs. Schwarz to Mr. Schwarz in the amount of \$38,249.00. (CP 106; 124-125)

Mrs. Schwarz sought a reconsideration of the trial court's decision on a number of issues. The reconsideration request was denied. (CP 151-2)

STANDARDS OF REVIEW

Although a trial court has broad discretion when determining the division of property in a marriage dissolution action, the trial court's decision is reviewable for an abuse of discretion. **In re Marriage of Rockwell**, 141 Wn. App. 235 (2007). A trial court abuses its discretion when the trial court's decision is manifestly unreasonable or made on untenable grounds or for untenable reasons. **In re Marriage of Crump**, 175 Wn. App. 1045 (2013). As set forth in **In re Jannot**, 110 Wn. App. 16, 22, affirmed in part, 149 Wn.2d 123 (2002):

The abuse of discretion standard is not, of course unbridled discretion. Through case law, appellate courts set parameters for the exercise of the judge's discretion. At one end of the spectrum the trial judge abuses his or her discretion if the decision is completely unsupportable, factually. On the other end of the spectrum, the trial judge abuses his or her discretion if the discretionary decision is contrary to the applicable law.

And as stated in **In re Marriage of Littlefield**, 133 Wn.2d 39, 47 (1997),

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on

untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

The trial court's challenged findings are reviewed for a determination of whether there is a sufficient quantity of evidence to persuade a fair-minded, rational person that the premise is true. **In re Marriage of Griswold**, 112 Wn. App. 333 (2002).

ARGUMENT

"The well-established rule is that the character of property, whether separate or community, is determined at its acquisition."

Marriage of Pearson-Maines, 70 Wn. App. 860 (1993). "If the property was separate property at the time of acquisition, it will retain that character as long as it can be traced and identified." **Pearson-Maines**, at 865, citing **Baker v. Baker**, 80 Wn.2d 736, 745, 498 P.2d 315 (1972). "Moreover, the character of this separate property continues through changes and transitions if it can be traced and identified. Only if community and separate funds are so commingled that they may not be distinguished or apportioned is the entire amount rendered community property."

Pearson-Maines at 866, citing **In re Estate of Allen**, 54 Wn.2d 616, 622, 343 P.2d 867 (1959); **In re Estate of Witte**, 21 Wn.2d 112, 125, 150 P.2d 595 (1944); **E.I. DuPont de Nemours & Co. v. Garrison**, 13 Wn.2d at 176, 124 P.2d 939; **In re Estate of Binge**, 5 Wn.2d 446, 456-57, 105 P.2d 689 (1940). "When money in a single account cannot be apportioned to separate and community sources, the community property presumption will render the entire fund community property." **Pearson-Maines**, at

866, citing **In re Estate of Smith**, 73 Wn.2d 629, 631, 440 P.2d 179 (1968). "However, if the sources of the deposits can be traced and apportioned, and the use of withdrawals for separate or community purposes can be identified, the funds are not so commingled that the account itself becomes community property." **Pearson-Maines**, at 867, citing **Cross, The Community Property Law in Washington**, 61 Wash.L.Rev. 17, 62 (1986); "(mere commingling of funds in an account does not destroy separate funds if their amount can be apportioned)."

It is the burden of a spouse claiming that property is separate to trace the property to a separate source clearly and convincingly.

Marriage of Skarbek, 100 Wn. App. 448 (2000). On the other hand, if a party asserts separate property has been converted to community property, it is that party's burden to clearly and convincingly show the conversion through evidence, "usually a writing evidencing mutual intent." **Skarbek**, at 449, citing **Marriage of Shannon**, 55 Wn. App. 137 (1989). The name under which a party holds the property is not direct and positive evidence of the community or separate nature of the property. **Skarbek**, at 449, citing **Marriage of Hurd**, 69 Wn. App. 38 (1993) and **Estate of Deschamps**, 77 Wash. 514 (1914)

Even if commingled with community property, if a party can trace and apportion separate property and identify separate and community purposes, the commingling will not result in the conversion of separate property to community property. **In re Marriage of Pearson-Maines**, 780 Wn. App. 860 (1993), citing **Cross, The Community Property Law in Washington**, 61 Wash. L. Rev. 17 (1986). Self-serving testimony of a party alone will not be sufficient to trace and apportion separate property. **Berol v. Berol**, 37 Wn. 2d 380 (1950). However the testimony of a party coupled with documents such as bank statements and a tracking of deposits and expenditures has been found to be a sufficient level of tracing of separate property. **In re Marriage of Pearson-Maines** at 867.

CHARLES SCHWAB IRA NUMBER 5129

At trial Mr. Schwarz testified that he established an IRA with Charles Schwab, referred to as Account Number 5129, prior to the date of the parties marriage and that he had a balance in the account as of the date of marriage. (RP 63, lines 24-25, RP 64, lines 1-6) However, Mr. Schwarz was unable to produce any statements from Charles Schwab for this account that pre-dated the parties' marriage nor was he able to produce

any statements showing a balance in the account as of the date of marriage. (RP 141, 10-18) Mr. Schwarz testified that Charles Schwab was unable to provide him with a statement to support his testimony. (RP 141, 10-12)

Mr. Schwarz did call a C.P.A. as a witness to testify about three deposits Mr. Schwarz admitted were made to the account during the marriage. (RP 109, lines 6-19) The C.P.A. was not able to testify as to whether the account existed prior to marriage or as to whether or not there was a balance in the account as of the date of marriage but based his entire testimony on the assumption that there was a separate property balance of Mr. Schwarz prior to the year 2006. (RP 114, lines 12-15) The first document regarding the account reviewed by Mr. Carlson was dated in 2006. (RP 114, lines 16-18)

Other than the self-serving statements of Mr. Schwarz, the only evidence at trial was that the Charles Schwab IRA No. 5129 existed at the time of the parties' separation and that deposits were made into the account during the marriage. Mr. Schwarz's testimony that Charles Schwab could not provide him with a statement regarding when the

account was opened or the balance on the date of the parties' marriage lacked any credibility.

The self-serving statements regarding these accounts should have been viewed in light of other incredulous testimony offered by Mr. Schwarz. For example, Mr. Schwarz testified during that trial that during the parties marriage he mailed \$34,000.00 in cash and gold to his former wife in California to pay for their daughter's college expenses in the State of Washington. (RP 97, lines 16-25) He testified he mailed the funds via regular mail from a post office without even a return receipt being requested. (RP 116, lines 1-20) In its memorandum decision, the trial court stated that Mrs. Schwarz's position that his testimony was "illogical and even ridiculous" was appropriate. (CP 105)

There is no evidence that this account existed prior to the date of the parties' marriage. There is evidence that deposits were made into the account during the marriage. In this matter, the presumption should have been ~~that~~ the account is community property and Mr. Schwarz should have borne ~~the~~ burden of proving, clearly and convincingly, that the account was ~~his~~ separate property. The memorandum decision of the trial court states that the court was satisfied the account was opened prior to the

parties' marriage.

In **Berol v. Berol**, 37 Wn.2d 380 (1950), the husband claimed that an insurance policy taken out during the marriage was paid for by his separate property. At trial, no evidence was offered to support the husband's claim other than his own statements to that effect. **Berol** at 381.

The Washington State Supreme Court held as follows:

"The requirement of clear and satisfactory evidence is not met by the mere self-serving declaration of the spouse claiming the property in question that he acquired it from separate funds and a showing that separate funds were available for that purpose. Separate funds used for such a purpose should be traced with some degree of particularity." Berol at 382.

The trial court's finding that Mr. Schwarz met his burden of proving, clearly and convincingly, that this account was his separate property is not supported by a sufficient quantity of evidence to meet the substantial evidence standard. The trial court's decision on this issue was an abuse of discretion.

WESTERN NATIONAL IRA

At trial, Mrs. Schwarz testified that she had a Washington Mutual IRA prior to the date of the parties' marriage. (RP 265, lines 16-25). A

statement verifying the existence of the account as far back as 1995 was admitted into evidence as Exhibit R119, page 1. An additional statement showing the account balance just prior to marriage was also admitted into evidence as page 2, Exhibit R119. Two additional Washington Mutual bank statements showing withdrawals from Mrs. Schwarz's Washington Mutual Bank account and the corresponding deposits into the Washington Mutual IRA account on April 15, 2005 and April 17, 2007 were also admitted into evidence as pages 3-9 of Exhibit R119. The Washington Mutual bank account later became the Bank of America Checking and Savings accounts. (RP 256, lines 4-24) The trial court found those accounts to be the separate property of Mrs. Schwarz from prior to the parties' marriage and found they had not been commingled during the marriage. (CP 101).

Next Mrs. Schwarz provided documents showing the closure of the Washington Mutual IRA via disbursement of a check for \$13,521.05 and the opening statement for an IRA with AIG in the amount of \$13,521.05. (EX R119, pages 14-17) The opening date of the AIG IRA was the same date as the closing date of the Washington Mutual IRA. (EX R119, page 17)

Mrs. Schwarz then testified that AIG later became Western National. (RP 273, lines 12-13). A statement from Western National showing the same account number as the AIG account was admitted into evidence as Exhibit R119, page 18. The closing balance on the AIG IRA statement was the same as the opening balance on the Western National IRA statement. Finally, Mrs. Schwarz provided a statement from Western National as of April 8, 2013 that was admitted as Exhibit R105.

Through testimony and documentary evidence, Mrs. Schwarz clearly and convincingly established that she had an IRA account before marriage and that the only contributions made during the marriage were from a source of funds the trial court later determined to be her separate property. She further clearly and convincingly established through testimony and documentary evidence that the Washington Mutual IRA was transferred to AIG which later became Western National.

On the other hand, Mr. Schwarz offered no evidence to establish the conversion of this account from separate property to community property.

The trial court erred in concluding that this account was

presumptively community property and that Mrs. Schwarz failed to meet her burden of overcoming that presumption. This account existed prior to marriage. There was no commingling of funds. It was a separate property asset of Mrs. Schwarz prior to marriage and its character did not change during the marriage. With clear and convincing evidence of this asset's separate nature and lack of any evidence to establish a conversion from separate to community property, this asset should have been determined to be the separate property of Mrs. Schwarz. In keeping with the court's ruling regarding separate assets, (i.e. the assets identified by the court as a party's separate asset were awarded to that party), it should have been awarded to Mrs. Schwarz.

"Once established, separate property retains its separate character unless changed by deed, agreement of the parties, operation of law or some other direct and positive evidence to the contrary." **Marriage of Skarbek**, 100 Wn. App. 444 (2000), citing **In re Witte's Estate**, 21 Wn.2d 112 (1944) and **In re Estate of Madsen**, 48 Wn.2d 675 (1956). There was substantial evidence to support the finding that this account was the separate property of Mrs. Schwarz. There was not substantial evidence

to support the finding of the trial court that this account was community property. The trial court's decision on this issue was an abuse of discretion.

BANK OF AMERICA IRA

The trial court found the Bank of America Checking and Savings accounts in Mrs. Schwarz's name to be her separate property. (CP 101). The trial court based its finding on its determination that the source of the funds was the separate property of Ms. Schwarz from prior to marriage and that the accounts had not been commingled with community property.

Mrs. Schwarz testified at trial that on April 2, 2010, she withdrew \$4,200.00 from her Bank of America checking and savings account and deposited the same amount into the Bank of America IRA. Further, Mrs. Schwarz provided bank statements showing an April 2, 2010 withdrawal in the amount of \$4,200.00 from her account that was titled "Withdrawal to Fund IRA", as well as the Bank of America Retirement Portfolio statement showing that an IRA had been opened the same day with a deposit of \$4,200.00. These statements were admitted into evidence as Exhibit R118, page 1 and R118, page 2-3. At the time of trial, the IRA was worth \$4,435.94. (RP 292, line 10).

The trial court found that the account was presumptive community property and that Mrs. Schwarz failed to rebut the presumption. But according to the trial court's own findings, the Bank of America IRA was funded by the separate property of Mrs. Schwarz; property she owned prior to marriage. Although the separate funds were taken from her Bank of America account and deposited into a Bank of America IRA account, the transfer of the separate funds was clearly traceable and identifiable. There was no evidence of commingling to an extent that the funds could not be traced and identified.

The trial court erred in concluding this account was presumptively community property. Even if the presumption applied, Mrs. Schwarz established through clear and convincing evidence that the account was in fact separate property. Conversely, Mr. Schwarz provided no evidence that the account had been converted from separate property to community property.

There was substantial evidence to support the finding that this account was the separate property of Mrs. Schwarz. There was not substantial evidence to support the finding of the trial court that this account was community property. The trial court's decision on this issue

was an abuse of discretion.

D.A. DAVIDSON INVESTMENT ACCOUNT

Mrs. Schwarz spent considerable time at trial testifying as to the funds held in her D.A. Davidson Investment Account and introducing documents to support her testimony. The D.A. Davidson account was funded by a number of sources, all of which were the separate property of Mrs. Schwarz.

1. AG Edwards & Sons

At trial Mrs. Schwarz testified that she owned an account with AG Edwards & Sons prior to her marriage to Mr. Schwarz. (RP 299, lines 17-25, RP 300, lines 1-25, RP 301 1-23) A statement from AG Edwards & Sons dated March 17, 1999 to June 25, 1999, (prior to the date of marriage), showing an account value of \$45,180.59 for an account in the name of Mrs. Schwarz, (under Susan Champagne, her name prior to marriage), was admitted into evidence as Exhibit R121, pages 1-2. The statement details the specific shares and funds held in the AG Edwards & Sons account. This account was the separate property of Mrs. Schwarz.

Mrs. Schwarz testified that she transferred the shares and funds

from AG Edwards & Sons to a D.A. Davidson Investment Account on January 27, 2000, approximately four months after the parties' marriage. (RP 299-304, RP 305 1-14) A March 31, 2000 statement for the D.A. Davidson Investment Account showing a transfer in of the same stocks and funds previously held in the AG Edwards & Sons account as of January 27, 2000 was admitted into evidence. (EX R121, pages 4-6) (RP 301, lines 24-25) This fund, along with the WM Financial Services fund in her name, was used to open the D.A. Davidson Investment Account in her name. (RP 302, 16-25)

2. WM Financial Services

Mrs. Schwarz testified that she owned an account with WM Financial Services prior to marriage. (RP 305, lines 22-25, RP 306-308) A statement from WM Financial Services in her name, dated March 31, 1999, (prior to the date of marriage), was admitted into evidence as Exhibit R121, page 3. As testified to by Mrs. Schwarz and as set forth in Exhibit R121, page 3, the WM Financial Services account consisted entirely of 107.441 shares of Fidelity Contrafund. (RP 307, lines 1-14). Further, Mrs. Schwarz had selected the dividend reinvestment option. (RP

308, lines 5-6) This account was the separate property of Mrs. Schwarz.

Mrs. Schwarz then testified that she transferred all of her shares in Fidelity ContraFund to the D.A. Davidson Investment account when she opened the account. (RP 307, lines 19-25, RP 308, lines 1-10) The D.A. Davidson Investment Account statement showing a transfer to D.A. Davidson of the Fidelity Contrafund shares on January 27, 2000, just months after the parties' marriage, was admitted as Exhibit R121, pages 4-6.

3. Washington Mutual

Mrs. Schwarz provided sufficient evidence for the trial court to determine that the Washington Mutual Checking and Savings accounts, which later became the Bank of America Checking and Savings accounts, were her separate property from prior to marriage and were not commingled with community property. (CP 101) Mrs. Schwarz then provided her Washington Mutual statement showing a transfer of \$56,000.00 from her Washington Mutual account to the D.A. Davidson Investment Account in her name. This statement was admitted into evidence as Exhibit R120, page 8. She also provided the corresponding

D.A. Davidson Investment Account statement showing the deposit of \$56,000.00. Exhibit R121, page 7. Mrs. Schwarz then provided statements from the D.A. Davidson Investment account showing withdrawals of \$10,000.00 and \$16,369.47, (EX R120, pages 10-11), both of which were deposited back into her separate Washington Mutual account. (RP 246, lines 8-25, RP 247, lines 1-5)

The Washington Mutual funds were the separate property of Mrs. Schwarz. The net deposit of \$29,630.53, (\$56,000.00 deposited less \$26,369.47 withdrawal), into the D.A. Davidson Investment account was entirely her separate property

4. Charles Schwab

a. Cisco Stock

Mrs. Schwarz testified that she owned 736 shares of Cabletron stock prior to marriage. (RP 293, lines 4-25, RP 294, lines 1-13) A statement dated June 2, 1999 showed that number of shares, with a market value of \$10,902.37, in her name, three months prior to the date of the parties marriage. That statement was admitted into evidence as Exhibit R116, page 1.

Mrs. Schwarz testified that she sold the Cabletron stock and purchased 500 shares of Cisco stock. (RP 295, lines 2-23). E-Trade statements in Mrs. Schwarz's former name, (Champagne), dated March 31, 2001 and March 31, 2009 showed that she held 500 shares of Cisco stock as of those dates. Those statements were admitted into evidence as Exhibit R116, pages 5 and 9. An additional statement showing the transfer of those 500 shares of Cisco from that E-Trade account into the Charles Schwab account in Mrs. Schwarz's name on September 11, 2009 was admitted into evidence as Exhibit R121, pages 13-16.

b. Loan repayment

The trial testimony of both parties confirmed that Mrs. Schwarz loaned Mr. Schwarz \$15,000.00 prior to the date of the parties marriage. (RP 309, 20-25) The \$15,000.00 loan was repaid by the transfer of a Charles Schwab account in Mr. Schwarz's name to Mrs. Schwarz. (RP 309, 20-25) The account was valued at \$15, 591.84 and was made up of specific shares of stock and mutual funds. (RP 138, 4-20, RP 310, lines 4-12)

The respondent then provided a statement documenting the transfer

of the 500 shares of Cisco mentioned above into the Charles Schwab account in her name. This statement was admitted into evidence as Exhibit R121, pages 13-16. This Charles Schwab account then held the 500 shares of Cisco stock purchased by the sale of her separate property Cabletron stock and the stocks and mutual funds transferred into Mrs. Schwarz's name in repayment of the pre-marriage loan.

Mrs. Schwarz testified that she transferred the stocks and mutual funds held in her E-Trade account into the D.A. Davidson Investment Account in her name. (RP 312, lines 8-25, RP 313-315 ending at line 12) A Charles Schwab statement for the account in her name detailing the stocks and mutual funds held in the month prior to the transfer was admitted into evidence as Exhibit R121, pages 21-29.

Mrs. Schwarz then provided a statement from the D.A. Davidson Investment Account in her name, dated the very next month, showing the deposit into that account of the exact same shares and mutual funds previously held in her name with Charles Schwab. The statement was admitted into evidence as Exhibit R121, pages 30-34. The funds in the Charles Schwab account were the separate property of Mrs. Schwarz. They remained her separate property after being deposited into her D.A.

Davidson Investment Account.

The D.A. Davidson Investment Account was funded entirely by four sources, all of which were the separate property of Mrs. Schwarz: Her pre-marital AG Edwards & Sons account; her pre-marital WM Financial Services Account; funds from her separate property Washington Mutual account; and her separate property Charles Schwab account. All transitions in the separate property were clearly traced, often by showing the exact same shares being moved from one separate property account to another. Even had there been a community property presumption, Mrs. Schwarz provided clear and convincing evidence of the separate nature of the property.

Even if the trial court had determined that some community funds were deposited into the D.A. Davidson Investment Account, the above referenced funds would still remain the separate property of Mrs. Schwarz. Only when money placed into a single account cannot be apportioned to separate and community sources will it be considered so commingled that the community property presumption applies. **In re Marriage of Pearson-Maines**, 70, Wn. App. 860 (1993). If the sources of funds

are clearly traceable and apportioned, the funds are not so commingled that the account itself becomes community property. **In re Marriage of Pearson-Maines**, at 867. In the present case, all of the sources of funds were initially separate property and were clearly traceable into the D.A. Davidson Investment Account and easily apportioned as to each specific source.

There was substantial evidence to support the finding that the assets deposited into this account were the separate property of Mrs. Schwarz and that the account itself is her separate property. There was not substantial evidence to support the finding of the trial court that any of the separate assets deposited into the account were "hopelessly commingled" with community assets. The trial court's decision on this issue was an abuse of discretion.

EQUALIZATION PAYMENT

After reaching its conclusions regarding the value and nature of the community and separate property, the trial court awarded each party what it found to be that party's separate property. Mr. Schwarz was awarded \$404,693.08 in separate property. Mrs. Schwarz was awarded \$48,927.99 in separate property.

The trial court then awarded Mr. Schwarz \$107,952.50 in community property and awarded Mrs. Schwarz \$185,450.51 in community property. In order to reach a 50/50 division of community property, the trial court then ordered Mrs. Schwarz to pay Mr. Schwarz a cash equalization payment of \$38,249.00. The net result of the court's award was total community and separate property to Mr. Schwarz of \$550,894.58 and total community and separate property to Mrs. Schwarz of \$195,129.50.

The trial court's division of property and debt in a dissolution action does not have to be equal but must be just and equitable. RCW 26.09.080. Even if the trial court had not erred in determining the community versus separate nature of the property in this matter, the trial court's award of an equalization payment from Mrs. Schwarz to Mr. Schwarz was not just and equitable. In its determination, the trial court did not find that Mrs. Schwarz did not have substantial separate property prior to marriage but rather found that it was commingled with community property. Even if the court's findings as to the nature of the property were correct, then Mrs. Schwarz's separate property increased the community

property that was then equally split with Mr. Schwarz, while his separate property remained entirely his.

Further, the award of an equalization payment is not appropriate considering the mis-characterization of community and separate property.

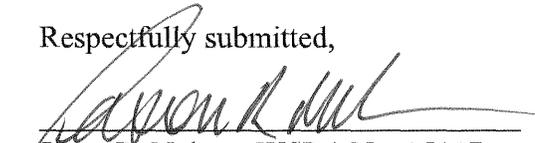
Under these circumstances, the award of an equalization payment was neither just nor equitable and therefore an abuse of the court's discretion.

CONCLUSION

It is respectfully requested that the trial court's decision be reversed as follows and that the assets themselves be awarded as follows: The Charles Schwab IRA Number 5129 should be found to be community property and equally divided between the parties; the Western National IRA should be found to be the separate property of Mrs. Schwarz and awarded to her as her separate property; the Bank of America IRA should be found to be the separate property of Mrs. Schwarz and awarded to her as her separate property; and the D.A. Davidson Investment Account should be found to be the separate property of Mrs. Schwarz and awarded to her as her separate property. Additionally, taking into account the above and the nature and extent of Mr. Schwarz's separate property, Mrs.

Schwarz requests that the court reverse the trial court's decision as to the equalization payment ordered and order that no equalization payment be required.

Respectfully submitted,



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