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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III
No. 322742

IN RE:
DAMIAN A. SCHWARZ
Respondent
and.
SUSAN M. SCHWARZ
Appellant

BRIEF OF RESPONDENT

Salina, Sanger & Gauper
Martin L. Salina WSBA #6905
Attorney for Respondent
422 West Riverside, Suite 824
Spokane, WA 99201
(509) 838-2700

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I.

STATEMENT OF THE CASE

1. Charles Schwab IRA Account Number ... 5129

Mr. Schwarz testified, and the trial court found, that he had contributed both to a 401(K) plan and a defined benefit plan with National Cash Register company, his employer prior to marriage (RP 63, lines 21-25, CP 102).

He further testified that he was unable to secure statements relative to the account balances that were in existence at the time of marriage (RP 141, lines 8-12).

Mr. Todd Carlson, CPA, testified that four contributions were made during the marriage to the premarital accounts after they had been rolled into the Schwab 5129 account (RP 109, lines 6-9).

Mr. Schwarz did produce the "IRA Contribution Information Form 5498" for each of the four years in which contributions were made by the community (Exhibit Petitioner 1, 2, 3, 4).

Mr. Todd Carlson, CPA, testified that these contributions made during the marriage, totaling \$21,870, had a value of \$26,082 at the time of trial (RP 113, lines 21-24).

2. Western National IRA

Mrs. Schwarz did testify that she had a Washington Mutual Savings Bank IRA account prior to the marriage of the parties (RP 265, lines 16-25).

This account had a value of \$5,770.21 on July 1, 1999 (Exhibit Respondent 119, page 2).

Mrs. Schwarz testified that during the marriage, she made two deposits into this account. One deposit in the amount of \$3,000 was made on April 15, 2005, and a second deposit of \$4,000 was made on April 17, 2007 (RP 345, lines 20-25; 346, lines 1-25; 346, lines 1-5; Exhibit Respondent 119, pages 3, 9).

The deposits to the IRA account of \$3,000 and \$4,000 respectively, came from an account held in both parties' names at Washington Mutual Savings Bank, account number...6711-3 (Exhibit Respondent 119, page 4, 9).

She further testified that her earnings from her employment during the marriage were deposited to the Washington Mutual checking account from which these IRA contributions were made (RP 338, lines 1-11; 345, lines 20-25; 346, lines 1-25; 347, lines 1-5).

3. Bank of America IRA

Mrs. Schwarz did provide statements on an account held in her name alone at Washington Mutual Savings Bank, account number...2369-0, establishing a value in that account of \$49,719.35, prior to the marriage (Exhibit Respondent 119).

After the marriage of the parties, the parties opened a joint account in their names at Washington Mutual Savings Bank, account number...5779-2 (Exhibit Respondent 120).

They transferred \$47,979 from Washington Mutual Savings Bank account #...2369-0 into Washington Mutual Savings Bank account #...5779-2 on October 18, 1999 (Exhibit Respondent 120).

Mrs. Schwarz testified that during the marriage, her earnings were deposited to this Washington Mutual Savings Bank account (RP 338, lines 16-17).

The Washington Mutual Savings Bank account was ultimately transferred to Bank of America in September of 2008, to account numbers ...2732 and ...4899-4. Both were established as joint accounts naming both spouses (Exhibit Respondent 118, page 1).

On April 2, 2010, Mrs. Schwarz withdrew \$4,200 from the joint Bank of America checking and savings accounts, and deposited \$4,200 into a Bank of America IRA in her name (Exhibit Respondent 118, page 1, 2, and 3).

4. D.A. Davidson Investment Account Number ... 6087

1. AG Edwards & Sons, Account Number...1441-014

Mrs. Schwarz testified that she owned, as her separate property, an AG Edwards & Sons account number...1441-014, which held both stock and cash. This account was worth \$45,180.59 on June 25, 1999 (Exhibit Respondent 121, pages 1-2).

This account was transferred to D.A. Davidson, account number...6087, in March of 2000 (Exhibit Respondent 121, pages 4-7).

2. WM Financial Services

Mrs. Schwarz testified that on March 31, 1999, prior to marriage, she held an account at Washington Mutual Financial Services, consisting of 107.441 shares of Fidelity Contrafund, valued at \$6,399.18 (RP 305, lines 22-25; RP 306-308; Exhibit Respondent 121, page 2).

Mrs. Schwarz testified that these shares were transferred to D.A. Davidson account number 6087 on January 27, 2000, some nine months later (RP 307, lines 19-25; RP 308, lines 1-10).

Mrs. Schwarz did not produce a Washington Mutual Financial Services statement showing the transfer of this account to D.A. Davidson. She did provide a D.A. Davidson statement dated January 27, 2000, evidencing a deposit of 129.167 shares of Fidelity Contrafund, to the D.A. Davidson account number ...6087. However, this statement does not provide any information regarding the source of this transferred stock (Exhibit Respondent 121, pages 4-6).

The trial court justifiably concluded that, given the disparity in the number of shares (107.441 shares vs. 129.167 shares), as well as the passage of time, as well as the lack of any documentation confirming that the 129.167 shares came from the premarital account, that the evidence was insufficient to establish that the Contrafund stock contribution was separate in nature (CP 104).

3. Washington Mutual

Mrs. Schwarz did provide a statement from Washington Mutual Savings Bank account number...2369-0, showing a balance of \$49,719.35 on September 27, 1999 (Exhibit Respondent 120-1).

Between the date of marriage on September 18, 1999, and the transfer of \$56,000, approximately one year later on August 22, 2000, this account had been converted by the parties to a joint account with a new account number, account number ...5779-2 (Exhibit Respondent 121-3). Between September 18, 1999 and August 22, 2000, Mrs. Schwarz was depositing her paycheck to this account (RP 338, lines 1-11; 345, lines 20-25; 346, lines 1-25; 347, lines 1-5).

4. Charles Schwab

a. Cisco Stock

Mrs. Schwarz did establish that she owned 736 shares of Cabletron stock on June 2, 1999, prior to the marriage (RP 293, lines 4-25; RP 294, lines 1-13; Exhibit Respondent 116, page 1).

She also established that in June and July of 2000, she sold 482 shares of Cabletron stock, and received proceeds totaling

\$11,270.26 (Exhibit Respondent 116, pages 2, 3, and 4), holding these proceeds in her E-Trade account number ... 4575-005.

Mrs. Schwarz did introduce an exhibit showing that on March 31, 2001, that she held 500 shares of Cisco stock in her E-Trade account (Exhibit Respondent 116, page 5).

Mrs. Schwarz provided no documentary evidence that the Cabletron proceeds were used to purchase the Cisco stock.

Respondent's Exhibit 121, at pages 13-16, does not establish that the 500 shares of Cisco stock was transferred from the E-Trade account to a Charles Schwab account.

Page 13 of Respondent's Exhibit 121 establishes that on June 10, 2004, Mrs. Schwarz opened an account at Charles Schwab, account #...9712. Pages 14, 15, and 16 of Exhibit Respondent 121 establish that some type of transfer from her E-Trade account #...1059 to her Schwab account #...9712, was instructed at the time that this form was signed on September 11, 2009.

The pages of this exhibit, however, do not establish the transfer of the Cisco stock, and no confirmation of the transfer was provided to the trial court.

b. Loan Repayment

Mrs. Schwarz did testify that on May 31, 2004, she had a Charles Schwab account number ... 9712, which held \$15,591.84 (RP 310, lines 8, 9), and that these funds represented a repayment to her of a loan made to Mr. Schwarz prior to the marriage (RP 309, lines 20-22).

Mr. Schwarz testified that he did not recall the specifics of this transaction (RP 138, page 6-8).

Mrs. Schwarz testified that she transferred stocks and mutual funds from this Schwab account number ... 9712 (not the E-Trade account as stated at page 37 of her Brief), to D.A. Davidson account number ... 6087 (RP 312, lines 8-25; RP 313-315, ending at line 17), in May of 2012.

II.

ARGUMENT

CHARLES SCHWAB IRA ACCOUNT NUMBER 5129

Mr. Schwarz testified, and the trial court found, that he had contributed both to a 401(K) plan and a defined benefit plan with National Cash Register company, his employer prior to marriage (RP 63, lines 21-25, CP 102).

He further testified that he was unable to secure statements relative to the account balances that were in existence at the time of marriage (RP 141, lines 8-12).

However, through the testimony of Mr. Todd Carlson, CPA, it was established that four contributions were made during the marriage to the premarital accounts after they had been rolled into the Schwab 5129 account (RP 109, lines 6-9).

Mr. Schwarz did produce the "IRA Contribution Information Form 5498" for each of the four years in which contributions were made by the community (Exhibit Petitioner 1, 2, 3, 4).

Mr. Todd Carlson, CPA, testified that these contributions made during the marriage, totaling \$21,870, had a value of \$26,082 at the time of trial (RP 113, lines 21-24).

Although Mr. Schwarz was unable to produce a document establishing his separate property interest at the time of marriage (15 years earlier), he did provide testimony and documentation of the exact community contributions and their exact value at the time of trial. Simple math allowed the trial court to reduce the total value of the account at the time of trial, by the present value of the community interest at the time of trial, which produced a net sum

representing the present value of Mr. Schwarz's separate property interest at the time of trial.

Mrs. Schwarz, of course, had equal access to the jointly filed tax returns during the marriage, and did not offer any evidence rebutting Mr. Schwarz's evidence concerning the community contributions, nor did she attempt to secure rebutting evidence (RP 345, lines 12-19).

The trial court had substantial evidence to support the court's finding that this account originated with Mr. Schwarz's premarital retirement investments. There was clear and convincing evidence that the only contributions to this account during the marriage totaled \$21,870, and the present value of those contributions at the time of trial was established by the expert testimony of Mr. Todd Carlson, which established that the community value in this account was \$26,082, and the remaining balance of \$159,189.44, was Mr. Schwarz's separate property.

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

Wash.App. 860, 855 P.2d 1210 (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, supra.

In this case, the trial court had substantial evidence establishing the value of the community contributions and, thus, had substantial evidence to support its characterization.

WESTERN NATIONAL IRA

Mrs. Schwarz did, in fact, testify that she had a Washington Mutual Savings Bank IRA account prior to the marriage of the parties (RP 265, lines 16-25).

This account had a value of \$5,770.21 on July 1, 1999 (Exhibit Respondent 119, page 2).

However, Mrs. Schwarz acknowledged that during the marriage, she made two deposits into this account. One deposit in the amount of \$3,000 was made on April 15, 2005, and a second deposit of \$4,000 was made on April 17, 2007 (RP 345, lines 20-25; 346, lines 1-25; 346, lines 1-5; Exhibit Respondent 119, pages 3, 9).

The deposits to the IRA account of \$3,000 and \$4,000 respectively, came from an account held in both parties' names at Washington Mutual Savings Bank, account number...6711-3 (Exhibit Respondent 119, page 4, 9).

She further testified that her earnings from her employment during the marriage were deposited to the Washington Mutual checking account from which these IRA contributions were made (RP 338, lines 1-11; 345, lines 20-25; 346, lines 1-25; 347, lines 1-5).

Mrs. Schwarz commingled her separate property IRA account with community funds by depositing \$7,000 from community earnings during the marriage.

Mrs. Schwarz did not attempt to segregate, prorate, or provide a present value of the separate and community property interests in this commingled account.

The trial court did not find the Washington Mutual Savings Bank account listed above, to be Mrs. Schwarz's separate property.

The bank accounts that the trial court found to be Mrs. Schwarz's separate property were Bank of America account numbers...2732 and ...4899-4 (CP 124).

Mrs. Schwarz did testify that in September of 2008, years after she made the contributions to her IRA account, she transferred the Washington Mutual checking accounts to Bank of America, account numbers...2732 and ...4899-4. (RP 255, lines 1-25; 256, lines 1-25) It is these Bank of America accounts that the trial court found to be her separate property at the time of trial (CP 124). The fact that the trial court found the Bank of America balances at the time of trial in 2013 to be Mrs. Schwarz's separate property, does not mean inferentially (as Mrs. Schwarz seems to suggest) that the Washington Mutual Savings Bank balances from which the IRAs were funded in 2005 and 2007 were, likewise, also Mrs. Schwarz's separate property. These were two different accounts and, of course, there was a substantial lapse of time between the contributions and the characterization of these Bank of America accounts as her separate property at the time of trial.

At the point of the community property contributions to the Washington Mutual IRA, it was commingled, thus, the funds transferred to AIG (Western National) were also commingled.

The Western National IRA was funded with the premarital funds of Mrs. Schwarz, which had a value of \$5,770.21 on July 1,

1999, as well as community contributions made after the marriage in the amount of \$3,000 on April 15, 2005, and \$4,000 on April 17, 2007. Mrs. Schwarz did not provide any testimony regarding segregation, apportionment, or values of the respective contributions at the time of trial.

When money placed into a single account cannot be apportioned to separate and community sources, it will be considered so commingled that the community property presumption applies. In re Marriage of Pearson-Maines, 70 Wash.App. 860, 855 P.2d 1210 (1993).

Mrs. Schwarz failed to introduce any evidence relative to gains or losses within the account during the marriage and, thus, failed to value the respective contributions at the time of trial.

BANK OF AMERICA IRA

Mrs. Schwarz did provide statements on an account held in her name alone at Washington Mutual Savings Bank, account number...2369-0, establishing a value in that account of \$49,719.35, prior to the marriage (Exhibit Respondent 119).

After the marriage of the parties, the parties opened a joint account in their names at Washington Mutual Savings Bank, account number...5779-2 (Exhibit Respondent 120).

They transferred \$47,979 from Washington Mutual Savings Bank account #...2369-0 into Washington Mutual Savings Bank account #...5779-2 on October 18, 1999 (Exhibit Respondent 120).

Mrs. Schwarz testified that during the marriage, her earnings were deposited to this Washington Mutual Savings Bank account (RP 338, lines 16-17).

The Washington Mutual Savings Bank account was ultimately transferred to Bank of America in September of 2008, to account numbers ...2732 and ...4899-4, both were established as joint accounts naming both spouses (Exhibit Respondent 118, page 1).

On April 2, 2010, Mrs. Schwarz withdrew \$4,200 from the joint Bank of America checking and savings accounts, and deposited \$4,200 into a Bank of America IRA in her name (Exhibit Respondent 118, page 1, 2, and 3).

The trial court found as follows:

Again, the wife's argument regarding the separate nature of this account was never conclusively demonstrated to the Court, nor was any accounting provided to rebut the community property presumption. (CP 104)

The court found that the IRA was funded during the marriage and, thus, was presumptively a community asset.

Mrs. Schwarz failed to provide any accounting as to whether or not the funds in the Bank of America account used to fund the IRA in her name, were community or separate property at the time of the transfer in April of 2010. In light of the community property presumption, the trial court correctly found the IRA to be funded with community funds.

Three years later, at the time of trial, the court did find that the funds in the Bank of America accounts at that time, were her separate property. Contrary to Ms. Schwarz's argument, one finding is not inconsistent with the other.

Importantly, the trial court did not find the Bank of America account from which the IRA was funded, to be her separate property and, in fact, determined that the community property

presumption required the court to find the contributions to be community in nature.

There was substantial evidence to support the trial court's finding that the community property presumption regarding this account was not rebutted. 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 Wash. App. 448, 997 P2d 447 (2000).

Mrs. Schwarz commingled the assets held in the Washington Mutual Savings Bank accounts with her community property earnings, and then transferred the commingled accounts to Bank of America, from which she funded the subject IRA. She did not produce any tracing, segregation, or provide evidence as to the present value of the respective contributions. Thus, the community property presumption applied by the trial court was correct.

D.A. DAVIDSON INVESTMENT ACCOUNT NUMBER 6087

All contributions which Mrs. Schwarz attempts to trace into this D.A. Davidson Investment Account number 6087, were made

after the parties were married. As Judge Price stated in his

Memorandum Decision:

Perhaps to the greatest extent of all assets of this marital estate, this account's various metamorphosis over the years can best be characterized as an accounting nightmare. Without exaggeration, this particular asset's present status is derived from a plethora of sources, including but not limited to Charles Schwab, A.G. Edwards, Washington Mutual, Contrafunds, Cabletron Shares, Cisco, and E-Trade. The best analogy the Court can think of to express the complexity at this attempt at tracing would be to ask me to unwind a seemingly endless ball of multicovered twine, and discern where the same starts and ends. (CP 104)

1. AG Edwards & Sons, Account Number...1441-014

Mrs. Schwarz did establish at trial that she owned, as her separate property, an AG Edwards & Sons account number...1441-014, which held both stock and cash. This account was worth \$45,180.59 on June 25, 1999 (Exhibit Respondent 121, pages 1-2).

It is also acknowledged that this account was transferred to D.A. Davidson, account number...6087, in March of 2000 (Exhibit Respondent 121, pages 4-7).

However, as will be argued in the following sections, the trial court appropriately found that community property contributions

were also made to this same D.A. Davidson account commingling Mrs. Schwarz's separate property with community property (CP 104).

2. WM Financial Services

Mrs. Schwarz testified that on March 31, 1999, prior to marriage, she held an account at Washington Mutual Financial Services, consisting of 107.441 shares of Fidelity Contrafund, valued at \$6,399.18 (RP 305, lines 22-25; RP 306-308; Exhibit Respondent 121, page 2).

Mrs. Schwarz testified that these shares were transferred to D.A. Davidson account number 6087 on January 27, 2000, some nine months later (RP 307, lines 19-25; RP 308, lines 1-10).

Mrs. Schwarz failed to produce a Washington Mutual Financial Services statement showing the transfer of this account to D.A. Davidson. She did provide a D.A. Davidson statement dated January 27, 2000, evidencing a deposit of 129.167 shares of Fidelity Contrafund, to the D.A. Davidson account number ...6087. However, this statement does not provide any information regarding the source of this transferred stock.

Therefore, the trial court justifiably concluded that, given the disparity in the number of shares (107.441 shares vs. 129.167 shares), as well as the passage of time, as well as the lack of any documentation confirming that the 129.167 shares came from the premarital account, that the evidence was insufficient to establish that the Contrafund stock contribution was separate in nature.

3. Washington Mutual

Mrs. Schwarz did provide a statement from Washington Mutual Savings Bank account number...2369-0, showing a balance of \$49,719.35 on September 27, 1999 (Exhibit Respondent 120-1).

Mrs. Schwarz argues that, "Mrs. Schwarz then provided her Washington Mutual statement showing a transfer of \$56,000 on August 22, 2000, from her Washington Mutual account, to the D.A. Davidson account in her name (Respondent's Opening Brief of Appellant at page 34).

However, between the date of marriage on September 18, 1999, and the transfer of \$56,000, approximately one year later on August 22, 2000, this account had been converted by the parties to a joint account with a new account number, account number ...5779-2 (Exhibit Respondent 121-3). Between September 18,

1999 and August 22, 2000, Mrs. Schwarz was depositing her paycheck to this account (RP 338, lines 1-11; 345, lines 20-25; 346, lines 1-25; 347, lines 1-5).

Thus, again, a commingling of community and separate property assets occurred before this Washington Mutual account was transferred to D.A. Davidson.

4. Charles Schwab

a. Cisco Stock

Mrs. Schwarz did establish that she owned 736 shares of Cabletron stock on June 2, 1999, prior to the marriage (RP 293, lines 4-25; RP 294, lines 1-13; Exhibit Respondent 116, page 1).

She also established that in June and July of 2000, she sold 482 shares of Cabletron stock, and received proceeds totaling \$11,270.26 (Exhibit Respondent 116, pages 2, 3, and 4), holding these proceeds in her E-Trade account number ... 4575-005.

Mrs. Schwarz's documentary evidence does not prove that these proceeds were applied to the purchase of Cisco stock.

She does introduce an exhibit showing that on March 31, 2001, that she held 500 shares of Cisco stock in her E-Trade account (Exhibit Respondent 116, page 5).

However, Mrs. Schwarz provided no documentary evidence that the Cabletron proceeds were used to purchase the Cisco stock. Respondent's Exhibit 121, at pages 13-16, does not establish that the 500 shares of Cisco stock was transferred from the E-Trade account to a Charles Schwab account.

Page 13 of Respondent's Exhibit 121 establishes that on June 10, 2004, Mrs. Schwarz opened an account at Charles Schwab, account #...9712. Pages 14, 15, and 16 of Exhibit Respondent 121 establish that some type of transfer from her E-Trade account #...1059 to her Schwab account #...9712, was instructed at the time that this form was signed on September 11, 2009.

The pages of this exhibit, however, do not establish the transfer of the Cisco stock, and no confirmation of the transfer was provided to the trial court.

b. Loan Repayment

The trial testimony regarding the "loan repayment," was inconclusive. Mrs. Schwarz did testify that on May 31, 2004, she had a Charles Schwab account number ... 9712, which held \$15,591.84 (RP 310, lines 8, 9), and that these funds represented

a repayment to her of a loan made to Mr. Schwarz prior to the marriage (RP 309, lines 20-22).

Mr. Schwarz testified that he did not recall the specifics of this transaction (RP 138, page 6-8).

Mrs. Schwarz argues for a second time that the Cisco stock was purchased from the proceeds from the sale of Cabletron stock, and deposited to the Charles Schwab account.

Again, as previously discussed at paragraph 4(a), Mrs. Schwarz provided no such tracing. Her limited attempt at tracing is Exhibit Respondent 121, page 13-16. Again, this exhibit establishes, if anything, a direction by her to transfer her E-Trade account number . . . 6513-1059, to a Schwab account number . . . 9712 on September 11, 2009. These pages do not show the transfer of any stock, and certainly do not establish that the Cisco stock was transferred from her E-Trade account to her Schwab account.

Mrs. Schwarz testified that she transferred stocks and mutual funds from this Schwab account number . . . 9712 (not the E-Trade account as stated at page 37 of her Brief), to D.A. Davidson account number . . . 6087 (RP 312, lines 8-25; RP 313-

315, ending at line 17), in May of 2012. However, at this point, the assets being transferred have not been clearly established as Mrs. Schwarz's separate property.

Even if the deposits to this account could be traced, Mrs. Schwarz made no effort at apportionment and valuing the respective contributions to the time of trial. Thus, the community property presumption prevails.

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 Wash. App. 448 (2000). 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, 70 Wash. App. 860 (1993), at 866, citing In Re Estate of Smith, 73 Wash. 2d 629, 631, 440 P.2d, 179 (1968).

EQUALIZATION PAYMENT

The trial judge, after making the appropriate characterizations of property, awarded to each party that party's separate property, and ordered an equalization payment such that

the community assets would be divided equally between the parties.

A trial court's division of marital property will not be reversed on appeal absent a showing of manifest abuse. In Re Marriage of Wright, 78 Wash. App. 230, 896 P.2d 735 (1995); In Re Marriage of Pearson-Maines, 70 Wash. App. 860, 855 P.2d 1210 (1993).

The trial court's award in this instance was not an abuse of discretion, and the characterizations made by the trial court as to separate and community property were based upon substantial evidence.

III.

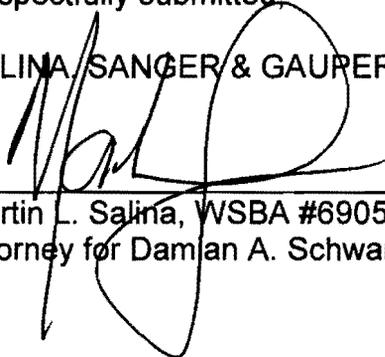
CONCLUSION

It is respectfully requested that the trial court's decision be affirmed.

DATED this 24th day of November, 2014.

Respectfully submitted,

SALINA SANGER & GAUPER



Martin L. Salina, WSBA #6905
Attorney for Damian A. Schwarz

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By _____

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DIVISION III

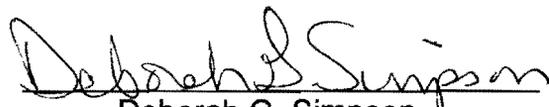
In Re the Marriage of: DAMIAN A. SCHWARZ, Respondent, And SUSAN M. SCHWARZ, Appellant.	C.O.A. No. 322742-III CERTIFICATE OF SERVICE
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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 24th day of Nov, 2014, the foregoing Brief of Respondent was sent by messenger to be filed with the above-named Court and delivered to the following persons in the manner indicated:

Jason Nelson
2222 North Monroe
Spokane, WA 99205

VIA REGULAR MAIL
VIA CERTIFIED MAIL
HAND DELIVERED VIA
MESSENGER SERVICE


Deborah G. Simpson

CERTIFICATE OF SERVICE