FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 332659-III

0IN THE COURT OF APPEALS, DIVISION III,

OF THE STATE OF WASHINGTON

In re the Marriage of
GARY WEIDINGER,
Petitioner/Respondent,
and
KAREN IRONS-WEIDINGER,
Respondent/Appellant.

APPEAL FROM THE SUPERIOR COURT OF WALLA WALLA

COUNTY, THE HONORABLE JOHN W. LOHRMANN, JUDGE

APPELLANT'S REPLY BRIEF

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III. ARGUMENT

A. THE TRIAL COURT ERRED IN FINDING THE SUN TRUST ACCOUNT TO BE REPSONDENT'S SEPARATE PROPERTY.

1. Respondent fails to adequately address rules governing the standard of review in this case.

Respondent fails to address the rule the court must have in mind the correct character and status of the property as community or separate before any theory of division is ordered. *Schwarz v. Schwarz*, 192 Wn. App. 191, 368 P. 3d 173 (2016); *Blood v. Blood*, 69 Wn. 2d 680, 682, 419 P. 2d 1006 (1966).[1] Nor does Respondent address the rule remand is required when it appears the trial court's division of the property was dictated by a mischaracterization of the property. *Schwarz*, 192 Wn. App. 192; *Marriage of Skarbeck*, 100 Wn. App. 444, 450, 997 P. 2d 447 (2000); *Marriage of Shannon*, 55 Wn. App. 137, 142, 777 P. 2d 8 (1989). The Court should consider this appeal with the foregoing rules in mind.

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[1] Respondent's Brief, p. 12-14.

2. Respondent failed to adequately trace the IDS IRA into the SunTrust Account.

Respondent misplaces reliance upon cases such as *Marriage of Pearson-Maines*, 79 Wn. App. 860, 855 P. 2d 1210 (1993) and *Marriage of Skarbeck*, *supra,* and *Estate of Witte*, 21 Wn. 2d 112, 125, 150 P. 2d 595 (2000). Neither *Pearson-Maines*, nor *Skarbeck,* nor *Estate of Witte* supports Respondent's argument here. In *Pearson-Maines*, the respondent, a former member of a committed relationship, successfully traced the separate character of funds deposited along with her partner's paychecks and disability payments into the parties' Seafirst and Pioneer accounts by introducing copies of her bank statements for the relevant time period that tracked the deposits of insurance proceeds paid to cover the fire loss of her Lake Ki home Ki property owned prior to cohabitation with the appellant. 70 Wn. App. 867. Respondent also submitted a detailed accounting of improvements at the Lake Ki property, with check numbers, dates and purpose of the expenditures. *Ibid.* Thus, there is no parallel to the volume and quality of the documents in *Pearson-Maines* here in the virtual absence of documents introduced by Respondent to establish the separate character of the Sun Trust account in this case.

Similarly, in *Skarbeck*, the former husband successfully traced $46,000 of his separate funds deposited into the parties' joint savings account by '*exhaustively documenting the details of the bank account activity....*" 100 Wn. App. 449-50. Here, in contrast, Respondent did not and could not do the same. Thus, *Skarbeck*, like *Pearson-Maines*, is distinguishable from the facts of this case.

Estate of Witte, the failure of the decedent to segregate the earnings by his personal efforts from the rental values of his separate property, and the reinvestment of those unsegregated funds rendered the entire mass of property, with the exception of the original parcel, community property. 21 Wn. 2d 602-03. Thus, *Estate of Witte* does not support Respondent's argument here.

Respondent argues that because the SEP IRA was completely funded prior to the parties' marriage and maintained only in Respondent's name, tracing was therefore not required. [2] Respondent fails to support his argument with any citation to authority, so it should not be considered. RAP 10.3 (a) (6); *Critchlow v. Dex Media West, Inc.*, 192 Wn. App. 710, 719, 368 P. 3d 246 (2016) ("*This court does not review issues not argued, briefed, or supported with citation to authority...*").

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[2] Respondent's Brief, p. 16.

Respondent argues the identification and award to Respondent of the IDS IRA in the parties' Virginia Decree of Dissolution[3] and the tax law prohibition against depositing money other than self-employment income in that account constitutes objective evidence akin to the bank statements referenced in *Pearson-Maines.* To the contrary, the bank statements in *Pearson-Maines* allowed the respondent to track the deposits of insurance proceeds into the parties' accounts. Here, in contrast, Respondent's Exhibits 16 and 17, the December, 2003 Fidelity Form 5498 IRA Contribution Information, reveal nothing about deposit of the IDS IRA proceeds into the Fidelity account. Moreover, the 2003 Form 5498 was produced five years after the date of the Virginia decree.

Nor is there anything in Exhibit 116, the Sun Trust Investment Services, Inc. Statement for September 30, 2014, to indicate either a deposit of the IDS IRA or the Fidelity account proceeds into the Sun Trust Account. Thus, Respondent's analogy to the documentation in *Pearson-Maines* fails.

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[3] EX 20.

Respondent points to the destruction of documents during the parties' move to Washington from Maryland.[4] Respondent fails to explain how the destruction of his records satisfies the requirement in *Schwarz* and *Berol v. Berol*, 37 Wn. 2d 380, 382, 223 P. 2d 1055 (1950) that a party's testimony be supported by documentary evidence. 192 Wn. App. 214-15. Nor does Respondent recognize the judicial admission of his trial counsel that tracing was not possible.[5] *Mukilteo Retirement Apartments, LLC v. v. Mukilteo Investors, LP*, 176 Wn. App. 244, 256 n. 8, 310 P.3d 814, *review denied*, 179 Wn. 2d 1025 (2014); *Black v. Suydam*, 81 Wash. 279, 286-87, 142 P. 700 (1916).

Respondent relies upon his testimony which he argues the trial court found to be credible.[6] Under *Schwarz* and *Berol*, Respondent's testimony by itself is insufficient. Instead, "[i]*t is reasonable to require the party's testimony to be supported by e.g., documentary evidence, an admission by their party-opponent, or the testimony of another witness*." 192 Wn. App. 214-15. Respondent fails to satisfy this requirement.

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[4] Respondent's Brief, p. 17.
[5] VRP Vol. IV, p. 4.
[6] Respondent's Brief, p. 17.

In light of the foregoing, Finding 2.21.1 fails to satisfy either *Berol* or *Schwarz.* It further follows Respondent failed to meet his burden of tracing the separate property character of the Sun Trust SEP IRA with clear, cogent and convincing evidence. Finding 2.21.1 is therefore not supported by substantial evidence, and must be reversed. *Miles v. Miles*, 128 Wn. App. 64, 114 P. 3d 671 (2005); *McGovern v. Department of Social & Health Services*, 94 Wn. 2d 448, 617 P. 2d 434 (1980). Alternatively, Finding 2.21.1 is erroneous as a conclusion of law under *Schwarz, Skarbeck* and *Berol, supra.*

B. THE TRIAL COURT ERRED IN AWARDING THE ENTIRE VALUE OF THE SUN TRUST ACCOUNT TO RESPONDENT AS HIS SEPARATE PROPERTY.

The trial court's failure to have in mind the correct community character of the Sun Trust Account undermined its distribution of that entire account to Respondent. *Blood v. Blood*, 69 Wn. 2d 682 ("[*T*]*he court must have in mind the correct character and status of the property as community or separate before any theory of division is ordered.*"). Respondent fails to recognize this rule.

C. THE TRIAL COURT ERRED IN FINDING APPELLANT'S CLAIM OF A LOAN TO HER SISTER UNSUPPORTED BY THE EVIDENCE.

Respondent argues the trial court's Finding of Fact 2.21.2 will be upheld as it was supported by substantial evidence, citing *Henery v. Robinson*, 67 Wn. App. 277, 289, 834 P. 2d 1091 (1992). *Henery* was overruled on other grounds in *Klem v. Washington Mutual Bank*, 176 Wn. 2d 771, 782-86, 295 P. 3d 1179 (2013).

A trial court's finding will be upheld if there is substantial evidence to support it. *Miles v. Miles*, 128 Wn. App. 64, 69, 114 P. 3d 671 (2005). Substantial evidence is evidence of sufficient quantum to lead a fair-minded, rational person to believe the truth of the matter asserted. *Ibid.* Here, Finding of Fact 2.21.2's finding the parties had an outstanding loan to Respondent's sister in the amount of $40,000 is unsupported by the evidence, is itself contradicted by substantial evidence in the record, to wit, Exhibit 114, which provides written documentation of the loan in question. Also, Respondent's Exhibit 13 proposed treating "*Carol's Loan to Karen*" as a community debt to be shared equally by the parties. Respondent testified he adjusted the amount of that debt from the $40,000

amount used by Appellant's accountant to $32,000.[7] Appellant's Exhibit 102 listed the debt as community property at $40,000. Appellant's forensic accountant calculated that amount from the documents in Exhibit 114.[8] Respondent treated that debt as a community debt for purposes of the property distribution.[9] Thus, the trial court's Finding 2.21.2 that Appellant's outstanding loan in the amount of $40,000 to her sister is unsupported by the evidence is itself not supported by substantial evidence and must be reversed. *Miles v. Miles*, 128 Wn. App. 71.

D. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES IN THE AMOUNT OF $7,500.

The trial court's award of attorney fees is determined by need and ability to pay. RCW 26.09.140; *Buchanan v. Buchanan*, 150 Wn. App. 730, 737, 207 P. 3d 478 (2009). Finding of Fact 2.12.4 found Appellant currently employed part time, making less than $2,000 per month. Appellant's health problems prompted her doctor to tell her to work part-time.[10] In Finding 2.12, the trial court found Respondent's net monthly income as of trial over $15,000.00 per month. In Conclusion 3.8, the trial court deferred payment of approximately $250,000 until at least December

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[7] RP Vol. II, p. 80-81, p.83-84.
[8] RP Vol. III p. 63.
[9] *Ibid.*
[10] RP Vol. III, p. 142; p. 143-44; EX 141.

31, 2017.[11] The record in this case thus supports a full award to Appellant of attorney fees incurred in the trial court.

F. APPELLANT REQUESTS ATTORNEY FEES ON APPEAL.

Respondent's argument for attorney fees on appeal for intransigence lacks merit. Paragraphs III A-E above demonstrate meritorious argument, as do the arguments raised in the Brief of Appellant. Moreover, Respondent fails to indicate whether he sought attorney fees for intransigence in the trial court. If he did not, he cannot raise intransigence as a new issue on appeal. *In re Marriage of Williams*, 84 Wn. App. 263, 273, 927 P. 2d 679, *review denied,* 131 Wn. 2d 1025 (1997).

In exercising its discretion, the appellate court considers the issues' arguable merit on appeal and the parties' financial resources, balancing the financial need of the requesting party against the other party's ability to pay. *In re Marriage of Kim*, 179 Wn. App. 232, 256, 317 P. 3d 555, *review denied*, 180 Wash.2d 1012, 325 P.3d 914 (2014). Here, the foregoing argument establishes the merit of the issues brought by Appellant before this Court. Further, as indicated above, the record here

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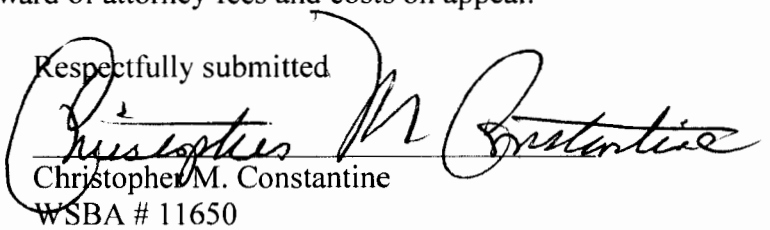
[11] CP 582; Appellant's Brief, App. 1.

establishes Appellant's need for an award of attorney fees and Respondents' ability to pay the same.

VII. CONCLUSION

In light of the foregoing, Appellant requests the Court to reverse Findings of Fact 2.15, 2.21.1, 2.21.2, Conclusions of Law 3.4, 3.7, and Paragraphs 3.2, 3.3, 3.4, 3.5, 3.6, 3.13 of the Decree of Dissolution. Appellant also request an award of attorney fees and costs on appeal.

Respectfully submitted



Christopher M. Constantine
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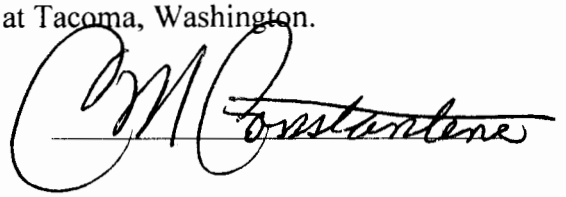
VII. CERTIFICATE OF MAILING

I, Christopher M. Constantine, certify that on June 30, 2016, I served upon Respondent and appellant copy of APPELLANT'S REPLY BRIEF addressed to Respondent's counsel at the following address:

Janelle Carman (Via email)
Attorney at Law
Carman Law Office
6. E. Alder St., Ste 418
Walla Walla, WA 99362

Dated this 30th day of June, 2016 at Tacoma, Washington.