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Kraly v. Kraly Respondent's Brief Dckt. 34947

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STANLEY ROBERT KRALY, Plaintiff-Respondent, vs. SUSAN MARIE KRALY, Defendant-Appellant.	Docket No. 34947

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT FOR THE COUNTY OF BONNER

HONORABLE STEVE VERBY
District Judge Presiding

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STATEMENT OF THE CASE

A. Nature of Case:

This is a divorce case which resulted in a trial before the Magistrate and the issue on appeal is the characterization of real property acquired during the marriage.

B. Course of Proceedings Below:

The Magistrate ruled the real property in question was community property and that Husband had a right of reimbursement to his separate estate for the full amount of the purchase price. The Husband appealed to the District Court. The District Court reversed the Magistrate's conclusions of law because the source of the funds to entirely purchase the real property were the Husband's separate property, and ruled the Subject Property was the Husband's separate property.

C. Concise Statement of Facts:

Plaintiff-Respondent, STANLEY KRALY, (hereinafter referred to as "Husband"), was married to Defendant-Appellant, SUSAN KRALY, (hereinafter referred to as "Wife"), on April 12, 2003 in Stuart, Florida. Husband sold his separate property (owned and paid for prior to the marriage) in Palm City, Florida netting proceeds of $536, 659.31. The real property was his primary residence prior to his marriage with Wife. Husband used the proceeds from the sale of his separate home for the purchase of a parcel of unimproved 60 acres of real property near Rapid Lightning Creek, Idaho (hereinafter the "Subject Property"). The Subject Property is listed as Item #3 on the Inventory of Property submitted

at Trial as Court's Exhibit No. 1. The purchase price for the Subject Property was $167,500 and Husband used $167,500 from his separate property for the entire purchase of the Subject Property. No other payments or improvements were made on the Subject Property.

ISSUES PRESENTED ON APPEAL

1. Did the Magistrate err in characterizing the Subject Property as community property?
2. Did the Husband gift or agree to transfer the Subject Property to the Wife?
3. Can the Parole Evidence Rule be used upon appeal to exclude evidence surrounding Husband's purchase of the Subject Property?

ARGUMENT

STANDARD OF REVIEW

This Court's review of a magistrate's decision is made independently from, but with due regard for, the decision of a district court sitting in an appellate capacity. *Batra v. Batra*, 135 Idaho 388, 391 (Ct.App. 2001); *Worzala v. Worzala,* 128 Idaho 408, 411 (1996); *Smith v. Smith*, 124 Idaho 431, 436 (1993); *McAffee v. McAffee*, 132 Idaho 281, 284 (Ct.App. 1999).

The magistrate's findings of fact will be upheld if supported by substantial and competent evidence. *Worzala*, 128 Idaho at 411; *Smith*, 124 Idaho at 436; *McAffee*, 132 Idaho at 284.

The manner and method of acquisition of property, as well as the parties' treatment of that property, are questions of fact. The Court should defer to the magistrate's findings on these issues only when they are supported by substantial evidence. *Krebs v. Krebs,* 114 Idaho 571, 573-74 (Ct.App. 1988).

However, the characterization of an asset as separate or community, is a question of law over which the Court exercises free review. *Batra v. Batra*, 135 Idaho 388, 391 (Ct.App. 2001).

A. The Character of Property is Determined at the Time of Acquisition: The Inception of Title Doctrine.

Idaho follows the "Inception of Title Doctrine", meaning that the character or nature of property acquired during the marriage as community or separate property is established and vests at the time of acquisition and cannot be

changed. *Estate of Freeburn,* 97 Idaho 845, 849 (1976); *Lang v. Lang*, 109 Idaho 805 (Ct. App. 1985); *Winn v. Winn,* 105 Idaho 811, 814 (1983); *Batra v. Batra*, 135 Idaho 388, 397 (Ct. App. 2001).

The practical effect of the Inception of Title Doctrine is that once the character of property is determined, such character remains the same, regardless of the improvements, indebtedness, or other expenditures on the property by the community.

> "Confusion has arisen in this area because some courts have allowed the source of subsequent payments to determine the character of the property. This is inconsistent with the rule that character of property vests at the time of acquisition and we reject it as having any bearing upon the nature of the property"
>
> *Winn v. Winn,* 105 Idaho 811, 816, fn.1 (1983)

For example, in *Pringle v. Pringle*, 109 Idaho 1026 (Ct. App. 1985), the husband argued that real property acquired by the wife just prior to the marriage was completely paid for with community funds. Due to the Inception of Title Doctrine the Court in *Pringle* rejected the argument that community expenditures after the purchase of the property could change the character of the property, stating:

> "If proceeds from a sale of separate property are used to acquire other property, the acquired property also is separate in character. I.C., § 32-903; *Travelers Insurance Co. v. Johnson*, 97 Idaho 336, 544 P.2d 294 (1975)."
>
> *Pringle v. Pringle*, 109 Idaho at 1027 (citations in original).

B. The Character of Property is Dependent on the Source of the Funds Used to Acquire the Property, not the Way in Which Title is Held: The Source Doctrine.

Under Idaho's community property analysis, the source of funds used in the acquisition of property determines the character of property acquired during the marriage This is called the "Source Doctrine". *Cargill v. Hancock*, 92 Idaho 460, 463 (1968). Reference to the title or the names in which the property is held is not dispositive of the character of the property.

For example, most retirement accounts are held only in the employee's name, but retirement earnings during the marriage are generally characterized as community property. Similarly, if the community purchases real property during the marriage, but it is titled in only one spouse's name, the character of the property is not necessarily changed to the separate property of the one spouse on title.

Another example would be when one spouse commingles separate property into a joint bank account owned by both spouses. The commingling alone does not transmute the property to the community, because through tracing the separate nature of the funds may be proven.

Idaho Code § 32-903 provides as follows:

> "All property of either the husband or the wife owned by him or her before marriage, and that acquired afterward by either by gift, bequest, devise or descent, or that which either he or she shall acquire with the proceeds of his or her separate property, by way of monies or other property, shall remain his or her sole and separate property". (*emphasis added)*

Idaho Code § 32-906(1) follows:

> All other property acquired after marriage by either husband or wife is community property. The income, including the

> rents, issues and profits, of all property, separate or community, is community property unless the conveyance by which it is acquired provides or both spouses, by written agreement specifically so providing, declare that all or specifically designated property and the income, including the rents, issues and profits, from all or the specifically designated property shall be the separate property of one of the spouses or the income, including the rents, issues and profits, from all or specifically designated separate property be the separate property of the spouse to whom the property belongs. Such property shall be subject to the management of the spouse owning the property and shall not be liable for the debts of the other member of the community." (emphasis added)

The very opening idea of I.C. § 32-906(1) is "All other property". The aim is clearly at the remaining property not addressed by Idaho Code § 32-903. The presumption under Idaho Code § 32-906(1) that property acquired during a marriage is community in nature only follows after this distinction.

In *Cargill v. Hancock*, 92 Idaho 460 (1968) the issue concerned real property purchased during the marriage by contract in the name of both spouses. In affirming the trial court's holding that the separate funds of the husband purchased the real property, the Court stated:

> "While the court recognizes the presumption that all property acquired by spouses during coverture is community property, that presumption is rebuttable "when the source of the property can be established with reasonable certainty and particularity as the separate property of one or the other [spouses]***and the property so traced retains its character as separate property. *Stahl v. Stahl,* 91 Idaho 794 at p. 797 (and numerous cases cited therein for that proposition), 430 P.2d 685, 688 (1967)."
>
> *Cargill* at 464.

The Court in *Cargill* also stated:

> "In *Stewart v. Weiser Lumber Co., Ltd.*, 21 Idaho 340, 121 P. 775 (1912), the wife made a down payment (27% of the purchase price) from her own separate funds on a certain piece of realty and thereafter assumed a first mortgage and second mortgage on said tract, the second mortgage and two promissory notes being signed by both the husband and wife. The court there held that no community interest was created in favor of the husband where he had not expended any of his separate funds or any community funds in payment of the purchase price. The mere fact that the husband co-signed the mortgage and notes did not create a community interest until and to the extent that it could be shown the community had contributed to the purchase of the land."
>
> *Cagill* at 464.

This principle was also affirmed in *Winn v. Winn,* 105 Idaho 811 (1983) where the Court stated:

> "...[T]he property or thing acquired partakes of the same nature as the property or funds used to acquire it, de Funiak & Vaughn, *Principles of Community Property*, § 77 (2d ed. 1971) or otherwise stated: [t]he crucial question in determining the status of...property is the source of the funds with which it was purchased", *Rose v. Rose*, 82 Idaho 395, 399, 353 P.2d 1089 (1960); accord *Stanger v. Stanger*, supra; in re *Estate of Cook*, 96 Idaho 48, 524 P.2d 176 (1974); *Cargill v. Hancock*, 92 Idaho 460, 444 P.2d 421 (1968); *Stewart v. Weiser Lumber Co., Ltd.*, 21 Idaho 340, 121 P. 775 (1912). Accordingly, the rule proceeds, when separate property is used to acquire an asset, that asset becomes the separate property of the acquiring spouse. Idaho Code §32-903."
>
> *Winn*, 105 at 813.

In *Stanger v. Stanger*, 98 Idaho 725 (1977), the Court held that the fact that real property was acquired in the name of the husband alone did not make it separate property. The Court directed the trial court to look to the source of the funds used to acquire the property.

> "The status of property acquired during marriage is determined by the funds with which it is purchased. *Cargill*

> *v. Hanock,* 92 Idaho 460, 444 P.2d 42 (1968). The fact that the husband was named as the only grantee in the deed and the only obligor named in the annuity contract is immaterial in determining the status of the property.
>
> *Stanger* at 728 (*emphasis added*).

In *Stanger*, the property was partly a gift to the husband and partly acquired through a community obligation, therefore, the property had a mixed characterization.

This holding has been repeatedly followed and restated: "If an asset purchased during the marriage is purchased with separate property, that asset becomes the separate property of the acquiring spouse." *Worzala v. Worzala*, 128 Idaho 408, 412 (1996).

> "The general rules governing this issue are well known. The character of the property vests at the time of its acquisition (cite omitted). If proceeds from a sale of separate property are used to acquire other property, the acquired property also is separate in character."

Batra v. Batra, 135 Idaho 388, 397 (Ct. App. 2001).

In this case, it is beyond dispute that the Subject Property was acquired with the sole and separate funds of the Husband. Therefore, pursuant to the Source Doctrine, this property should be characterized as the separate property of Husband.

C. The Reimbursement Analysis.

In the case at hand, Husband does not contend that Wife has no possible interest in the Subject Property. If there were community efforts or expenditures subsequent to acquisition of the Subject Property, the community estate could

have a claim for reimbursement under Idaho law. However, the measure of reimbursement is the enhancement of value resulting from the expenditure of such community funds or community efforts.

> "[W]hen the community efforts, labor, industry, or funds enhance the value of separate property, such enhancement is community property for which the community is entitled to reimbursement. The measure of reimbursement...is the increase in value of the property...not the amount or value of the community contribution."
>
> *Martsch v. Martsch*, 103 Idaho 142, 147 (1982).

The community may also have a claim of reimbursement if the community makes payments to reduce the principal of the Subject Property's indebtedness. *Pringle v. Pringle*, 109 Idaho 1026, 1027 (Ct. App. 1985). This is inapplicable in this instance since the Subject Property was purchased free of any encumbrance.

The character of the Subject Property was established as the Husband's separate property on the date of acquisition. Wife may claim an interest through the right of reimbursement of the subsequent enhancement in value due to the community efforts and expenditures or reduction of principal indebtedness. In this case, there is no evidence of any community efforts, labor, or funds to improve the Subject Property. The only evidence is that any enhancement in value is due to natural passive appreciation (Tr. pp. 102-103 "by virtue of it laying there"). Wife presented no evidence supporting either claim for reimbursement.

D. The Deed Does Not Prevent Husband from Demonstrating the Subject Property was Acquired with his Separate Property.

In the case at hand the subject deed makes no mention of the character of the Subject Property. It does not state that it is community property. If the deed would have been in Husband's sole name and recited the property was his sole and separate property, it would not change the analysis herein. "The definitions of community and separate property are found in the Idaho Code." *Stanger v. Stanger,* 98 Idaho 725, 727 (1977). As stated above, according to the Idaho Code all other property acquired during the marriage, regardless of how title is held, is presumed to be community property. The deed to Husband and Wife is not a statement as to the character of the Subject Property. The deed in this case makes no expression as to the character. It does not state that the Subject Property is "community property of the parties" or that it is the "sole and separate property of Husband". The deed was prepared by the third-party grantors or closing agents who, we can assume, do not purport to know the character of the Subject Property. This deed alone cannot transmute the character of the property.

In *Winn v. Winn*, 105 Idaho 811 (1983), the real property in question was titled in both spouses' names by a deed. *Id.* at 813. However, the Court also examined several other factors besides the deed (the value of the down payment and who signed the documents of indebtedness) as some of the factors relevant in determining the character of the credit by which the loan was obtained. *Id.* at 815.

In the trial transcript in this matter, the Magistrate confirms the Husband's argument that the deed is not a controlling document in the legal analysis:

> "this asset [the Subject Property] stands in a slightly different position because unlike everything else which – which never was transferred in terms of title – titled ownership to Miss Kraly, this one was. This one is deeded in both parties names. Now, let me back up a little. The fact that it's deeded in both parties names does not answer the question under the – under the law. Indeed we often have situations where one spouse during a marriage with community funds acquires a vehicle or a piece of property, puts it only in his or her name and actually thinks that that's gonna matter. It doesn't. It's still community property even though the other spouse's name is not on it. In this case this is a piece of community property. We know that because it was acquired during the marriage. So it's community property. The only issue is – well, we have a couple issues, actually. One is undisputed in the evidence as far as I'm concerned and that is the source of the funding. The source of the funding to purchase this property was clearly and undisputably from Mr. Kraly's realization of proceeds of over half a million dollars for the sale of his Florida home, along with other separate assets that over time at various times went into that – that account which is Exhibit 3. So the property was bought with separate money."
>
> (Tr. p. 177 L. 1 to p.178 L. 2).

In this case, the deed is not from Husband to Wife and therefore, does not raise any presumptions under Idaho Code § 32-906(2):

> "Property conveyed by one spouse to the other shall be presumed to be the sole and separate estate of the grantee and only the grantor spouse need execute and acknowledge the deed or other instrument of conveyance notwithstanding the provisions of section 32-912, Idaho Code; provided, however, that the income, including the rents, issues and profits, from such property shall not be the separate property of the grantee spouse unless this fact is specifically stated in the instrument of conveyance."

Nothing in the deed alone contravenes the application of Idaho Code § 32-903 and the cases cited above, that the Subject Property is the separate property of Husband.

E. The Undisputed Evidence Overcomes the Presumption of Community Property.

Husband acknowledges that, under Idaho law there is a presumption that all "other property" acquired during the marriage is community property according to Idaho Code § 32-906(1).

It is noteworthy that such presumption would apply to the Subject Property regardless of whether the deed contained Wife's name or not, as the property was acquired during the marriage. It is Husband's burden to overcome that presumption.

> "It is recognized that there is a presumption that all property acquired by the spouses during coverture is community property; *Brockelbank, Community Property Law of Idaho* (1962), pp. 123-24; however, when the source of the property can be established with reasonable certainty and particularity as the separate property of one or the other, the effect of such presumption is overcome, and the property so traced retains its character as separate property."
>
> *Stahl v. Stahl*, 91 Idaho 794, 797 (1967).

The law in Idaho is unequivocal in holding that property purchased with separate funds of a spouse fully overcomes such presumption.

> "The presumption that property acquired during marriage is community is controlling only when it is impossible to trace the source of the specific property"
>
> *Stahl* at 798.

There is no case in Idaho that holds that Idaho Code § 32-903 does not apply if the property acquired with the separate proceeds of one spouse is placed in the names of both spouses by a third-party grantor or title company.

In this case, the source of funds has been established with complete certainty. The Magistrate found that Husband established by direct and exact tracing that all the funds used to acquire the Subject Property were his separate funds. Wife does not dispute the source of funds.

F. The Mortgage of Property does not Change the Character of the Property.

Execution of a document by both parties, like a mortgage or encumbrance, does not change the character of the property. The Court in *Shumway v. Shumway*, 106 Idaho 415 (1984) stated:

> "In regard to appellant's contention that the signing of a mortgage (the proceeds of which were used to build the home in which the parties lived) and leases evidence the fact that the property was part of the community, we hold that the mere signing of the mortgage and leases by appellant does not constitute such clear evidence of the community's ownership of the farm land that we are required to reverse the trial court's finding of fact. Furthermore, having determined that the interest in the land was respondent's separate property, the mere signing of the mortgage did not create a community interest. See *Cargill v. Hancock*, 92 Idaho 460, 444 P.2d 421 (1968); *Stewart v. Weiser Lumber Co.*, 21 Idaho 340, 121 P. 775 (1912)."
>
> *Shumway*, 106 Idaho at 420.

In this case, Wife passively received a document with her name on it, the Warranty Deed. There was no consideration paid by the Wife in exchange for the

deed. This deed does not transmute the real property or change its character. There was no other evidence tending to prove any community interest in the Subject Property or any agreement between the parties. The sole document supporting Wife's position in this appeal is the deed. The deed is not clear and convincing evidence of an agreement between the parties, pursuant to Idaho Code § 32-906(2). The document standing alone could not alter the character of the Subject Property.

G. As a Matter of Law, Husband did not Gift the Subject Property to Wife.

Wife contends that Husband somehow gifted the Subject Property to her such that the Subject Property became the community property of the parties. Wife must prove such a gift by clear and convincing evidence. It has been held in Idaho that such gifts cannot be accomplished through oral statements or circumstance. The Court in *Stockdale v. Stockdale,* 102 Idaho 870 (Ct. App. 1982) reviewed a factual situation where the wife had a home prior to the marriage. Her home was sold and both parties signed the contract to sell the home and the closing statements. A new home was purchased with the proceeds. During the ownership of the first home, the wife had written to the mortgage lender and asked that the husband's name be added to the mortgage and payment coupons. During the divorce proceedings, the husband contended that any separate interest the wife had in the prior home was transmuted to community property because of these circumstances. After an extensive review of the law of Idaho, California and other states, the Court in *Stockdale* stated:

> "This statutory framework sets our state apart from the other jurisdictions where the courts have embraced oral or informal transmutation. Idaho Code § 32-916, before amendment, and sections 32-917 through 32-919, have California counterparts in former California Civil Code §§ 178-181 (reen. §§ 5133-36). However, these California statutes have been tempered by former sections 158 and 159, discussed above, from which the doctrine of oral or informal transmutation was derived. In Idaho, our restrictive statutes have not been tempered by other provisions. They stand alone, and the policy they embody has been reaffirmed by the 1980 amendments to I.C. §§ 32-906 and 32-916. We defer to this recent reaffirmation of Idaho legislative policy. We hold that the separate or community character of real property may be altered only in the manner provided or permitted by statute."
>
> *Stockdale*, 102 Idaho at 873.

The *Stockdale* Court held that, as a matter of law, no transmutation occurred and no transmutation was possible for real property absent compliance with the applicable provisions of the Idaho Code. The Idaho Court continues to hold that there is a very high standard to meet to demonstrate a gift or that there has been a transmutation of separate property. *See Hoskinson v. Hoskinson*, 139 Idaho 448, 459 (2003) (held quitclaim deed to wife did not satisfy statutory requirements sufficient to transmute property from separate to community).

The statutory formalities are as follows:

> "32-917. Formalities required of marriage settlements. – All contracts for marriage settlements must be in writing, and executed and acknowledged or proved in like manner as conveyances of land are required to be executed and acknowledged or proved."

> "32-918. Marriage settlements – Record. – (1) When such contract is acknowledged or proved, It must be recorded in the office of the recorder of every county in which any real estate may be situated which is granted or affected by such contract.

(2)(a) A summary of the contract may be recorded in lieu of the contract, under this chapter or the laws of this state, if the requirements of this section are substantially met.
(b) A summary of the contract shall be signed and acknowledged by all parties to the original contract. The summary of the contract shall clearly state:

The names of the parties to the original contract;

(i) The complete mailing address of all parties;
(ii) The title and date of the contract;
(iii) A description of the interest or interests in real property created by the contract; and
(iv) The legal description of the property.

(c) Other elements of the contract may be stated in the summary.

(3)If the requirements of this section are met, the summary of the contract may be recorded under the provisions of this chapter and, as to the contents of the summary only, it shall have the same force and effect as if the original contract had been recorded, and constructive notice shall be deemed to be given concerning the contents of the summary and the existence of the contract to any subsequent purchasers, mortgagees, or other persons or entities that acquire an interest in the real property."

"32-919 *Marriage settlements – Effect of record.* – The recording or nonrecording of such contract has a like effect as the recording or nonrecording of a conveyance of real property."

Where the wife asserts that a husband intended to transmute property or to make a gift, burden is on the wife to prove such intent by clear and convincing evidence, and in this case she has failed to meet that burden of proof. *Ustick v. Ustick,* 104 Idaho 215, 222 (Ct.App. 1983).

Therefore, Wife cannot, as a matter of law, show a gift or a transmutation of Husband's separate interest in the Subject Property or a written and acknowledged agreement, as provided in Idaho Code §§ 32-917 through 32-919.

H. The Deed Alone is Insufficient to Transmute the Subject Property.

In *Hoskinson v. Hoskinson*, 139 Idaho 448 (2003), the husband and wife exchanged quitclaim deeds regarding husband's separate property including a quitclaim deed from husband to "husband and wife". *Id.* at 459.

The Court Stated:

> "[A]lthough husband and wife may elect at any time to change their property rights, they must engage in certain formalities." *Wolford v. Wolford,* 117 Idaho 61, 66, 785 P.2d 625, 630 (1990) (quoting *Stockdale v. Stockdale,* 102 Idaho 870, 873, 643 P.2d 82, 85 (Ct. App. 1985). Idaho Code § 32-917 prescribes the requisite formalities as follows: "All contracts for marriage settlements must be in writing. and executed and acknowledged or proved in like manner as conveyances of land are required to be executed and acknowledged or proved." The burden of proof on the party asserting transmutation is a high one, as the Idaho Court of Appeals described in *Ustick v. Ustick*, 104 Idaho 215, 222 657 P.2d 1083, 1090 (Ct. App. 1983):
>
> [W]here it is asserted...that a spouse intended to transmute property or to make a gift, the burden is on the party urging the assertion to prove the intent in question by clear and convincing evidence. [citations omitted]. Concomitantly, because the question of whether a "clear and convincing" burden of proof has been met is a question for the trier of facts to decide in the first instance, the determination of the trial judge – that a claim was not shown by clear and convincing evidence – is entitled to great weight on appeal. [citations omitted].
>
> In applying Idaho Code § 32-917 to the evidence presented at trial, the magistrate made the following findings and conclusions regarding Elizabeth's claim that Reed's quitclaim deed transmuted his separate property into community property:
>
> Here, the parties offered conflicting evidence of the intent behind the quitclaims deeds. Elizabeth testified that Reed asked her to sign a quitclaim deed to facilitate the financing and that she refused to sign until Reed agreed to sign a deed conveying the property to her and Reed. Reed denied that allegation. He testified he signed the quitclaim deed

simply because the lender presented it to him during the loan closing, that he signed it along with many other papers the lender presented to him, and that he had no intent to transmute his property into community property. Reed notes that he alone signed the promissory note for the new loan. Under these circumstances, the court finds that Elizabeth has not proved a transmutation by clear and convincing evidence. The evidence did not establish that Reed intended to make a gift to the community."

Hoskinson, 139 Idaho at 459-460.

In another case involving a deed, the Court in *Bowman* stated:

"In actions of this kind, the trial court-"* * *, upon proper averments and under the express provisions of those sections of the Civil Code (sections 82-148) regulating actions for divorce, is invested with full power to determine the status of the property of both or each of the spouses, regardless of the name of either in which the title to such property stands, and the recitals of whatever transfers there may have been between such spouses regarding such properties or in transfers thereof to the one or other of them, are merely prima facie evidence of ownership, and raise only disputable presumptions as to whether such properties are the separate or community property of the parties to such transfers.

The crucial question in determining the status of the property was the source of funds which went into the purchase of the property, and the court has found upon this conflicting evidence from which different inferences could be drawn, that it was purchased with community funds."

Bowman v. Bowman, 72 Idaho 266, 270 (1952). (citations omitted)

I. The Spouses Reached an Agreement Supporting the Husband's Contention the Subject Property is Separate Property.

Even the fact that Husband allowed the receipt of a deed that mentions Wife's name has been explained. The Husband repeatedly and consistently testified that the spouses had an informal agreement that he would purchase the Subject Property and that Wife would eventually use her separate funds to build a residence. (Tr. pp. 41-42; p. 47 L. 4; p. 48 L. 22-24; p. 49 L. 1-6; p. 52 L. 24 - p. 53 L. 17; p.130 L. 16 - p.131 L. 8; p. 155 L. 3-6). This agreement would have the spouses equal partners in the final project combining land and residence, once Wife made her contribution.

Wife offers no evidence disputing the agreement, just a mere denial (Tr. p. 135, L. 2).

The Magistrate in this matter found that Husband and Wife:

> "had an express verbal agreement that when [wife] sold her separate Florida home, she would kick in an equal amount of money, such to the point that where they would build a house on this property that when the house, this marital dream house, if you will, was finished and the property was just the way they wanted it, they wanted it, they each would have kicked in an equal amount of their own separate proceeds and then they don't have to carry separate claims because everybody's in it 50/50. Dollar for dollar, and it's a true community asset at that point.
>
> Miss Kraly denies that such an agreement was made; however, in her opportunity to testify in terms of why she believed that [husband] did in fact intend a gift of this large amount of money, the $168,000, his half, there was never anything in the evidence, other than her subjective belief or conclusion that a gift had been intended."
>
> (Tr. p. 178, L. 23 – p. 179, L.15). (emphasis added).

In this case, Wife failed to honor her portion of the bargain.

J. The Parol Evidence Rule Does Not Prevent Husband From Demonstrating The Property Was Acquired With His Separate Property.

One major argument by Wife is her contention that the parol evidence rule bars Husband's claim that the Subject Property is Husband's separate property. Wife mis-characterizes the effect and purpose of the rule.

1. The Deed is Not an Unambiguous Statement.

The warranty deed at hand makes no mention of the character of the Subject Property. It does not state that it is community property. The fact that the deed is to "Husband and Wife" is not an unambiguous statement as to character of the Subject Property because the deed makes no expression as to the character. The deed in question is not clear and unequivocal evidence of an agreement between Husband and Wife. The deed is from third party grantors who cannot characterize property contrary to Idaho law. Secondly, The deed states it was delivered for "Value Received". Husband contends that the parol evidence rule would not have been applicable at the trial of this matter to prevent Husband from presenting evidence regarding two issues: (1) the true consideration paid; and (2) evidence demonstrating the character of the Subject Property as his sole and separate property pursuant to I. C. 32-903.

Wife cites several cases in support of her contention that the parol evidence rule requires this court to hold that the real property is the community property of the parties.

In *Hall v. Hall*, 112 Idaho 641 (Ct. App. 1987), the deed in question stated in its consideration clause "For Value Received". This is an ambiguous statement. Therefore "parol evidence is admissible to show the true consideration for the conveyance". *Hall*, 112 Idaho at 642. In *Hall*, the consideration clause stated "For Value Received" exactly as in the instant case. *Hall*, 112 Idaho at 642. Therefore, in the case at hand, the consideration clause is not an unambiguous statement, and is subject to the Husband's parol evidence to explain the actual source of the considerations paid, namely his $167,500.00 of separate funds. In the case at hand, the true consideration has been proven by admissible tracing evidence to be the separate property of the Husband.

In *Hall v. Hall*, 116 Idaho 483 (1989) the Court held that the grantor who sells property to a husband and wife for valuable consideration cannot testify that the conveyance was part gift and part sale. This is the application of the parol evidence rule that prohibits grantors from presenting evidence that a grantee received something different than demonstrated in the deed. *Hall* does not suggest that a grantee will be unable to demonstrate the nature and source of funds used to acquire property. *Hall* does not overrule I.C. 32-903, *Cargill v. Hancock*, 92 Idaho 460 (1968), or the long line of cases that hold the character of property is determined by the source of funds used to acquire the property, not the method by which title is held. *Estate of Freeburn*, 97 Idaho 845 (1976), (1983) *Lang v. Lang,* 109 Idaho 802 (Ct. App. 1985). *Winn v. Winn*, 105 Idaho 811, 813 (1983)

In *Bliss v Bliss,* 127 Idaho 170 (1995), the husband conveyed real

property to his wife by quitclaim deed. The deed included language that the conveyance was to her as "her separate property" and that the conveyance was for "valuable consideration". The court noted that the wife was entitled to the presumption set forth in Idaho Code § 32-906(2) and stated:

> "Here, not only did Gordon "convey" the property to Althea, thereby raising the presumption of separateness under I.C. § 32-906(2) , the deed expressly states the land is conveyed "as *her separate property*." Further, the deed unambiguously declares that it is "in consideration of ONE DOLLAR and OTHER GOOD and VALUABLE CONSIDERATION." Gordon's extrinsic evidence is inadmissible to contradict these clear statements. Hall, 116 Idaho at 484, 777 P.2d at 256. Thus, the evidence offered to rebut the statutory presumption of I.C. § 32-906(2) was legally insufficient."
>
> *Bliss v Bliss,* 127 Idaho at 174, 175.

The facts of the *Bliss* case present an unambiguoug fact pattern in distinction to the case at hand

Although the deed to the Subject Property is to "Husband and Wife" the deed is not from Husband to wife and does not raise any presumptions under Idaho Code § 32-906(2). Even if the parol evidence rule were applicable, nothing in the deed is contradicted by application of Idaho Code § 32-903 and the cases cited above.

2. Husband Did Not Present Contradictory Evidence.

Husband contends that the parol evidence rule is not applicable because this is not a case where the grantor is being asked to contradict the terms or statements in the deed. The *Bliss* Court, in reviewing the history of the parol

evidence rule, stated:

> "As we understand the statute [of frauds] above quoted, it was intended to prevent just such a class of proof and to preclude the possibility of titles becoming subject to the capricious memories of interested witnesses. The statute was enacted to guard against the frailties of human memory and the temptations to litigants and their friendly witnesses to testify to facts and circumstances which never happened. Experience had convinced both jurists and lawmakers that the only safe way to preserve and pass title to real property is by a written conveyance subscribed by the grantor. The beneficial effects of this statute would be destroyed if a grantor could come in years afterwards and submit oral testimony to show that the conveyance was not intended as an absolute grant but was only intended to create a trusteeship in the grantee."
>
> *Bliss v. Bliss*, 127 Idaho 170,175, *citing Dunn v. Dunn*, 59 Idaho 473, 484, 83 P.2d 471, 475-76 (1938).

In this case, Husband does not seek to introduce evidence from the grantor that contradicts the plain language of the deed. Unlike *Bliss*, the deed makes no attempt to set forth the character of the Subject Property. Husband only seeks to have the court consider the un-contradicted evidence that the Subject Property was acquired with Husband's separate funds pursuant to I.C. 32-903 and is therefore his separate property.

3. <u>The Parol Evidence Rule was Untimely Raised and Therefore Waived</u>.

During the Trial Husband testified as to the source of funds to purchase the Subject Property, the agreement of the parties to eventually improve the Subject Property with Wife's funds, and the tracing of his separate funds. The Wife interposed no trial objections to the testimony of the Husband.

While it may be true that *Hall v. Hall,* and the Parol Evidence Rule might be the basis for a timely trial objection, in this matter no such objections were interposed. Because no objection was interposed, the trial court in this case received the evidence and it is properly part of the record for Appeal.

In *Hall v. Hall,* 116 Idaho 483 (1989) timely trial objections were made to the introduction of evidence, but the objections were overruled by the trial court. The objections were the grounds for the appeal. The Court ruled that this type of evidence is inadmissible over an objection timely placed during trial.

However, in this case, no such trial objections were raised. Relying upon the Parol Evidence Rule is inappropriate at the Appellate level if not raised at trial. The trier of fact must apply the Parol Evidence Rule to evidence and objections when presented. The reason this issue is not properly before the Court is that the Parol Evidence Rule is not a rule of evidence but it is merely a rule of construction of contracts that has been applied to deeds. *Hall*, 112 Idaho at 643.

Therefore, the appellate record has properly admitted evidence to determine the crucial questions: (1) When the inception of title occurred? (2) What is the source of the funds to acquire the Subject Property? (3) Whether receipt of the Warranty Deed was an expression of an agreement between the Wife and Husband? and (4) Whether Husband gifted or transmuted the Subject Property to the community?

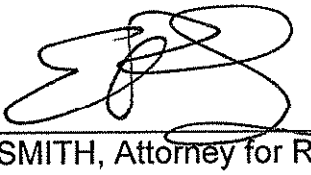
The credible and un-controverted evidence admitted in this trial answers these questions in favor of the Husband/Respondent.

CONCLUSION

The Subject Property is Husband's separate property pursuant to Idaho Code § 32-903. The character of property acquired during the marriage is determined by the source of the proceeds used for the acquisition. The Subject Property was entirely acquired with the separate funds of the Husband. The funds used to acquire the Subject Property were obtained through the sale of the real property owned by Husband prior to his marriage to Wife. The tracing of the separate funds was complete and sufficient.

Because Wife has not disputed the source of funds used to acquire the Subject Property, the Court must affirm the Magistrate's finding that $167,500 of Husband's separate property proceeds was the sole source used to acquire the Subject Property. Husband has overcome the presumption of community property and the Deed recorded on the Subject Property does not alter the character of the Subject Property.

DATED this 28 day of July, 2008.



ERIK P. SMITH, Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing document were mailed postage prepaid thereon on this 28 day of July, 2008, to:

Jed K. Nixon, Attorney at Law
P.O. Box 1560
Coeur d'Alene, ID 83816

Lora Henderson

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