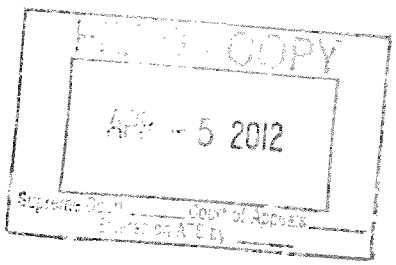
4-5-2012

Baruch v. Clark Respondent's Brief Dckt. 39224

IN THE SUPREME COURT OF THE STATE OF IDAHO

AMY BARUCH, Plaintiff/Respondent vs. WILLIAM CLARK, Defendant/Appellant	)	DOCKET No. 39224-2011



RESPONDENT'S BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, The Honorable Kathryn Sticklen, affirming the Honorable Michael J. Reardon, Magistrate Judge, Presiding.

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STATEMENT OF THE CASE

A. Nature of the Case.

Bill Clark brings his appeal from the District Court decision of the Honorable Kathryn Sticklen, District Judge, entered August 25, 2011, which affirmed (R. 826) the Magistrate's Decision in the Judgment and Decree of Divorce on August 10, 2010. R. 605.

Following a three day trial and hundreds of Exhibits and extensive post trial briefing, and after receiving proposed Findings of Fact and Conclusions of Law from each party, the lower court entered Findings of Fact and Conclusions of Law on July 26, 2010. R. 561. Bill Clark moved the Trial Court to alter or amend its Decision but the Magistrate did not change the result (R. 679) and Appellant appealed to the District Court from the Order Re: Motion to Alter or Amend Findings of Fact, Conclusions of Law and Judgment entered on September 24, 2010. R. 683.

When the District Court considers an appeal from the magistrate Judge not involving a trial de novo, the District Court is acting as an appellate court, not as a trial court. State v. Kenner, 121 Idaho 594, 596, 826 P.2d 1306 (1992).

It is Respondent's position that this appeal again involves Bill Clark's quibble with studied Findings of Fact and Conclusions of Law which are well-supported in the record. Appellant in large measure still continues to ignore the evidence supporting the

Court's Findings and Conclusions, the fact that Appellant failed to trace his separate property with reasonable certainty and particularity, and failed to carry his burden of proof and persuasion by the preponderance of the evidence. Reed v. Reed, 137 Idaho 53, 59-60, 44 P.3d 1108 (2002). The Magistrate Court properly applied the law, reaching its result well within the bounds of discretion and through the exercise of reason. Community property principles controlled the Magistrate's findings and decision, which were properly and carefully affirmed by the District Court as the intermediate appellate court.

B.

Course of the Proceedings

Following trial, the Magistrate ordered post trial briefing and reply briefs which addressed the issues on this appeal. The Trial Court also ordered Proposed Findings of Fact and Conclusions of Law. Respondent's proposed Findings and Conclusions numbered 91 pages and Appellant's 26 pages. As a result of Appellant's Post Trial Motion to Alter or Amend the Findings of Fact and Conclusions of Law, the issues were briefed and argued on September 13, 2010. The Trial Court denied Appellant's Post Trial Motion regarding Appellant's issues raised again in this appeal. Tr., pages 649-680.

Before the trial commenced, Defendant sought two pre-trial rulings, the first of which was that since his real estate development projects were underwater, he wanted essentially all of

the community assets.[1] The Court denied that obvious inequitable claim and Bill did not pursue the claim at trial. Appellant also asked the trial court to rule as a matter of law, as regards the first issue on appeal, that since the balance in his retirement account (Schwab IRA Account #...3713) on the day of trial was less than it was on the day of marriage, that automatically it was all Appellant's separate property. The Trial Court denied the request to ignore 10 years of history in the account, and held that such a claim depended upon what the evidence would show. At trial Bill could not trace his separate property with reasonable certainty and particularity. Worzala v. Worzala,128 Idaho 408, 913 P.2d 1178 (1996).

At trial Bill sought more assets in other ways. Bill sought an unequal division of the net community estate but the Court divided the estate equally, finding that Bill's "portrayal of his health issues was somewhat disingenuous, given the level of activity he enjoyed, and the vigor with which he pursued it, and as a result the Court assigned no weight to his claim of poor health as a basis to award more property to Bill". Findings of Fact and Conclusions of Law, p. 27.[2] R. 587.

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[1] The Court ruled in a telephone hearing with counsel on January 27, 2010, denying both claims of the Appellant.

[2] Findings of Fact #4 found: "An issue was raised with regard to Bill's health. In spite of a number of medical issues, which appear to be well managed by Bill, he is extraordinarily physically fit and vigorously active for any age. He works out at the YMCA four to five times per week, rides both mountain and road bikes three days per week, with road rides of up to 40 miles, rides horses, hunts, hikes, snow skis, and kayaks technically challenging and physically demanding rapids." R. 562.

Bill pursued two additional claims at trial designed so he could receive more community assets. In Post Trial Briefing, he claimed the parties' principal residence on Stone Point deeded in both names was his separate property. Secondly he claimed that he had a separate property interest in their Ketchum Condominium because of the money paid to him in 2007 for work on the Veltex Condominium project, built after marriage from 2002-2004 was not income but "capital gains", even though it was not clearly stated as capital gain on the 2007 Federal Tax Return. Exhibit 73. The second claim failed at trial because Bill Clark could not carry his burden of proof or persuasion, and overcome the community presumption by tracing his separate property claim with reasonable certainty and particularity. Reed v. Reed, 137 Idaho 53, 44 P.3d 1108 (2002); Barton v. Barton, 132 Idaho 394, 973 P.2d 746 (1999); and Worzala v. Worzala, supra.

On appeal to the District Court Bill urged that their principal residence on Stone Point was separate property. The District Court affirmed the Magistrate's Findings that Stone Point was community property. Appellant has now abandoned that issue on this Appeal. As a result, it is now the law of the case that Stone Point is community property.

Thus, regarding the first issue on appeal, the District Court in its appellate capacity affirmed the Magistrate Court, finding no abuse of discretion. R. 832, 835. As to the second issue the District Court found Bill "simply failed to meet his burden", "to

prove the property was separate with reasonable certainty and particularity". R. 839. Batra v. Batra, 135 Idaho 388, 395, 17 P.3d 889, 896 (Ct. App. 2001); Weilmunster v. Weilmunster, 124 Idaho 227, 234, 858 P.2d 766, 773 (Ct. App. 1993).

C.

Statement of the Facts And Corrections to Appellant's Statement of Facts

The parties married on December 1, 2000. They have one minor child, [redacted] born [redacted]. Amy is employed as an Emergency Room Physician and Bill is a real estate development consultant.

Appellant has some misstatements from the Record.

A. On page 8 of Appellant's Brief, the statement appears, "after Bill and Dr. Baruch were married, no funds were put into the Veltex Building, LLC", citing Tr. Vol. 1, p. 418, L. 15-19. The cite to Vol. 1, p. 418, L.15-19 does not say that.

B. Appellant states at pages 8 and 9 that Bill's separate property consisted of a capital gains distribution in the Ketchum Condominium. This is what Bill Clark testified to over objection that there was no foundation and the court allowed his testimony about the capital gains characterization. R. p. 421, L. 21 to p. 421, L. 23. Yet, the Court did not believe his capital gains characterization in its Findings of Fact and Conclusions of Law and found that the distribution was income and was presumed to be

community property, since it arose during the marriage. Tr. p. 655, L. 12 to p. 656, L. 10; Tr., p. 660, L. 16 to p. 661, L. 2.

C. Regarding his claim of capital gains Appellant relies heavily in this appeal on Exhibit 517A, a purported summary without supporting documentation. Exhibit 517A is referred to on pages 9, 10, and 28 of Appellant's Brief, **but it was not admitted in evidence.** The Clerk's Exhibit List at p. 878 is wrong. Tr., p. 205, L. 14-18, p. 216, L. 1-4, p. 219, L.11-13. That further, in the transcript there is an Exhibit List that appears multiple times at the beginning of each day's session which all show that Exhibit 517A was not admitted.

D. Appellant, in his brief at p. 6 and 7, refers to the withdrawal of monies from IRA #...3713 using the phrase that he did not "withdraw to himself". The clever choice of words is misleading. He did in fact withdraw the funds and funneled those monies into his investments. R. 833. Bill refers to these withdrawals as "rollovers" which is a way to defer the tax, but it doesn't change the fact that it was a withdrawal of funds out of the IRA which was spent on his investments and all but lost. Pensco Trust and Sterling Trust were strawmen to avoid the tax and penalty created by a withdrawal labeling it a rollover.

Schwab Retirement Accounts
(Issue No. 1)

Amy had $74,776.85 in her Schwab IRA Account #...5317 on the date of marriage. Exhibit 32(b). Bill and his attorney conceded

at trial that said amount was her separate property[3]. R. 441, item 32. Also see Defendant's Post Trial Brief, Exhibit A, item 32. R. 286. Amy, on the other hand for good reason, did not concede an alleged separate property amount in Bill's Schwab IRA Account #...3713 on November 30, 2000 of $386,636. The account had a balance of $354,350.31 on the day of trial. Exhibit 230.

Bill's account suffered two significant value decreases during marriage, dropping to $249,799.82 at year end 2002, with additional losses in 2008, both due to market losses. Tr. p. 103, L. 5-7; Exhibit 235, p. 2324 and p. 2334. During the marriage, in 2005, Bill removed $100,000 from his Schwab IRA #...3713 (Exhibit 235, Bates p. 2328) and deposited it into his Pensco Trust Account and removed it and invested it in Pearson Partners, which was awarded to Bill in the sum of $37,212. R. 593. In 2008 Bill took another $150,000[4] out of the Schwab IRA (Exhibit 234, p. 2334), deposited it into his Pensco Trust Account and removed it and invested it into the Crescent Rim Condominium Project in violation of the TRO (Tr., p. 368, L. 18) through the vehicle of Meyer Clark LLC, all without permission of Amy. Findings of Fact #48-49, Tr., p. 183, L. 18-25. The I.R.A. money invested in Crescent Rim was worthless

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[3] As stated by the District Court, oral stipulations of the parties in the presence of the Court are generally held to be binding, especially when acted upon or entered in the Court records. See: Kohringer v. Robertson, 137 Idaho 94, 99, 44 P.3d 1149, 1154 (2002).

[4] Amy objected to Bill's withdrawal of $150,000. Finding of Fact #50. Tr. p. 571, L. 2-19.

since Crescent Rim had a deficit of capital of $16,000,000. R. 357, L. 5; R. 367, L. 9-18. The Trial Court found that the investments in Crescent Rim had dubious value. Findings of Fact #73, #75, and #83, Tr., p. 575-576. If the only activity in Account #...3713 at the date of marriage, when the balance was $386,636, were Bill's distributions of $250,000[5], and the market loss of $136,837 from 11/30/2000 to 12/31/2002,[6] the IRA would have no value at all, and therefore, Bill was not entitled to claim the value on the date of marriage as his separate property. The Trial Court correctly determined that the balance in the account at trial was the result of community contributions and any separate property, if any remaining, was hopelessly commingled.

Exhibit 235 analyzed Account 3713 since the date of marriage and revealed significant community contributions during marriage (Finding of Fact #45). R. 570. The Trial Court after listening to the testimony and analyzing the evidence determined that two of the contributions to the account in the amount of $150,000 and $15,869 were roll-overs and the Court deducted said amounts from the total contributions of $373,182 shown on Exhibit 235, for total community contributions of $207,313. Footnote 1, page 11, Findings of Fact, Conclusions of Law and Order. R. 571. The evidence showed community funds were commingled with separate funds in Schwab #...3713. Findings of Fact and Conclusions of Law at R. 585-586. While the

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[5] There were additional distributions including $15,869 and $75,000 in 2006, and $28,000 in 2009. See Exhibits 235 and Defendant's Exhibit 638.

[6] There were additional market losses in 2008. Ex. 235.

value fluctuated during marriage it is unclear what percentage of the decrease in value was a result of market conditions, versus withdrawals, and it was unclear, as the court found, what percentage of the withdrawals were for a community or separate purpose since Bill solely controlled the account. Id; Findings of Fact and Conclusions of Law. R. 583 L. 26-27, R. 585.

> "Emblematic of Bill's course of dealing with the funds in the Schwab 3713 account is his testimony that "[In fall of 2008] I transferred, rolled over, $150,000 from my 3713 IRA account at Schwab to Pensco Trust, Pensco Trust in turn invested that money in Meyer Clark, Meyer Clark Investments, in turn, made a $150,000 loan to Crescent Rim". This was only one of several transactions, a number of which are described in paragraphs 45-58 above [of the Findings of Fact and Conclusions of Law] through which Bill's movement of IRA funds, for the sole purpose of using them for his own investments, begins to take on the characteristics of a shell game." Id., Findings of Fact and Conclusions of Law. (Emphasis added). R. 585.

Consequently, because Schwab Account #...3713 was commingled and the alleged separate assets were insufficiently traced, the entire account was community property. Findings of Fact and Conclusions of Law, p. 26. R. 586. As the District Court found, "the Magistrate's analysis of the circumstances surrounding Bill's I.R.A. and the community's funding of it, are supported by the evidence. Memorandum Decision and Order at page 7. R. 832.

Veltex Income and Purchase of the Ketchum Condominium
(Issue No. 2)

Bill's purported separate property claim in their Ketchum Condominium only arose for the first time two weeks before trial. R. 590, L. 10-11.

The Ketchum condominium was purchased during marriage on March 28, 2007. *Exhibit 6.* Bill attempted to orally trace into the purchase of the Ketchum Condominium $107,146 of a sum of $342,149 of monies he allegedly received as "income" in 2007 for work on the Veltex Condominium project. The condominium cost $975,000. Finding of Fact #14. **The parties** submitted checks at closing in the amount of $205,539.23. R. 564. Amy testified that the Ketchum Condominium was purchased in anticipation of paying down the initial loan with proceeds of sale of McCall properties owned by the parties jointly. Finding of Fact #13. Tr., p. 588, L. 3 - p. 589, L. 9.

Bill testified, but yet he could not support, that the funds he received in 2007 for his work on the Veltex building project, started in 2002 and completed in 2004, was anything but income. The money received during the marriage in 2007 was presumed to be community property and not his separate property. Banner Life Insurance Co. v. Mark Wallace Dixson Irrevocable Trust, 147 Idaho 117, 124, 206 P.3d 481, 488 (2009). Amy testified that Bill was paid for his labor. Tr. p. 588. The District Court referred to the Record in footnote 3 as follows:

> "[3] Amy testified that "Veltex was--the property site was owned by Veltex partners prior to my marriage to Bill. The actual planning and construction of the property occurred during the marriage. The construction occurred from 2003 and was completed in 2004. The sale that generated this amount of $342,149 occurred in 2007...And I believe that was due to the labor...sweat equity that was put in during the time of our marriage. Trial Transcript, at 192, 588." Memorandum Decision and Order R. 837

The 2007 tax returns, Exhibit 73, did not report the money as a capital gain on Schedule D, nor was it identified as such on form 4797. Bill's testimony that it was a capital gain was not believed by the finder of fact. Tr., pages 650-661. Bill's testimony about Veltex, LLC was conflicting. Finding of Fact #16-19. He could not provide the date of the loan from Washington Trust Bank to build the condominiums. Finding of Fact #17. R. 565. He avoided in testimony the question regarding when construction was begun or completed. Finding of Fact #18. R. 565. Tr., p. 511 and 513. Exhibits 241 and 243 introduced by Amy established that construction occurred in 2002 through 2004. Bill's credibility suffered when he did not even recognize Exhibit 241 which was his own website, Tr. p. 512, L. 3-5, yet Exhibit 241, the Clark Development Veltex website, states that the building was completed in 2004.

Bill received $342,149 from Veltex, LLC on February 7, 2007, but at that time he did not personally own the land the Veltex Building was built on, nor the building itself, rather he owned an interest in the entities that owned the property. R. 565. Bill had a history of being paid income to work on the projects in which he had an interest, and reported such as income. Tr., p. 514, L. 14 - p. 515, L. 16.

The funds received during marriage in February 2007 were presumptively community property, subject to proof by Bill that part or all of it was separate. Finding of Fact #24. R. 566. Bill

failed in his trace proof and that finding of fact is second-guessed again in this appeal.

The testimony established that the funds received from sales of the parties' McCall properties were used to reduce the Ketchum mortgage significantly. Tr., p. 588, L. 23 to p. 589, L. 9. Moreover, even if Bill could have established that $107,146 came from monies paid to him from Veltex, those funds were replaced by $284,000 of monies of McCall proceeds in accordance with the intent of the parties. Exhibit 232.

III.

RESPONDENT'S ATTORNEYS FEES ON APPEAL

The Appellant failed to present any significant issue of law on appeal. No findings of fact made by the trial court were arguably unsupported by substantial evidence. The Supreme Court has not been asked to establish any new legal standards or modify existing ones. As such, the appeal is without foundation. Huerta v. Huerta, 127 Idaho 17, 896 P.2d 985 (Ct. App. 1995); Reed v. Reed, 137 Idaho 53, 44 P.3d 1108 (2002).

Moreover, this appeal is in essence an attack upon the findings of fact, already affirmed by the intermediate appellate court, with the District Court acting in that capacity. Yet, Bill has appealed again urging the same arguments but abandoning his claim that the Stone Point principal residence was all his separate property.

Attorneys fees are therefore proper under Idaho Code, Section 12-121, Rule 54(e)(1), Idaho Rules of Civil Procedure, and Rule 41, Idaho Appellate Rules. Bill has not been dissuaded, all at great expense to Amy, but given the standard of review, affirming the District Court is a matter of procedure and attorneys fees should be awarded to Respondent.

IV.

LEGAL ARGUMENT

A.

Standards of Review

1. Effect of District Court Review. The District Court sitting in an appellate capacity applies the standards of review handed down by the Idaho Appellate Courts. However, given the decision in Losser v. Bradstreet, 145 Idaho 670, 183 P.3d 758 (2008), the structure of the Idaho Appellate Rules now requires the Supreme Court to directly review the District Court's decision and consider whether the District Court committed error. The Supreme Court in a further appeal will then review the trial court record to determine whether there is substantial and competent evidence to support the Magistrate's Findings of Fact, and whether the Magistrate's Conclusions of Law follow those findings. If the findings are so supported and conclusions follow therefrom, and if the District Court affirmed the Magistrate's decision, then the Supreme Court will likewise affirm the District Court decision *as a matter of procedure*. Dunagan v. Dunagan, 147 Idaho 599, 601, 213

P.3d. 384 (2009); Losser, supra, citing Nichols v. Blaser, 102 Idaho 559, 633 P.2d 1137 (1981); State of Idaho Department of Health and Welfare v. Doe, 145 Idaho 662, 182 P.3d 1196 (2008); Harris v. Carter, 146 Idaho 22, 189 P.3d 484 (Ct. App. 2008).

2. Review of Findings of Fact. The appellate court will not make credibility determinations or replace the trial court's factual findings by **re-weighing** the evidence. The evidence will be viewed in favor of the Magistrate's judgement and the Appellate Court will uphold the Magistrate's findings **even if there is conflicting evidence**. Danti v. Danti, 146 Idaho 929, 204 P.3d 1140 (2009)(emphasis added); Quiring v. Quiring, 130 Idaho 560, 944 P.2d 695 (1997). Findings of fact made by the trial court will not be set aside unless they are clearly erroneous. Rohr v. Rohr, 118 Idaho 689, 800 P.2d 85 (1990). As the District Court stated (R. 827), it is required to determine whether there is substantial evidence to support the Magistrate's findings of fact. Hentges v. Hentges, 115 Idaho 192, 194, 765 P.2d 1094, 1096 (Ct. App. 1988). Substantial evidence is "such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla, but less than a preponderance." Clear Springs Foods, Inc. v. Clear Lakes Trout Co., 136 Idaho 761, 764, 40 P.3d 119, 122 (2002), R. 827. Deference must be given to the special opportunity of the trial court to assess and weigh the credibility of the witnesses who appear before it. Rohr v. Rohr, supra. On review from

the District Court acting as intermediate appellate court, the Supreme Court or Court of Appeals will not weigh the evidence, nor substitute its view of the facts for that of the trial Judge. See Holley v. Holley, 128 Idaho 503, 915 P.2d 733 (Ct. App. 1996). When the appellate court considers findings of fact made by the trial court, **it will review the evidence in the light most favorable to the party who prevailed at trial**. Silva v. Silva, 142 Idaho 900, 136 P.3d 371 (C.A. 2006); Pieper v. Pieper, 1 125 Idaho 667, 873 P.2d 921 (Ct. App. 1994).

The Magistrate found that the community value of Defendant's retirement account at Charles Schwab was based on the most credible evidence presented. Finding of Fact #10. R. 563. The District Court agreed at p. 7, Memorandum Decision and Order. R. 832.

Where an intermediate appeal has occurred, only issues raised in the intermediate appeal may be brought forward to a higher appellate court. Harris v. Carter, 146 Idaho 22, 189 P.3d 484 (Ct. App. 2008).

The manner and method of acquisition of property, as well as the parties' treatment of that property, are questions of fact. [The Supreme Court] defer[s] to the magistrate's findings on these issues when they are supported by substantial evidence. Batra v. Batra, 135 Idaho 388, 391, 17 P.3d 889, 892 (Ct. App. 2001). However, characterization of an asset as separate or community, **in light of the facts found**, is a question of law over which we

exercise free review. Batra v. Batra, supra (emphasis added), District Court's Memorandum Decision and Order, at p. 2. R. 827.

Where a magistrate has set out to achieve equality in a division of property, the division and divorce decree will not be disturbed on appeal if it appears through substantial, albeit conflicting, evidence that the parties have received substantially equal shares. When there is conflicting evidence regarding property division, it is the **magistrate's task to evaluate the credibility of the witnesses and to weigh** the evidence presented. Batra v. Batra, 135 Idaho 388, 398, 17 P.3d 889, 899 (Ct. App. 2001), Court's Memorandum Decision and Order, R. 828.

The determination of "community" value is within the discretion of the trial court and will not be disturbed on appeal if supported by substantial and competent evidence. Stewart v. Stewart, 143 Idaho 673, 152 P.3d 544 (2007); Chandler v. Chandler, 136 Idaho 246, 32 P.3d 140 (2001).

3. Trial Court Discretion. The discretionary decisions of the trial court will not be overturned on appeal unless the trial court abused its discretion. A Trial Court's **disposition** of community property is reviewed for abuse of discretion. Chandler v. Chandler, 136 Idaho 246, 32 P.3d 140 (2001). A review for abuse of discretion means:

> "...(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and

> consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." Cameron v. Neal, 130 Idaho 898, 902, 950 P.2d 1237, 1241 (1997); Walborn v. Walborn, 120 Idaho 494, 817 P.2d 160 (1991); Sun Valley Shopping Center, Inc. v. Idaho Power Co., 119 Idaho 87 (1991).

The Idaho Supreme Court has stated that "individual cases will have to be largely decided on their facts" and that "it is better policy to allow the trial court sufficient discretion to consider the circumstances in each case to determine the most equitable manner for determining and dividing the marital portion of pension benefits". District Court's Memorandum and Decision, R. 835, citing Maslen v. Maslen, 121 Idaho 85, 91, 822 P.2d 982, 998 (1991).

4. Conclusions of Law. The Supreme Court and Court of Appeals will review freely conclusions of law reached, by stating legal rules or principles and applying them to facts found. State v. Miller, 134 Idaho 458, 462, 4 P.3d 570, 574 (Ct. App. 2000); Liebelt v. Liebelt, 118 Idaho 845, 801 P.2d 52 (Ct. App. 1990). If the law has been properly applied to the facts as found, the judgment will be upheld on appeal. Stonecipher v. Stonecipher, 131 Idaho 731, 963 P.2d 1168 (1998).

In this case, given the preponderance of the evidence, and burden of proof and persuasion, the Trial Court's findings were supported by substantial evidence and the Trial Court did not abuse its discretion. The District Court, after careful review, agreed.

Additionally, the trial court found Amy's testimony credible, but the same cannot be said for Bill Clark, whose credibility problems plagued him throughout the trial. Examples can be found in Findings of Fact #16, #18, #29, #50, #54, and #96; R. 585, L. 24; R. 587, L. 20-24.

It is unfortunate that Appellant fails to cite to Exhibits and the Record which supports the Trial Court's findings of fact, so that the Court can determine how it is the Trial Court made and supported its Findings of Fact and Conclusions of Law instead of just re-stating his version of the facts again.[7]

B.

The District Court Did Not Error In Affirming The Magistrate's Finding That The Value Of Appellant's Charles Schwab SEP/IRA #...3713 Was Community Property

Appellant's claim concerning his SEP/IRA was deceptively simple and inherently unfair. He claimed that since the value on the date of marriage of $386,636 exceeded the balance at the date of divorce of $353,873, that all of the account was his sole and separate property. That view ignores the fact that the account in 2002 because of market fluctuations dropped down to $249,799 (Exhibit 235) and dropped again thereafter; that Bill removed funds in excess of $250,000 from the account during marriage (Exhibits

[7] For example, Appellant states as "fact" in the course of proceedings Section of his brief, at page 5, that the magistrate found that the distribution Bill received was a "capital gain", which he attempted to trace into purchase of the Ketchum Condo., but the Court found it was not a capital gain, but income. District Court Memorandum Decision and Order at p. 13. R. 838. The Trial Court did not believe Bill's testimony that it was capital gain. Tr. p. 655, L. 12 to p. 656, L. 10; Tr., p. 660, L. 16 to p. 661, L. 2.

235 and 638); and that community contributions in the sum of $207,313 were added to the account during the marriage. (Exhibit 235, Footnote 1, Findings of Fact and Conclusions of Law, R. 571. Account #...3713 became hopelessly commingled as the Court so found.[8] Findings of Fact and Conclusions of Law, p. 23-26 cited by the District Court at p. 5-6 of the Memorandum Decision and Order. R. 830-831.

Appellant cited Maslen v. Maslen, 121 Idaho 85, 822 P.2d 982 (1991) to the Magistrate and District Court for the proposition that the Court should simply subtract the value on the date of marriage from the value at divorce to arrive at the community value today. The Supreme Court in Maslen recognized that such a simplistic view would not always apply and in affirming the Magistrate here the District Court quoted the **most applicable part** of Maslen:

> "Because the provisions of retirement plans vary so greatly from plan to plan, both in the manner of funding and also in the administration of the plans, and because the circumstances in each case are so varied we decline to state a single inflexible rule for calculating the community interest or value of retirement plans....it appears to us to be impractical-if not impossible-to formulate a categorical rule about the appropriate treatment of retirement accounts in dissolution of marriage cases. We conclude that it is a better policy to allow the trial court sufficient discretion to consider the circumstances in each case to determine the most

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[8] During marriage Bill transferred out $250,000 to Pensco Trust and Sterling Trust which lost nearly all of its value. Exhibit 74A, Findings of Fact and Conclusions of Law 46 and 48. R. 570-571. Amy objected to a $150,000 withdrawal in 2008 but Bill did it anyway. Finding of Fact #50. R. 571.

equitable manner for determining and dividing the marital portion of pension benefits." Maslen v. Maslen, supra, District Court Memorandum Decision and order at p. 7, R. 832.

The District Court in affirming the Magistrate explained as follows:

> "The circumstances of this case, concerning the utilization of the couple's IRAs, are also different than those in *McCoy v. McCoy*, in which no withdrawals were made from the IRA accounts. The magistrate's analysis of the circumstances surrounding Bill's IRA and the community's funding of it, **are supported by the evidence.** As noted by the magistrate, while Bill initially had a balance of $386,636.18, the community provided some $200,000 of contributions to it during the marriage, while Bill was making withdrawals from the account to finance his business ventures. **Due to the lack of accounting,** it cannot be determined to what extent the reduction in value in the account was due to market forces or the withdrawals. In any event, **the magistrate did not abuse his discretion in determining that the most equitable solution was to divide Bill's IRA equally, since his IRA, which began as consisting of only his separate property, was commingled with community property.**" R. 832-833.

The simple subtraction method was appropriate to one plan in Maslen in part because the plan increased in value during marriage, in that United Airlines (Mr. Maslen's employer) contributed 9% of his monthly salary to the retirement account. Mr. Maslen was not asserting that the growth in his retirement plan was separate property, rather he was asking the court to apply a time rule calculation to the entire plan. Appellant cites here and to the District Court the case of McCoy v. McCoy, 125 Idaho 199, 868 P.2d 527 (Ct. App. 1994) which utilized the subtraction method. Like Mr. Maslen's retirement plan, Judy McCoy's IRA's and 401(k) grew during

the marriage and the increase was determined to be community property. McCoy, supra, at 205. Here, Bill Clark's SEP/IRA decreased during the marriage. The Court in McCoy also stated "no evidence was presented to show that Judy or Clinton withdrew any funds from the retirement account during the marriage...". Supra, at 205. Yet here, during the marriage **Bill Clark took withdrawals and moved the monies from Schwab #...3713 in the sum of $301,975** (Exhibit 235) "to finance his business ventures". R. 832. Bill then asked the Trial Court to confirm the entire account balance of $353,873 as his separate property and the Court could not legally ignore said distributions as well as the contributions during the marriage in the amount of $207,313.

When separate property and community amounts exist in an account, commingling will convert the separate property portion to community property unless the separate property can be identified and properly traced. Barton v. Barton, 132 Idaho 394, 973 P.2d 746 (1999); Batra v. Batra, 135 Idaho 388, 17 P.3d 889 (Ct. App. 2001). Appellant's tracing of the separate property component must be established with "reasonable certainty and particularity". Worzala v. Worzala, 128 Idaho 408, 913 P.2d 1178 (1996); Houska v. Houska, 95 Idaho 568, 512 P.2d 1317 (1973). Bill failed to provide such proof. Before the trial, the parties asked the Court to address pre-trial Mr. Clark's attempt to compare the balance today to the balance on the date of marriage and if the amount were less, whether factually and legally the court would be compelled to

conclude that it was all separate property. On January 27, 2010, prior to trial, the court properly ruled that it would come down to a matter of proof. **Yet, at trial Appellant did not even attempt to trace, either directly or indirectly, with reasonable certainty and particularity**. Josephson v. Josephson, 115 Idaho 1142, 772 P.2d 1236 (Ct. App. 1989). Such trace was impossible due to lack of accounting evidence from Bill. R. 832. Because Bill Clark did not trace with reasonable certainty and particularity the $386,636 in existence one day before marriage to the stock, bonds, and cash in the account now, he failed to rebut the community presumption. In addition he did not attempt to identify community contributions, additions, interest, dividends, and natural enhancement on the same as part of a trace. **During the marriage funds were added and funds moved in and out of the account and what was there at trial was clearly not what was there on the date of marriage.** A review of Bill Clark's SEP/IRA shows that it dropped in value from $386,636 on November 30, 2000 (Exhibit 235) to $249,799 at the end of 2002 (Exhibit 235). The account suffered an additional drop in value because of the market correction in 2008. Apart from additions and withdrawals which Appellant ignored, in essence Bill Clark sought to make the community a guarantor and pay him back for the drop in value by a windfall award at trial of the value he had on the date of marriage, while his removal of funds to invest in his projects were all but lost in their entirety. The value consisted of

investments made from additions and interest, dividends, plus appreciation and minus market loss on the same, all of which was community property during the marriage. Mr. Clark did not attempt to trace because he could not trace with reasonable certainty and particularity in commingled account #...3713.

The Trial Court found and the District Court affirmed the following:

> "There is no question, based on the significant community contributions thereto, that the community has an interest in the Schwab 3713 account. From the date of marriage, and every year thereafter, the community invested into the account in varying amounts, totaling over $200,000. There was no evidence to suggest a finding other than that Bill had sole control over the withdrawal of money from the IRA [and that]...significant community funds were commingled with separate funds". Findings of Fact and Conclusions of Law. R. 583, 585, 586.

The Magistrate and District Court addressed and rejected Appellant's argument below that the characterization and distribution of the IRA was controlled by Maslen v. Maslen, 121 Idaho 85, 822 P.2d 982 (1991) and McCoy v. McCoy, 125 Idaho 199, 868 P.2d 527 (Ct. App. 1994). Neither case controlled because the IRA was a savings account and the time rule does not apply to a savings account. It was clear that "Bill's treatment of the account during marriage is more analogous to a savings account, or perhaps more accurately, a business capital or investment account, than a retirement account." Findings of Fact and Conclusions of Law, page 25. R. 585.

> "It is noteworthy that in neither Maslen or McCoy was there evidence that withdrawals were made from the accounts during the course of the marriage. The circumstances in this case are factually distinguishable from either above cited cases, and suggest a different analysis for determining the character and distribution of the Schwab 3713 account." Findings of Fact and Conclusions of Law. R., 585.

The Court found that significant community funds were commingled with separate funds in Account #...3713. Findings of Fact and Conclusions of Law. R. 585. That finding was inescapable.

Additionally, the Trial Court found that "Bill's course of dealing in Schwab 3713 took on the characteristics of a shell game". Findings of Fact and Conclusions of Law. R. 585. At trial Bill was confused about his own shell game, Tr., p. 432, L. 5-15, although he knowingly transferred money from 3713 over Amy's objection. Tr., p. 440, L.5-19 and p. 468, L. 2-21. There were numerous transfers between 3713, Pensco Trust, and Sterling Trust (Tr., p. 483, L. 9-18), all done to funnel funds out and into his investments. Tr., p. 664, L. 4-12. Because of the shell game, Appellant had failed to provide the Court with a basis to trace any funds within the IRA "as Bill's separate property with a reasonable certainty and particularity". Findings of Fact and Conclusions of Law. R. 585-586. Because the standard of proof is so high, and the trace proof totally lacking *or much less even attempted at trial*, the second guessing of the Findings of Fact and Conclusions of Law regarding Schwab 3713 is unreasonable in the words of Huerta v.

Huerta, 127 Idaho 77, 896 P.2d 985 (Ct. App. 1995) and Reed v. Reed, 137 Idaho 53, 44 P.3d 1108 (2002). The Appellate Court must view the evidence in a light most favorable to Respondent since Amy prevailed at trial on this issue. Silva v. Silva, 142 Idaho 900, 136 P.3d 371 (Ct. App. 2006).

> "Consequently, because it is commingled and assets are insufficiently traced, the entire amount of Schwab 3713 is deemed to be community and will be divided equally." Findings of Fact and Conclusions of Law. R. 586.

A tangential issue raised on appeal, and not properly an issue for appeal to the District Court or this Court, is the claim that the Magistrate erred in its decision that if the entirety of Bill's IRA was community property, then Dr. Baruch's account should be "characterized in the same manner". Appellant conceded Amy's separate property interest of $74,777 in **her IRA as a matter of tactics**, so Bill could argue Schwab 3713 was all his separate property. Tr., p. 662, L. 16-18. Mr. Welsh said, "Judge, all I'm saying is that we argued that both of their balances as of the date of marriage was separate property." Tr., p. 662, L. 16-18. At the Motion to Amend, Mr. Welsh tried to argue he did not concede her separate property portion yet he clearly did. Tr. p., 672, L. 7-11. A party may not obtain reversal on appeal for an alleged error that was invited by that party in the trial Court. Having conceded her separate property interest in her IRA (item 32 on the property and debt schedule), **Bill cannot appeal this issue, just like he could not have appealed from a stipulation.** Ratliff v.

Ratliff, 129 Idaho 422 (1996); Smith v. Smith, 136 Idaho 120, 29 P.3d 956 (Ct. App. 2001). **Bill's counsel's concession was a matter of tactics but was binding.** Moreover, this argument was not raised in the lower court and was only raised post trial and cannot be the subject of an appeal. See Smith v. Smith, 136 Idaho 120, 123, 29 P.3d 956 (Ct. App. 2001). In Bill's Post Trial Brief he conceded (R. 270) that Amy's $74,777 in item 32 on the property and debt schedule (her Schwab Account #...5317) was her "separate property". At the hearing on the Motion to Alter or Amend, Defendant stated that the balance in Amy's IRA before marriage was her separate property, and that the court should on that basis change its decision with reference to Bill's IRA. Tr., p. 662, L.16-18.

The District Court referred to a different I.R.A. when it quoted testimony at page 834.[9] The Trial Court was not referring to item 27A, but item 32 and properly treated, however, the separate property in Amy's Schwab IRA (Acct. #...5317) different than Bill's Schwab IRA (Acct. #...3713) because the parties treated them "completely different". Tr. p. 662, L. 22 to page 663, L. 5. Amy withdrew nothing from hers but she added to her IRA of which Bill got the benefit. "On the other hand, [Bill] used his a little bit like his wallet in terms of moving money out, making other

[9] The District Court committed a minor and harmless error when it referred to a passage from Bill's testimony where he conceded a Wells Fargo I.R.A. in the amount of $3,361. This is a different IRA than Amy's Schwab IRA #...5317, which is the one Mr. Welsh conceded was separate property to the extent of $74,777.

investments." Tr., p. 663, L. 10-12. The $150,000 of monies Bill withdrew from #...3713 in violation of the TRO, funneled through Pensco to Crescent Rim, was all lost. Tr. p. 367, L. 9-18. As Bill's accountant testified the IRA invested in Crescent Rim is "so far underwater to assign a value to it". Id. The $100,000 funneled into Pearson Partners was only worth $37,212 and was assigned to Bill. R. 593.

Appellant claims that he "never took any distributions from his IRA", however Bill's testimony and Bill's Exhibit 638 establish facts to the contrary:

> BILL CLARK: "My recollection is that it was around probably 1994, '95. I transferred funds from my Schwab IRA 3713 to Pensco Trust for an initial investment of $30,000--no excuse me. I'm confusing it with the one below, Sterling Trust. Pensco. It would have been - it was around 2005, and transferred $100,000 into it from my 3713 IRA for purposes of investing - having the IRA through Pensco invest in the purchase of the land and providing initial capital for the Pearson Partners, LLC." Tr., p. 432, L. 5-15.
>
> WELSH: "...In 2005 did you take from one IRA to another IRA of $100,000 other than to Pensco? Was that the only-
>
> BILL CLARK: I would have to look at the specific 3713 account. But at some point I believe it was later than 2005 - we invested $100,000 into Sterling Trust Company." Tr., p. 436, L. 24 - p. 437, L. 2.
>
> BILL CLARK: "I transferred, rolled over, $150,000 from my 3713 IRA account at Schwab to Pensco Trust, and Pensco Trust in turn invested that money in Meyer Clark, $150,000, in Meyer Clark Investments. Meyer Clark Investments in turn made a $150,000 loan to Crescent Rim". Tr., p. 439, L. 7-12.

Defendant's Exhibit 638 shows the following amounts in the column "Distribution or Rollover":

> $100,000 in 2005
> $15,869 and $75,000 in 2006,
> $1,495 in 2007,
> $150,000 in 2008 *(without counting the $150,000 that came out twice but went back in twice)*, and
> $150,000, $28,000 and $6,611 in 2009.

Bill Clark was very confused about all such transfers and lacked believability, as the following passage at Tr., p. 448, L. 7-21 shows:

> WELSH: How was your investment in Sterling created?
>
> BILL CLARK: It was through a transfer of funds from my 3713 IRA account to Sterling investments who in turn--the original investment was $30,000, I believe. And it was made--in turn made the investment in Alpha Lending, LLC, which is a Boise-based real estate lending company. I realize, as I was looking at this, **I have to correct a statement I made a little bit ago. I got confused.** I said a little bit ago that I had transferred $150,000 from my 3713 IRA to Pensco for purposes of the Meyer Clark investment. What I actually did was invest--transferred $50,000 to--**excuse me. I take all that back.**" Tr., p. 448, L. 7-21.

On appeal to the District Court, Appellant sought to distinguish between the word "rollover" and the word "distribution". Now on this appeal, regardless of semantics, the above monies were deducted and came out of account from the balance of Schwab IRA #...3713, which account was used like a shell game. R. 585. The District Court soundly rejected the semantics game.

> "The defendant contends that the magistrate's conclusion that Bill withdrew funds during the marriage from the IRA is not supported by the evidence. All of the evidence presented established that Bill never took any

> distributions from his IRAs. The evidence presented showed that he rolled over funds and transferred funds amongst the three retirement accounts only". Appellant's Brief, at 13-14. **This assertion is simply not accurate.** For example, Bill testified during the trial that he used $150,000 from this IRA to provide additional funding for his Crescent Rim condominium project. *See, e.g.*, Trial Transcript, at 439-40 ("I transferred, rolled over, $150,000 from my 3713 IRA account at Schwab to Pensco Trust, and my Pensco Trust in turn invested that money in Meyer Clark, $150,000 in Meyer Clark Investments, Meyer Clark Investments in turn made a $150,000 loan to Crescent Rim...And then I decided to use funds from the IRA, my 3713 IRA, as I just described. That's how it got to Meyer Clark into Crescent Rim.") *See also id.*, at 473 ("So there was a transfer from the 3713 IRA account to Pensco. And Pensco then put those funds into Pearson Partners for purposes of buying down the loan.") **Although technically the transfers were not made directly to Bill, the magistrate was correct in finding that they were effectively just that.**" R. 833.

It appears bold, greedy and litigious that Bill would still seek on this appeal to have all of his IRA treated as separate property, when the funds were withdrawn and virtually all lost in Bill's failed business ventures, and seek one-half of Amy's IRA too! Such an approach is consistent and why Bill Clark suffered from his inequitable positions.

The Court correctly perceived that its division of community property was a discretionary determination. Tr. p. 677, L. 11-14; Chandler v. Chandler, 136 Idaho 246, 32 P.3d 140 (2001); Stewart v. Stewart, 143 Idaho 673, 152 P.3d 544 (2007). In terms of Maslen, supra, that Supreme Court realized contrary to Appellant's view of Maslen, that one treatment of retirement accounts was not logical for all cases. There are different ways in treating retirement accounts based on the circumstances that exist (Tr. p. 677, L. 19

to page 678, L. 1) and that is why the Court exercised proper discretion when it stated:

> "Applying the analysis approved in Maslen and McCoy, would result in ignoring the entirety of the community's contributions to the account and produce a result that is unfair to the community." Findings of Fact and Conclusions of Law. R. 586.

In fact the message of Maslen is what Judge Reardon and the District Court thought it to be:

> "Because the provisions of retirement plans vary so greatly from plan to plan, both in the manner of funding and also in the administration of the plans, and because the circumstances in each case are so varied we decline to state a single inflexible rule for calculating the community interest or value of retirement plans."
>
> ...
>
> "Because there are so many variables, individual cases will have to be largely decided on their facts. We conclude that it is a better policy to allow the trial court sufficient discretion to consider the circumstances in each case to determine the most equitable manner for determining and dividing the marital portion of retirement benefits. Maslen v. Maslen, 121 Idaho 85, 91, 822 P.2d 982 (1991).

On page 13 of Appellant's Brief, he ignores the foregoing statement of the law and urges here a "one size fits all" approach to both IRAs in this case, which the lower court and the District Court wisely rejected.

The court acted well within the outer bounds of discretion and reached its result through reason. Walborn v. Walborn, 120 Idaho 494, 817 P.2d 160 (1991); Chandler v. Chandler, 136 Idaho 246, 32 P.3d 140 (2001).

The best example of proper discretion in action is the following passage from the hearing on Appellant's Motion to Alter or Amend:

> "We have different ways of treating retirement accounts based upon the circumstances that exist. And my findings were based upon my belief that the circumstances with which Mr. Clark treated his retirement account during the course of the marriage were significantly different than the way Dr. Baruch treated her retirement account during the course of the marriage. And it was those differences that made up the basis for my finding that the distribution should be as I set forth. And I can't think of a reason, based on what we have talked about here today, to change that. So I'll deny the motion to alter or amend with respect to that point." Tr., p. 677, L. 24 through p. 678, L. 12.

C.

The District Court Did Not Error In Affirming The Magistrate's Finding That Bill Received Income That Was Community Property And That Appellant Failed to Trace Separate Property Into the Ketchum Condominium

The value, debt and allocation of the Ketchum condominium was stipulated to by the parties. The condominium cost $975,000. R. 564. The parties agreed that at the time of trial the condominium was valued at $725,000, with liens in the amount of $372,788. It was agreed that Amy would keep the condominium with equity of $352,211. At trial, Bill sought reimbursement for separate funds he alleged were expended in acquiring the condominium. Finding of Fact #11. R. 564.[10] Bill testified that the separate funds invested

[10] Although not before this Court, the dollar for dollar separate property reimbursement rule of Ustick v. Ustick, 104 Idaho 215, 657 P.2d 1083 (Ct. App. 1983) appears inequitable when the property declined in value by $250,000. Why should the separate property receive such a guaranty when a community reimbursement claim is not treated that way? The community reimbursement rule in Martsch v. Martsch, 103 Idaho 142, 645 P.2d 882 (1982) is more logical and fair.

in the Ketchum Condominium were proceeds from the sale of the Veltex Building, which funds he received on February 7, 2007, subsequent to the sale of his interest in that development. Yet the Court did not accept that testimony, in part because Amy testified that the Ketchum Condominium was purchased in anticipation of paying down the initial loan with proceeds of the sale of the McCall properties which the parties owned jointly, and from which she should have been reimbursed for her separate property contribution in acquiring a McCall Cabin. Finding of Fact #13. R. 564. Tr., p. 193, L. 2-21; Tr. p. 588, L. 3-13. Bill and Amy purchased the Ketchum Condominium March 28, 2007, for $975,000. At closing, the parties submitted checks in the amounts of $30,000 and $175,539.23 as a down payment. Tr. p. 190, L. 24 - p. 191, L. 13; Exhibits 6 and 232.

Bill was engaged in development business through the auspices of variously named business entities. Two such entities were Veltex Building, LLC, formed to acquire the site on which the Veltex Building would be built, and BED Investments, LLC, formed to engage in the development and building of the Veltex building, a residential and office condominium complex. Finding of Fact #15. R. 564. However, Bill provided conflicting evidence and testimony regarding the timing of his acquisition of an interest in BED Investments and Veltex LLC. At trial, Bill's testimony was that BED Investments was a partner in Veltex at its inception, and that he acquired an interest in BED Investments at the same time it

acquired an interest in Veltex. R. 565, L. 1-9. Bill also testified that these two events occurred in 1997. R. 565, L.6. Exhibit 517 establishes that Veltex LLC was not established until October 29, 1998, and Exhibit 517 establishes that BED Investments was not formed until January 22, 1999. Finding of Fact #16. R. 565.

Bill testified that the construction of the Veltex building was financed through a loan from Washington Trust Bank to Veltex LLC, but did not provide a date on which the loan was procured. Finding of Fact #17; R., 565, Tr., p. 412, L. 7-25. Nor did Bill provide proof who signed the loan. Bill also testified that the planning for the Veltex building was done prior to marriage, but avoided the question regarding when construction was begun or completed. Finding of Fact #18. R. 565. On cross examination after shown Exhibit 241, Bill conceded construction began in the fall of 2002. Tr., p. 512, L. 23 to p. 513, L. 11. Bill first received $260,800, paid by BED Investments in October 2005 and deposited by Bill into Schwab #...3714, a community account. BED Investments was dissolved in April 2008. Exhibit 516. The next payment to Bill about which there was evidence, was in the amount of $342,149 paid by Veltex LLC, and deposited by Bill into the Schwab #...3714 community account on February 7th, 2007. Yet, at the time of marriage, and at the time he received the distributions referred to above, Bill personally owned neither the land the Veltex building was built on, nor the building itself, rather owned an interest in the entities which owned the property. Findings of Fact, #21-22.

R. 565. Bill did not relinquish any percentage of his shares in either BED Investments or Veltex LLC in exchange for the distributions he received. Finding of Fact #23. R. 566.

Accordingly, since both sums were received by Bill during marriage they were presumed to be community property, subject to proof by Bill that part or all of the funds received were separate. Banner Life Insurance Co. v. Mark Wallace Dixson Irrevocable Trust, 147 Idaho 117, 124, 206 P.3d 481, 488 (2009). Finding of Fact #24. While Bill testified that "all the planning" on the Veltex building project was done prior to marriage, the Court properly found it more likely than not, given the fact that ground was not broken on the project until sometime after September of 2002 (Exhibit 243) and not completed until 2004 (Exhibit 241), that significant community effort was expended on the project by Bill. Finding of Fact #25. R. 566; Exhibit 241.

At the hearing to alter or amend, the Court explained again to Appellant's counsel what the Court found to be true:

> "Well, my perspective on it was that based upon the timing, Mr. Clark had his share in Veltex at the time they were married, and at the time that he received this, what you characterized as capital gains and **I'm viewing it as income**, was about seven years after the marriage." Tr. p. 655, L. 12-17.

In Appellant's Motion to Alter or Amend, Bill's counsel could not convince the trial court that the monies he received for developing the Veltex project were something other than community income. Bill had failed to carry his burden to overcome the community

presumption, since the funds were received during the marriage. Banner Life Insurance Co. v. Mark Wallace Dixson Irrevocable Trust, supra; Reed v. Reed, supra; Winn v. Winn, 105 Idaho 811, 673 P.2d 411 (1983). Bill failed to trace his so-called separate proceeds with reasonable certainty and particularity. Findings of Fact and Conclusions of Law, p. 22.

The Court ruled:

> "...my finding was based upon my determination that it was more probable than not that Mr. Clark put a significant amount of effort into this project in the planning, building and selling of units after they were married. And that the compensation that was received in 2007 that has been characterized as capital gains was income because he didn't give anything up in exchange for that." Tr. p. 655, L. 24, through p. 656, L. 7.

The Court was well aware of Mr. Clark's credibility problem on this issue as well. Bill testified under oath that all planning on the Veltex building occurred before marriage, (Tr., p. 413, L. 4-6) but given the fact that ground was not broken until September 2002 (Tr., p. 513, L. 9-11; Exhibit 243), and not completed until 2004 (Tr., p. 573, L. 22-24), his testimony was not believable and the Court so concluded. Finding of Fact #25 (R. 566); Exhibit 241. Amy testified that the Veltex Building was planned and developed during the marriage, "and the proceeds that he lists there, $342,149, occurred during the time of marriage, and I believe that was due to the labor...the sweat equity that was put in during the time of our marriage". Tr. p. 588, L. 7-22.

Bill received income in 2007 for work on the Veltex project. Tr. p. 660, L. 3-10. The Court properly concluded:

> "I think based on the evidence that I heard, that it is more likely than not that the gain that they realized in 2007 was a result of community effort, **and it's income.**" Tr., p. 660, L. 3-7.

That further, the Court stated:

> "I mean, my view of the evidence was that, taken as a whole the evidence about when Veltex and Mr. Clark's confusion about when he formed BED Investments and when he formed Veltex, and his testimony about when the developments started and more credible proof that I received about when it actually started, all of that for me added up to a finding it was more likely than not that all the effort was put into the Veltex building that resulted in income being distributed seven years later **was income.**" Tr., p. 660, L17, through p. 661, L. 2. Exhibits 241 and 243.

A more classic example of the proper weighing of evidence, applying the preponderance of evidence standard, assessing credibility, and exercising reason well within the bounds of discretion would be hard to find. Stewart v. Stewart, 143 Idaho 673, 152 P.3d 544 (2007); Chandler v. Chandler, 136 Idaho 246, 32 P.3d 140 (2001). The Appellate Court must decline Appellant's invitation to **second guess** the fact finder. The Supreme Court does not re-weigh the evidence nor does it substitute its view of the facts for that of the trial judge, even if there is conflicting evidence in the record. Holley v. Holley, 128 Idaho 503, 509, 915 P.2d 733 (Ct. App. 1996.

Appellant's attempt to trace said funds into the purchase of the Ketchum Condominium also failed at the starting point and

Appellant was not entitled to a reimbursement claim in the Ketchum Condominium. Appellant concedes that the balance in Schwab Account Number #...3714 of $195,024.51 on February 9, 2007 was community property. (Appellant's Brief to the District Court, R. 729; Appellant's Brief to the Supreme Court, p. 27). Appellant conceded that the down payment of $30,000 came from a community property source. (Appellant's Brief, R. 729). Thereafter, the deposit of Veltex income received during the marriage in the sum of $342,149 was also community property and was presumed as such. Reed v. Reed, 137 Idaho 53, 44 P.3d 1108 (2002); Winn v. Winn, 105 Idaho 811, 673 P.2d 411 (1983). As the parties testified and which was further supported by Exhibits, ground was broken on the Veltex Building sometime after September 16, 2002, approximately 22 months after the parties were married, and **developed with Bill's community industry and on the community clock.** Veltex construction was finished in 2004. (Exhibit 241). The Veltex Building was planned, developed and constructed during the marriage which was corroborated through impeachment of Bill's testimony. Tr. p. 588, L. 19-22. Appellant did not meet his burden of proof and persuasion because he did not trace with **reasonable certainty and particularity** that any of his alleged separate funds comprised the $205,539 ($30,000+$175,539, Exhibit 232, Bates page 2374) paid by the parties at the closing to purchase the Ketchum Condominium. Bill Clark failed to trace his alleged separate property with "reasonable certainty and particularity". Worzala v. Worzala, 128

Idaho 408, 913 P.2d 1178 (1996); Houska v. Houska, 95 Idaho 568, 512 P.2d 1317 (1973). Plaintiff's Exhibit 232 was persuasive. Exhibit 232 outlined the flow of monies in and out of Account #...3714, Bill's working capital account. The Ketchum down payment of $205,539 was replenished from part of the proceeds from the sale of McCall properties totaling $684,211 on 5/17/2007 and 9/11 2007. Meanwhile Bill had paid out $333,391 of funds from #...3714 from 2/9/07 through 12/5/2007 unrelated to the Ketchum Condo. It appears that Bill would have difficulty running his business as usual if significant funds had not been returned to Account #...3714. Exhibit 232. In short, the supposed Veltex proceeds had been replenished to Bill's account.

On appeal, Appellant stated that the "Magistrate Court initially concluded as set forth in the Findings of Fact and Conclusions of Law, "that capital gains earned on separate property is income". (Appellant's Brief, p. 19). The Court actually stated, "this presumption appears to be based on his belief that capital gains from a separate asset during marriage are separate property, a proposition that the court can find no support. R. 582. The statement was harmless error and the District Court recognized that the Magistrate corrected the statement at the post trial hearing, namely, "that capital gains from a separate asset received during marriage are not always separate property". R. 838. Appellant appears to have created the problem in part with an improper

"capital gain" label--a tax concept.[11] The rule that applies is about natural appreciation as stated by the District Court:

> "As a general rule, the natural enhancement in value of separate property during coverture [marriage] does not constitute community property; however, to the extent an enhancement in value is due to the community efforts, labor, industry of funds, it falls into the community". Speer v. Quinlan, 96 Idaho 119, 127, 525 P.2d 314, 322 (1974).

Similarly, proceeds from the sale of a separate asset can be part separate, part community. Within proceeds a commingling issue can arise, which if not traced with reasonable certainty and particularity will all become community. Worzala v. Worzala, 128 Idaho 408, 913 P.2d 1178 (1996); Desfosses v. Desfosses, 122 Idaho 634, 836 P.2d 1095 (Ct. App. 1992). Income derived from Bill's labor and industry during the marriage is community. "The income, including rents, issues and profits of all property, separate or community, is community property...". Idaho Code, Section 32-906(1). Finally, since the $342,179 **of income** was received during the marriage in 2007 it is presumed to be community property. Banner Life Insurance Company v. Mark Wallace Dixson Irrevocable Trust, supra. This was a proper fact finding issue for the trial court and the court's finding is supported by substantial evidence.

The Magistrate's initial statement at R. 582 about capital gains did not effect the logic and appropriateness of the court's conclusion. The bottom line finding and conclusion was:

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[11] The term capital gains is a confusing term. Proceeds from the sale of an asset can have separate and community components. Community labor could have caused the proceeds and distribution may have commingling issues. But here, the money Bill received was income, not capital gains.

> "The Veltex Building was built and developed during the marriage and the proceeds from the Veltex Building and income are presumed to be community property and Defendant [Appellant here] failed to overcome the community presumption. Accordingly, Defendant's Motion regarding the purchase of the Ketchum Condominium is Denied." Judgment and Order Re: Motion to Alter or Amend Findings of Fact and Conclusions of Law and Judgment. R. 680-681.

The reason the Court arrived at its conclusion is that income from separate property is community. Idaho Code, Section 32-906. The Court found:

> "[G]iven that the funds were received during marriage, the Court begins with the presumption that they are community property. It then becomes Bill's burden to trace the origin of the funds "with reasonable certainty" to a separate source. The source in this case was Veltex Building LLC, not the actual property itself. Bill did not own the property at the time of marriage, but rather an interest in the entity that did own it. He did not receive the funds as a result of a liquidation of that interest, and in fact he still owns the same percentage of the LLC that he did at the time of marriage. His asset is preserved in its entirety. There is no evidence that the asset, the LLC, increased in value naturally, or that the funds he received were as a result of that natural enhancement. Given those circumstances, funds received through the asset must be regarded as income. Income from separate property, received during the marriage, is community property. I.C. §32-906." R. 582.

Again, the Court found the facts based on the evidence, and despite all of Appellant's second guessing, by way of motion to amend the Court ruled:

> "With respect to the findings that the proceeds from the Veltex building were community property in 2007, I can't find a reason to change that as well. We are talking about a period of time that was seven years post marriage. And my findings - I mean, we start with the presumption that the income received is community income. And it seems to me that I have to have something that demonstrates clearly and convincingly that it was separate property. The only finding that I can make,

based upon the evidence that I heard, was that this far into the marriage, given the state of the project at the time of the marriage and the amount of effort that I found that he put into during the marriage, that there is nothing that overcomes the presumption that its community income. And so I never got to a trace. And for that reason, I'm going to deny the motion to reconsider on that point." Tr., p. 678, L. 13 through p. 679, L. 6.

Not only does Appellant's tracing theory fail at the starting point, but Appellant's analysis of Schwab Account #...3714 was inaccurate. Exhibit 596 contains the Schwab statements for the period February and March 2007. Appellant's analysis fails to take into account the $1,631.60 in community dividends and interest added to the Schwab account in February (Exhibit 596, pages 1283 and 1284) and the $1,943.23 in community dividends and interest added to the account in March (Exhibit 596, page 1294). Further, in the table on page 24 of Appellant's Brief (R. 729), Bill subtracts a $10,000 check from community property "CP", allegedly on March 26, 2007, before he accounts for the check in the amount of $176,000 to close the purchase of Ketchum, when in fact the $10,000 check was withdrawn on March 28, 2007, after the $176,000 check cleared. (Exhibit 596, page 1293). Bates page 1307 in Exhibit 596 shows that said $10,000 check was payable to William Clark and was paid on March 28, 2007. Hypothetically, even if Bill had traced the Veltex funds to proceeds of his separate property, then his post trial table when corrected for dividends, interest, and the $10,000 chronological error, would reflect that there was $82,428.76 remaining from the community property February balance

in the Schwab account before the $176,000 check cleared. However, correcting Appellant's math in his Post Trial Brief was purely academic since the $342,149 "income" was a community property deposit, as the Court properly concluded. Finally, in addressing the alleged trace the Court properly considered the parties' intent.

It was not the parties' intent to use Veltex monies to purchase the Ketchum Condominium and Appellant only attempted such a trace belatedly in this case by ignoring the parties intent after applying too narrow of a time period to a purported last minute and undeveloped indirect trace under Josephson v. Josephson, 115 Idaho 1142, 772 P.2d 1236 (Ct. App. 1989). Amy testified that the Ketchum Condo was purchased knowing that they were going to use the proceeds from the sale of their McCall lots and their McCall Cabin to buy the Ketchum Condominium. Tr., p. 588, L. 7-13. The appropriate trace time period should extend to September 11, 2007. The proceeds from the sale of the McCall Lots were $452,528 and the proceeds from the sale of the McCall Cabin were $231,683. Exhibit 232, pages 2384 and 2385. The combined McCall proceeds of $684,211 ($452,528+231,683) were more than sufficient to fund the $205,539 used to purchase Ketchum ($30,000 + $175,539) as well as the $400,000 paid in October 2007 to reduce the Ketchum mortgage. (Exhibit 232, page 2380). The proceeds from the sale of the McCall properties more than replenished Account #...3714, Bill's working

capital commingled account, for the money temporarily removed for Ketchum. Tr., p. 588, L. 3 through p. 589, L. 9; Exhibit 232. When applying a trace under Josephson, supra, care must be taken to include the parties' intent in determining the overall effect of community monies in both assets, the 3714 account and Ketchum Condominium and to use the correct time span for the indirect trace.

The Court properly stated and found:

> "Even apart from the above analysis, the Court cannot find that Bill traced the funds used for the Ketchum condominium down payment to a separate source. Bill had no other livelihood or source of income than that of a real estate developer. Accepting his testimony that the site for the Veltex building was acquired at the same time BED investments was formed, the LLC's didn't own the site until January of 1999, slightly less than two years prior to marriage. Given that construction wasn't completed until more than three years after marriage, and that there was no evidence of what, if any, income was earned by either BED investments or Veltex Building LLC, prior to marriage, Bill has not met his burden of tracing either the 2005 distribution, or the 2007 distribution, with reasonable certainty.
>
> Therefore, the funds drawn from Schwab 3714 to use as a down payment on the Ketchum condominium are community funds, and Bill is not entitled to reimbursement separately for any part of the amount." Findings of Fact and Conclusions of Law. R. 583.

Appellant conflates the Magistrates Decision to serve his argument on appeal that the Judge misunderstood the issue. The bottom line for the Court is that based on this record and the evidence before it, what Bill received in 2007 was income and presumed to be community property. Bill could not carry his burden even by mislabeling the issue as "capital gains", because he failed

to trace with reasonable certainty and particularity that what he received was his separate property rather than compensation for his labor. The District Court properly rejected a second guessing of the fact finder attempted here again.

The case of Wolford v. Wolford, 117 Idaho 61, 785 P.2d 625 (1990) dealing with whether there is an undistributed dividend which may actually be undistributed wage income, in a corporation, entitling the community to reach it, is not involved in this case, and is an irrelevant misdirect. Again, what Bill received was income.[12]

The community reimbursement rules are not involved in this case but rather the failure of Bill to identify and trace community income used to purchase the Ketchum Condominium.

Neither are the community enhancement rules of Sherry v. Sherry, 108 Idaho 645, 701 P.2d 265 (Ct. App. 1985) or Swope v. Swope, 122 Idaho 296, 834 P.2d 298 (1992) applicable here. While Appellant may like to recharacterize the issue, Bill's problem is not found in those cases, but rather is found in his failure to overcome the community presumption of the income he received, coupled with his lack of credibility.

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[12] Speer v. Quinlan, 96 Idaho 119, 128, 525 P.3d 314, 323 (1974) adds credence to the Trial Court's finding that what Bill received was compensation for his labor, but is not applicable to an inquiry of retained earnings in this case, because Bill actually received income, and Amy wasn't chasing retained earnings because Bill may not have been properly compensated.

V.

CONCLUSION

The Decision of the District Court must be upheld on appeal. Findings of Fact were not clearly erroneous, were supported by substantial evidence and the Magistrate did not abuse his discretion, as the District Court so concluded. Attorneys fees should be awarded to Respondent.

RESPECTFULLY SUBMITTED this 4th day of April, 2012.

BEVIS, THIRY & SCHINDELE, P.A.

JAMES A. BEVIS

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2012, I caused two true and accurate copies of the foregoing document to be served upon the following as indicated below:

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