

IN THE SUPREME COURT

STATE OF IDAHO

RODGER C. SWANSON,
Petitioner/Respondent,

vs.

JACKIE SWANSON,
Respondent/Appellant

DOCKET NO. 48021-2020

RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District,
in and for the County of Lemhi

HONORABLE STEVAN H. THOMPSON, Presiding

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III. STATEMENT OF THE CASE

A. Nature of the Case.

This is a divorce action filed by Plaintiff/Respondent Rodger C. Swanson (“Rodger”) against Defendant/Appellant Jackie Swanson (“Jackie”). The appeal involves property issues, including determination of separate property and division of community property, the district court’s award of attorney fees and costs to Rodger in the intermediate appeal, and whether fees and costs should be awarded to either party in this appeal.

B. Course of Proceedings.

On January 5, 2017, Rodger filed a complaint for divorce based on irreconcilable differences and willful desertion. Rodger sought return of his separate property in excess of \$1,000,000.00, which Jackie had taken from his bank accounts, an order confirming each party’s separate property to him or her, and an equitable division of community property and debt. Jackie filed her answer and counterclaim on March 2, 2017 and Rodger replied to the counterclaim on March 7, 2017.

This case was tried to the Magistrate Court, Hon. Stephen J. Clark presiding, on January 30 and 31, 2019. On April 12, 2019, Judge Clark issued his Findings of Fact and Conclusions of Law (“FFCL”). Thereafter, Judge Clark’s Judgment and Decree was entered on May 9, 2019.

Jackie appealed the Judgment and Decree to the District Court on May 10, 2019. The case was assigned to the Honorable Stevan H. Thompson, and on April 2, 2020 Judge Thompson issued his Opinion and Order on Appeal, upholding the Magistrate Court and awarding Rodger his attorneys fees and costs.

The within appeal was filed on May 12, 2020.

C. Statement of Facts.

Rodger and Jackie were married May 27, 2000 in Salmon, Idaho. This was a first marriage for Rodger; Jackie had been married before. No children were born to Rodger and Jackie. Both parties came into the marriage with separate property; however, they did not execute a prenuptial agreement.¹

It is undisputed that during the marriage, the parties lived and worked on the ranch properties; it is likewise undisputed that a community property interest accrued in those properties based upon improvements made during the marriage. This is reflected in the Court's findings and conclusions.

Jackie was the exclusive manager of the parties' financial books and records during the marriage, continuing until approximately December 2016.² Jackie was well aware that bookkeeping was not Rodger's "forte."³ Rodger trusted Jackie, and signed whatever she asked him to sign.⁴ Jackie took advantage of Rodger's trust in her, a fact which the magistrate discussed in his FFCL.⁵ Jackie testified "I'm not proud of how I handled the books."⁶ She admitted she took more than \$1,000,000.00 from ranch accounts from May to July, 2016 and placed that money in her own accounts to which Rodger had no access.⁷ Jackie did not tell

¹ Tr., p. 131, ll. 6-8; Tr. p. 395, ll. 23-24; Tr. p. 396-397.

² Tr., p. 68, l. 4; Tr. p. 105, ll. 7-8; Tr., p. 331, ll. 20-24;

³ Tr., p. 409, ll. 11-12.

⁴ Tr., p. 87, ll. 10-12; Tr. p. 95, ll. 3-12.

⁵ See FFCL, R.Vol. I, p. 39-40.

⁶ Tr., p. 433, ll. 8-9.

⁷ Tr., p. 411, ll. 2-13; Tr. p. 413, l. 2 – p. 415, l. 2.

Rodger about the transfers; in fact, he did not discover that she had taken the money until December 2016 when there was not enough money left in the ranch accounts to pay income taxes which were due.⁸ Jackie's assertion in Appellant's Corrected Opening Brief that "the parties" deposited funds into their joint Wells Fargo account and then into several different Swanson bank accounts is a mischaracterization of what occurred. The only party transferring funds was Jackie, and she did so surreptitiously, without Rodger's participation or knowledge.⁹

Throughout the proceedings, Rodger attempted to obtain information about Jackie's accounts at Eastern Idaho Credit Union and her investment accounts with Bill Allen; the original trial setting was delayed by the trial court because the trial judge determined those records were necessary for the Appellant to accurately support her claims of her separate property characterization. However, Jackie was non-responsive to discovery requests by Rodger, and failed to provide him necessary information.¹⁰ The magistrate noted the paucity of evidence provided by Jackie. Regarding her separate property, he found: "There was an unknown amount of funds, received as a result of her ex-husband's death which contributed to her separate property. The return on those funds is unknown."¹¹

Rodger retained an expert, David M. Smith, C.P.A., to trace his separate property funds from the sale of the Swanson Ranch, and to identify other transfers which Jackie had made during the marriage. Mr. Smith was not asked to trace any separate property interests claimed by Jackie. Jackie strategized to not call an accounting expert to present her version of the finances

⁸ Tr., pp. 81-82.

⁹ See, e.g. FFCL, R. Vol. I, pp. 39-40.

¹⁰ Tr., p. 9, ll. 7-15; Tr. p. 384, ll. 13-19; Tr. p. 404, ll. 3-21.

¹¹ FFCL, R., Vol. I, p. 32.

and rebut Rodger's financial expert's testimony and conclusions, or to offer any evidence to support her separate property claims.

Mr. Smith identified transfers and disbursements which occurred during the marriage, and also identified a number of "unknown disbursements." Mr. Smith assumed those disbursements were community funds, absent any documentation to the contrary. Jackie's appeal to this Court is taken on the sole issue of the characterization of the unknown disbursements identified by Mr. Smith.

IV. ADDITIONAL ISSUES ON APPEAL

Rodger seeks costs and attorney fees on appeal pursuant to I.A.R. 40 and 41, and I.C. § 12-121.

V. ATTORNEYS FEES ON APPEAL

In accordance with the provisions of I.A.R. 35(b)(5), and I.A.R. 41, Rodger requests this Court to award him reasonable costs and attorney fees incurred on appeal.

Attorney fees and costs should be awarded to Rodger under I.A.R. 40 and 41, and I.C. § 12-121. Attorney fees are appropriate when "an appeal does no more than simply invite the appellate court to second-guess a trial court on conflicting evidence, or if the law is well settled and the appellant has made no substantial showing that the lower court misapplied the law."¹²

Attorney fees are also appropriate on review of discretionary decisions where no cogent challenge is presented with regard to the trial judge's exercise of discretion.¹³

¹² *Pass v. Kenny*, 118 Idaho 445, 449, 797 P.2d 153, 157 (Ct. App. 1990) (citing *Johnson v. Edwards*, 113 Idaho 660, 747 P.2d 69 (1987)).

¹³ *Id.* (citing *McPherson v. McPherson*, 112 Idaho 402, 732 P.2d 371 (Ct. App. 1987)).

VI. ARGUMENT

A. Standard of Appellate Review

When reviewing the decision of a district court sitting in its capacity as an appellate court, the Supreme Court reviews 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 from findings. If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, the Supreme Court affirms the district court's decision as a matter of procedure.¹⁴

On appeal, the trial court's findings of fact will not be set aside if supported by competent evidence.¹⁵ It is not within the province of the appellate court to weigh the evidence, or substitute its view of the facts for the view of the trial judge.¹⁶ Moreover, "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."¹⁷

The party challenging the findings has the burden of showing error, and the appellate court must review the evidence in the light most favorable to the prevailing party.¹⁸ The judgment of the trial court will be affirmed on appeal if it is capable of being upheld on any theory.¹⁹ When the trial court sits without a jury, the appellate courts must liberally construe the

¹⁴ *Griffiths v. Griffiths*, 167 Idaho 287,294, 469 P.3d 615, 621 (2020).

¹⁵ *Burgess v. Salmon River Canal Co.*, 119 Idaho 299, 309, 805 P.2d 1223, 1233 (1991).

¹⁶ *Ernst v. Hemenway and Moser Co., Inc.*, 126 Idaho 980, 987, 895 P.2d 581, 588 (Ct. App. 1995).

¹⁷ *Worzala v. Worzala*, 128 Idaho 408, 413, 913 P.2d 1178, 1183 (1996) (*citing Rohr v. Rohr*, 118 Idaho 689, 691, 800 P.2d 85, 87 (1990)).

¹⁸ *Rohr v. Rohr*, 118 Idaho 689, 691, 800 P.2d 85, 87 (1990) (*citing Rueth v. State*, 103 Idaho 74, 77, 644 P.2d 1333, 1336 (1982)).

¹⁹ *Ustick v. Ustick*, 104 Idaho 215, 221-22, 657 P.2d 1083, 1089-90 (Ct. App. 1983); *see also Berry v. Koehler*, 86 Idaho 225, 383 P.2d 484 (1963).

trial court’s findings of fact in favor of the judgment rendered.²⁰ Even if there exists conflicting evidence, the appellate court may not disturb the trial court’s findings and conclusions on appeal if they are based on substantial and competent evidence, however meager.²¹

B. The District Court Properly Affirmed the Magistrate Court’s Decision Regarding Unknown Disbursements.

Jackie’s lengthy argument regarding the allocation of “unknown disbursements” identified in the report of Rodger’s expert, David Smith, C.P.A., focuses on disbursements from the account, rather than Judge Clark’s findings characterizing the source of the funds in that account. Jackie’s argument presumes facts not in evidence regarding her claim that the certificates of deposit (“CDs”) and the annuities she later purchased were her separate property, or derived from her separate property funds.

1. Jackie’s Burden of Proof.

Under Idaho law, all property acquired after marriage is presumed to be community property.²² A party seeking to overcome this presumption has the burden of proving that an asset is that party’s separate property, and absent such proof, all property acquired after marriage by either spouse is community property.²³ When community and separate assets have been commingled, the party claiming separate assets must show with reasonable certainty and particularity that the property was, in fact, separate.²⁴

²⁰ *Ervin Constr. Co. v. Van Orden*, 125 Idaho 695, 699, 874 P.2d 596, 510 (1993).

²¹ *Id.*; see also *Rueth v. State*, 103 Idaho 74, 644 P.2d 1333 (1982).

²² I.C. 32-906(1).; *Smith v. Smith*, Idaho Supreme Court No. 46832, October 5, 2020, citing *Banner Life Ins. Co. v. Mark Wallace Dixon Irrevocable Tr.*, 147 Idaho 117, 124, 206 P.3d 481, 488 (2009)

²³ *Id.*

²⁴ *Barton v. Barton*, 132 Idaho 395, 973 P.2d 746 (1999).

Jackie has made no such showing regarding her claim that the four \$250,000 annuities were funded from her separate property assets in the Eastern Idaho Credit Union Account. She provided no evidence to support her claim that she had \$1,000,000 in separate assets in that account at any time. To the contrary, her testimony at trial established that the annuities were purchased, in whole or in part, with community funds. She commingled funds she had taken from community accounts with funds she claimed to be separate property, and she failed to identify with any degree of particularity where the funds to purchase the annuities came from.²⁵

2. Jackie's Trial Testimony. Jackie testified at trial that she came into her marriage with Rodger with approximately \$730,000.00 in total assets: "My opinion is that with all the assets and -- that I had and all the stocks and investments and annuities at that time, I had around \$730,000 that I could have said I was worth."²⁶ Between \$450,000 and \$475,000 of that was in cash.²⁷ She sold the house she owned before she and Rodger were married, and put the money from the sale with Bill Allen to invest.²⁸ She also invested \$130,000 of the money she took from Rodger's sale of the Swanson Ranch with Bill Allen.²⁹ Jackie testified that some of her cash assets were in CDs, but she didn't know how many CDs she had when she married Rodger.³⁰ She testified that the money in the six CDs she had at the time of trial came mostly from investment money she had with Bill Allen.³¹ Jackie further testified that some of her

²⁵ Tr., p. 339, ll. 18-21; Tr. p. 387, ll. 6-19; Tr., p. 401, ll. 3-24.

²⁶ Tr., p. 347.

²⁷ Tr., p. 348.

²⁸ Tr., p. 348.

²⁹ Tr., p. 366.

³⁰ Tr., p. 342.

³¹ Tr., p. 342.

separate property was invested in stocks.³²

Jackie testified that the CDs were later used to purchase annuities, and that she purchased four \$250,000 annuities.³³ She admitted that the money for the annuities came from the CDs and from interest she received on her investments.³⁴ She further admitted that she did not know whether money that came back into her account from transfers back and forth between the Wells Fargo accounts were used to purchase the annuities.³⁵

Finally, Jackie testified that after purchasing the annuities she still has investments with Bill Allen: “I still have some investments from previous funds before Rodger--well, I can’t say before Rodger and I--but previous from this account that Bill Allen is still holding; and it’s revolving.”³⁶

3. Jackie’s Failure to Provide Evidence. Jackie did not provide the records of her transactions with Bill Allen to either opposing counsel or the Court.³⁷ She did not testify regarding the current value of those investments. Jackie did not provide the records of her stock holdings to either opposing counsel or the Court. She did not testify regarding the current value of her stock accounts. Clearly, the cash Jackie said she had when she married Rodger was insufficient to purchase four \$250,000 annuities for her children; indeed, if all of her assets were included, she had insufficient separate property funds to purchase the annuities.

Jackie had the burden to prove the annuities were purchased from her separate property

³² Tr., p. 342.

³³ Tr., p. 343.

³⁴ Tr., p. 423, l. 15 - p. 424, l. 7.

³⁵ Tr., p. 442, ll. 7-10.

³⁶ Tr., p. 346

³⁷ Tr., p. 388, l. 20 – p. 390, l. 4.

funds, and failed to do so. In the absence of any evidence to the contrary, the funds were properly presumed to be community.

4. The Magistrate’s Findings and Conclusions. The magistrate found, regarding Jackie’s investments with Bill Allen, that “[t]he income and the exact nature of those investments are unknown.”³⁸ He further found that the income from those investments went into East Idaho Credit Union.³⁹ The magistrate found that the specifics of Jackie’s separate property were “somewhat ambiguous.”⁴⁰ He found that “the interest gained through [Jackie’s] investments over the marriage is unknown.”⁴¹ Jackie’s testimony supported that conclusion.⁴² The court found that Jackie had “\$730,000 in *various investments and accounts* which would be used to purchase annuities for Ms. Swanson’s children.”⁴³ Finally, the trial court stated: “Initially the court considered whether the excess funds [identified in Mr. Smith’s Opinion 15] were used to fund the annuities, but having concluded Ms. Swanson had sufficient monies to fund those accounts the disposition of those funds is unknown.”⁴⁴

Throughout the marriage, Jackie evidenced an inclination to spend Rodger’s money rather than her own. She did not contribute any of her investment income to the community, even though the marital community paid the income taxes on that money.⁴⁵ She took Rodger’s separate property money from the sale of the Swanson Ranch, while she still had all of the

³⁸ FFCL, R., Vol. I, pp. 42-43.

³⁹ *Id.*, pp. 46-47.

⁴⁰ *Id.*, p. 50.

⁴¹ FFCL, R. Vol. I, p. 46.

⁴² e.g., Tr., p. 394, ll. 2-10; Tr., p. 422, ll. 11-17; Tr. p. 421, ll. 10-19.

⁴³ FFCL, R., Vol. I, p. 47 (Emphasis added).

⁴⁴ *Id.*, p. 66.

⁴⁵ FFCL, R., Vol. I, p. 36; Tr., p. 402, ll. 19-25; Tr., p. 412, ll. 2-12.

money she brought into the marriage, plus interest and investment earnings.⁴⁶ While the parties were separated, she spent some of the money she “surreptitiously transferred marital funds to her separate accounts”⁴⁷ for her living expenses and to pay her attorneys rather than spending her own investment income.⁴⁸ It is quite likely that she utilized community funds to purchase the annuities for her children, and retained her separate property in other accounts, which she admitted she had. The trial court, while not explicitly coming to that conclusion, considered whether the unknown distributions were Jackie’s separate property, and concluded that they were not, and that she had various investments and accounts, which provided sufficient monies to fund the annuities.⁴⁹

The trial court was very generous to Jackie. In spite of the fact that she failed to specifically identify her separate property as of the date of trial, Judge Clark chose to leave her with the annuities as her separate property. His finding that she had sufficient separate monies to fund the accounts is also more than reasonable. The trial court specifically stated that she had *various investments and accounts* where her separate funds of \$730,000 were held. This was very fair, and was supported by Jackie’s own testimony about the other assets she still held over and above the annuities, including investments with Bill Allen and her stock accounts. Because the principal value of Jackie’s separate assets, based upon her trial testimony, could not have exceeded \$730,000.00, the trial judge clearly gave her some latitude regarding income she received during marriage, which was most likely community property. It is disingenuous at best

⁴⁶ Tr., p. 412, ll. 1-9.

⁴⁷ FFCL, R., Vol. I., p. 43 (in the trial court’s own words).

⁴⁸ *Id.*, p. 66; Tr., p. 415, ll. 3-13.

⁴⁹ *Id.*, pp. 47, 64.

for Jackie to now claim she was short changed by the trial court.

5. Credibility of Witnesses. Jackie argues that the trial court should have given more weight to her testimony regarding the “unknown distributions”. However, under Idaho law, “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.”⁵⁰ The trial judge clearly found Jackie’s credibility lacking. The court stated: “There is no evidence that any of the funds from ranch operations were hidden. . . . The only subterfuge involved Ms. Swanson.”⁵¹ The court went on to find that [t]here is no evidence that Mr. Swanson would conceal any income from Ms. Swanson or attempt to transfer monies covertly.”⁵² The trial court found that Jackie “surreptitiously transferred” over \$1,000,000.00 of marital funds to her separate accounts at East Idaho Credit Union, and that there were successive transfers from the joint account and incursions into the community property.⁵³

Rodger testified that \$1.8 million was missing from his accounts, including his separate property funds from the Swanson Ranch sale.⁵⁴ He further testified that the missing \$800,000 came from cattle sales.⁵⁵ Jackie admitted that cattle sales proceeds were deposited into their Wells Fargo savings account, from which she took the \$1,015,000.00 in 2016.⁵⁶

⁵⁰ *Worzala v. Worzala*, 128 Idaho 408, 413, 913 P.2d 1178, 1183 (1996) (citing *Rohr v. Rohr*, 118 Idaho 689, 691, 800 P.2d 85, 87 (1990)).

⁵¹ FFCL, R., Vol. I, p. 39.

⁵² *Id.*, p. 40.

⁵³ *Id.*, p. 43.

⁵⁴ Tr., p. 90, l. 9-24; Tr. p. 94, ll. 15-18.

⁵⁵ Tr., 107, ll. 3-7.

⁵⁶ Tr., p. 427, ll. 1-7.

The trial judge considered Rodger’s argument that Jackie breached her fiduciary duty during their marriage, and acknowledged that during marriage, “the parties are not free to act fraudulently.”⁵⁷ However, the court found the legal duty in this case to be “a question of community property being siphoned off for the benefit of one spouse, i.e. for other than community purpose.”⁵⁸ With regard to the East Idaho Credit Union accounts, he found that Rodger did not have access to those accounts, so the only transfers came from Jackie.⁵⁹ Jackie testified that she transferred money into Wells Fargo Account No. 4483, and then from there into Wells Fargo Account No. 9759.⁶⁰ When money from cattle sales came in, it sometimes went into 4483 other times into 9759; sometimes she transferred money directly to Bill Allen from the Wells Fargo accounts.⁶¹ Jackie testified she also transferred money from the Bill Allen accounts she and Rodger had into the ranch account and back out again, and that she used that for operating money.⁶² While the transactions she discussed related primarily to her loans to the community and repayment for those loans, they are evidence of a pattern of behavior on Jackie’s part.

Given Jackie’s behavior, which she admitted to at trial, the trial court was justified in placing little reliance upon Jackie’s testimony regarding the unknown distributions. The trial court had substantial and compelling evidence supporting Roger’s testimony that there were hundreds of thousands of dollars missing from community accounts, accepting Mr. Smith’s

⁵⁷ FFCL, R., Vol. I, p. 56, citing *Compton v. Compton*, 101 Idaho 328, 612 P.2d 1175 (1980).

⁵⁸ *Id.*, p. 64.

⁵⁹ *Id.*

⁶⁰ Tr., p. 404, l. 16 – p. 407, l. 1.

⁶¹ *Id.*

⁶² Tr., p. 410, ll. 7-11.

characterization of the property, and finding that Jackie had received all of the “unknown distributions.”

6. Expert Testimony. Neither party disputed that David Smith was a qualified expert. Once an expert witness is qualified, the trial court must determine whether the expert’s opinion testimony will assist the trier of fact in understanding the evidence.⁶³ The weight given to the testimony is left to the trier of fact.⁶⁴

At trial, Jackie chose not to present expert testimony, or to rebut Mr. Smith’s expert opinion in any way. She chose not to call her accounting expert, although her counsel represented to the trial court that the accountant had reviewed Mr. Smith’s report and prepared her for her examination of Mr. Smith.⁶⁵ Jackie had David Smith’s report in her possession well in advance of trial. She did not present testimony and evidence to rebut his conclusions, conceding for the purposes of appellate review that no such evidence existed. She made no effort to present evidence tracing the unknown distributions, or show that they were her separate property. It was not error for the trial court to rely on the testimony and evidence presented at trial.

The trial court was entitled to rely on the expert opinion of Mr. Smith.

VII. CONCLUSION

Jackie presents no genuine issues on appeal. Rather, she seeks to have the appellate court second-guess the trial court’s interpretation of the evidence and improperly asks this court to substitute its judgment for that of the trial court and re-characterize property. The trial court’s

⁶³ I.R.E. 702; *Sidwell v. William Prym, Inc.*, 112 Idaho 76, 81, 730 P.2d 996, 1001 (1986)

⁶⁴ *State v. Hopkins*, 113 Idaho, 679, 681; 747 P.2d 88, 90 (Ct. App. 1987).

⁶⁵ Tr., p. 11., ll. 19-24.

Findings of Fact and Conclusions of Law, and Decree of Divorce and Judgment are improperly challenged for following Idaho law and for the proper exercise of that tribunal's discretion. Jackie has presented no persuasive argument in support of her contention that the trial court misapplied the law. No cogent challenge is presented regarding the trial court's exercise of discretion.

Jackie's failure to provide expert testimony and evidence at trial, and to substantiate the values of the separate and community property in her possession is not the fault of Rodger or the trial court. Courts must rely on evidence presented to them, and Jackie's appeal fails to identify any factual determination contrary to the weight of credible evidence. As such, the district court's Opinion and Order on Appeal, sustaining the trial court's Findings of Fact and Conclusions of Law, and Decree of Divorce and Judgment should be affirmed. Rodger should be awarded his reasonable attorney fees and costs on appeal.

Respectfully submitted this 30th day of December, 2020.

/s/ James C. Herndon
James C. Herndon
HERNDON & STOSICH, P.A.

/s/ John L. Stosich
John L. Stosich
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VIII. CERTIFICATE OF SERVICE

I certify that I am a member of the Idaho State Bar, and on the 30th day of December, 2020, I served a true and correct copy of Respondent's Brief on the following parties through I-Court e-service.

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