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Carol McCoy Brown

IN THE SUPREME COURT OF THE STATE OF IDAHO

In the Matter of the Estate of:)
) **DOCKET NO. 46926-2019**
MICHAEL ORION BROWN,)
)
Deceased.) District Court
) Case No. CV2016-319-C
)
)
)

APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District for Valley County
Honorable Jason D. Scott, District Judge, presiding

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I. STATEMENT OF THE CASE

This case involves a community property claim of a surviving spouse against assets of her deceased husband's estate. The surviving spouse, Carol Brown, is the personal representative of the estate of her husband, Michael Orion Brown. The disputed assets consist of several financial accounts that were maintained by Michael during his lifetime. These accounts were established by Michael as payable on death (P.O.D.) accounts, with his children and grandchildren named as the beneficiaries. After Michael's death, the funds in the accounts were transferred to the named beneficiaries pursuant to the P.O.D. designations on the accounts. Carol filed a petition with the probate court pursuant to I.C. § 15-2-202 making an elective share claim to the transferred funds as the surviving spouse of the decedent, and seeking to have the transferred funds restored to the estate while her claim was pending. Michael's children, Michael J. Brown and Dorraine S. Pool ("the Heirs"), who were the beneficiaries of most of the transferred funds, contested Carol's petition.

A. Factual Background

Michael and Carol were married on May 19, 1991. R., p. 25, L. 10. Michael was employed with the U.S. Forest Service and the Bureau of Land Management. R., p. 25, L. 16. Carol was also a federal employee until her retirement in 2011. R., p. 179, L. 1. In 1995, Michael retired and began receiving a federal retirement annuity from the Office of Personnel Management. R., p. 25, L. 18. During the marriage Michael maintained a number of deposit accounts and investment accounts, including accounts with Wells Fargo Bank, US Bank, Ameriprise Financial and TD Ameritrade. R., p. 75, L. 1. Michael designated death beneficiaries

for these accounts, which included Michael's children from a previous marriage, Dorraine S. Pool and Michael J. Brown, and his grandchildren, Jacob F. Pool, Joshua Pool, Michael B. Brown and Christopher R. Brown. He made these designations without Carol's knowledge or consent. R., p. 75, L. 18. These accounts have been distributed and the assets transferred to the beneficiaries. R., p. 76, L. 1. The total amount transferred was approximately \$385,835.67. R., p. 77, L. 19. Michael's children and grandchildren are now in possession of the funds of the accounts.

B. Procedural History

Carol filed her Petition for Elective Share of Augmented Estate on February 10, 2017. She simultaneously filed a motion for temporary restraining order and preliminary injunction under IRCP 65 seeking to prevent the transfer of additional funds from the financial institutions to the Heirs and seeking an order to place the funds already transferred in the custody of the court while her claim was pending. The magistrate court denied the motion for preliminary injunction at a hearing on February 27, 2017. The Heirs proceeded to file a petition to remove Carol as personal representative of the estate. While the petition was pending Carol could not take further action as personal representative. The Heirs' petition was denied in an order issued on April 18, 2017. Carol then filed a petition with the magistrate court requesting the restoration of the funds of the accounts to the decedent's estate pursuant to I.C. § 15-2-202. A hearing was held on this petition on July 11, 2017. The court issued an order denying the petition to restore the property to the estate on September 18, 2017. The court set a hearing date on the petition for elective share on October 26, 2017. On that date the court held an evidentiary hearing on the petition. On January 18, 2018, the magistrate court entered its Order Denying Petition for Elective Share. The magistrate court's order was based on the following conclusions: (1) Carol

had the burden of proof to show that the funds in the accounts were “quasi-community property” as defined in the elective share statute, and failed to carry that burden of proof; (2) the funds in the accounts derived almost entirely from Michael’s retirement income; (3) Michael’s retirement income was almost entirely separate property; and (4) to the extent any funds in the accounts were community property Carol had received numerous lifetime gifts from Michael and the Heirs were entitled to offset the value of the gifts against any community property in the accounts. Carol appealed the magistrate court’s final order on her claim to the district court.

In its decision on appeal, the district court concluded that the magistrate court correctly held that Carol had the burden of proof to demonstrate that the accounts were quasi-community property to prevail on her elective share claim, and affirmed the magistrate court on this basis. The district court did not review the magistrate court’s conclusions that Michael’s accounts were separate property or that the Heirs had a right to an offset against any community property in the accounts. The district court’s conclusion that Carol had the burden to prove that the accounts were quasi-community property is inconsistent with this Court’s precedents that a married person’s assets are presumed to be community property, not separate property. Although the district court suggested that Carol should have pursued a common law remedy to void Michael’s gifts of community property, the district court failed to review the magistrate court’s rulings that the accounts were almost entirely separate property and that Carol had no valid claim to these accounts. This effectively left Carol with no recourse to pursue her community property claim by means other than an elective share claim in the probate action. It also prejudiced her in subsequent probate proceedings. The district court compounded its error by awarding attorney’s fees against Carol for filing a frivolous appeal.

II. ISSUES ON APPEAL

- A. Whether the district court erred in holding that the community property presumption does not apply to quasi-community property.
- B. Whether the district court erred in failing to review the community property issues decided by the magistrate court.
- C. Whether the district court abused its discretion in awarding attorney's fees on appeal.

III. STANDARD OF REVIEW

On appeal of a decision of a district court acting in its intermediate appellate capacity, this Court directly reviews the district court's decision. *In re Estate of Peterson*, 157 Idaho 827, 830, 340 P.3d 1143, 1146 (2014). However, to determine whether the district court erred in affirming the magistrate court, this Court reviews the record before the magistrate court to determine whether the magistrate court's findings are supported by substantial and competent evidence. *Id.* Questions of law, including questions of statutory interpretation, are reviewed *de novo*. *Idaho Dep't of Health & Welfare v. McCormick*, 153 Idaho 468, 470, 283 P.3d 785, 787 (2012). Matters within the district court's discretion are reviewed for abuse of discretion. *Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho 87, 803 P.2d 993 (1991).

IV. ARGUMENT

- A. **The district court erred in holding that the community property presumption has no application to quasi-community property.**

Carol Brown petitioned the magistrate court under the elective share statute in the Probate Code, I.C. § 15-2-201 *et seq.*, claiming that she was entitled to a share of Michael's accounts. The magistrate court rejected her claim, holding that Carol had the burden to prove that the accounts were quasi-community property as defined in the elective share statute. R., p.

190. The district court upheld the magistrate court's order, holding that the elective share statute applies to quasi-community property, that the community property presumption has no application to quasi-community property, and therefore Carol had the burden to prove that the accounts were quasi-community property. R., pp. 287-90.

Whether the community property presumption applies to "quasi-community property" as defined in the elective share statute is an issue of first impression in Idaho. This Court has long held that the property of a married person is presumed to be community property. *See, e.g., Houska v. Houska*, 95 Idaho 568, 570, 512 P.2d 1317, 1319 (1973); *Matter of Eliassen's Estate*, 105 Idaho 234, 239, 668 P.2d 110, 115 (1983); *Barton v. Barton*, 132 Idaho 394, 396, 973 P.2d 746, 748 (1991); *Baruch v. Clark*, 154 Idaho 732, 737, 302 P.3d 357, 362 (2013).

This presumption can be rebutted only by evidence showing with reasonable certainty and particularity that the property has a separate source. *Stahl v. Stahl*, 91 Idaho 794, 798, 430 P.2d 685, 689 (1967). The district court notes that there is no authority that the community property presumption applies to quasi-community property as defined in the Probate Code. R., p. 290, L. 16. While that is true, the district court failed to note that there is no authority to the contrary. No Idaho appellate court ruled on the issue of whether the community property presumption applies to quasi-community property.

The district court further argues that it is illogical to apply the community property presumption to quasi-community property because the same thing cannot be both community property and quasi-community property. R., p. 290-91. The district court's argument misses the point. The community property presumption is not a rule of logic. It is a rule of policy. Its purpose is to protect the community property rights of married persons by placing the burden of proof on any party claiming that the property of a married person is separate property.

The district court's reasoning treats quasi-community property as distinct from community property, rather than as a subcategory of community property. Quasi-community property is not a separate and distinct category of property under Idaho's community property system. It is simply a term for property acquired outside the state by a married resident that is treated as community property under Idaho law. Idaho's property system recognizes only two categories of property: separate and community. I.C. §§ 32-903, 32-906; *In re Hicks*, 300 B.R. 372, 376 (2003); *Suchan v. Suchan*, 106 Idaho 654, 657, 682 P.2d 607, 610 (1984); *Hall v. Johns*, 17 Idaho 224, 105 P. 71 (1909). Quasi-community property is not treated differently under the law from community property because it is simply a form a community property. There is nothing illogical about presuming property to be either community property or quasi-community property until it is proven to be separate property.

The district court's conclusion has the effect of creating a default rule that for purposes of the elective share statute all property is separate property until it is proven to be quasi-community property. Under the facts of this case, that was the effect of the district court's reasoning. The decedent's accounts were treated as if they were separate property. This is inconsistent with this Court's decisions, and with the policy underlying those decisions that a spouse's community property interests must be protected by placing the burden of proof on parties asserting a claim of separate property.

B. The district court erred in failing to review community property issues decided by the magistrate court.

The district court affirmed the magistrate court on the grounds that the elective share statute only applies to quasi-community property and the community property presumption has no application to quasi-community property. If this is all the magistrate court had decided, Carol could have decided to pursue her claim by other means. However, the magistrate court did not

simply decide that the elective share statute applies only to quasi-community property and that Carol had not proven the accounts were quasi-community property. It also decided community property issues regarding the nature of the funds in Michael's accounts. Carol appealed these decisions to the district court. R., p. 212. The district court did not address any of these issues on appeal.

The magistrate court concluded that the source of the funds in Michael's accounts was his retirement income. According to the magistrate court, the Heirs "proved with certainty...that the source of the funds in the POD accounts had to be Michael's separate retirement benefits. There is no suggestion in the evidence that there is any other source of the POD funds other than Michael's retirement funds." R., pp. 190-91. As stated in Carol's appellate brief to the district court, the evidence in the record does not support this conclusion. R., pp. 222-23. Michael worked and received a salary until 1995, and could have saved some of his salary. R., p. 25, L. 16. There was evidence that portions of the funds came from other sources, including interest and dividends. R., p. 29, L. 7. The available bank statements provided limited evidence of the source of the funds, and most of the funds could not be traced to any source. R., p. 223, L. 5. The community property presumption requires that assets must be traced with reasonable certainty and particularity to a separate source, and where evidence is not available they must be presumed to be community property. *Estate of Hull v. Williams*, 126 Idaho 437, 441, 885 P.2d 1153, 1157 (Ct. App. 1994). The magistrate court erred in failing to presume the funds to be community property in the absence of evidence demonstrating with reasonable certainty and particularity that they came from a separate source.

The magistrate court also decided the issue of the character of Michael's retirement income. That court concluded that Michael's retirement income was "almost entirely separate

property.” R., p. 191, L. 5. As stated in Carol’s appellate brief to the district court, the magistrate court cites no relevant authority in support of this conclusion. R., p. 224. The magistrate court’s conclusion appears to be contrary to the plain language of I.C. § 32-906 that income received during marriage is community property.¹

The magistrate court also concluded that the Heirs were entitled to offset funds that Michael contributed to the parties’ joint account during his lifetime, the value of Carol’s federal survivor’s benefits, and the value of the couple’s house and the vehicles against Carol’s community property claim to the accounts on the theory that they were “gifts” from Michael:

In this case, the Heirs assert that when looking at the home, property, vehicles, various assets, and survivor’s benefits Carol has received over a (sic) \$1,000,000 from Michael during the marriage. While Carol takes issue with this calculation, it is sufficient to acknowledge that Carol has received vastly more than \$19,815 from Michael during the marriage and she is now left with property derived from the decedent far beyond that number.

R., pp. 193-94. As stated in Carol’s appellate brief to the district court, this conclusion was legally and factually erroneous for a number of reasons. Carol testified that she purchased the house and land prior to the marriage. The survivor’s benefits were not an asset that Michael could “give” Carol, but benefits to which Carol was entitled under law as a surviving spouse of a federal employee. Contributions Michael made to the couple’s living expenses were not “gifts.” Even if Michael made gifts to Carol, there is no authority under Idaho law that these gifts could be offset against her share of community property. R., pp. 227-232.

The district court’s opinion offers no explanation for its failure to review these issues on appeal. An aggrieved party has a right to appeal. *Kinghorn v. Clay*, 283 P.3d 779, 153 Idaho

¹ Although it cites no case in its opinion, it is clear from the proceedings that the magistrate court based its decision on the “time rule” set forth in *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975). This rule applies to the division of retirement accounts in a divorce, but does not address the treatment of retirement income received during marriage. The magistrate court also concludes that the retirement income was not “income” within the meaning of I.C. § 32-906. R., p. 191, L. 14. It cites no authority in support of this conclusion.

462 (2012). The magistrate court's decisions on these issues had a material impact on Carol's community property rights and her right to receive her share of Michael's estate. Carol is therefore an "aggrieved party." *See also Application of Fernan Lake Village*, 80 Idaho 412, 415, 331 P.2d 278, 279 (1958) ("a party or person is aggrieved by a decision when . . . it operates directly and injuriously upon his personal, pecuniary, or property rights").

It is possible that the district court considered these issues to be moot after it decided that Carol had the burden to prove that the accounts contained quasi-community property to prove her elective share claim. An appellate court does not review an appeal that is moot. An appeal is moot when a judicial determination will not have a practical effect on the outcome. *Fenn v. Noah*, 133 P.3d 1240, 142 Idaho 775 (2006), *overruled on other grounds by City of Osburn v. Randel*, 152 Idaho 906, 277 P.3d 353 (2012). The community property issues decided by the magistrate court were not moot because they have a continuing effect on Carol's right to claim a share of Michael's accounts, and also potentially affect her right to inherit other assets of Michael's estate.

The magistrate court's decisions have a continuing impact on Carol's property rights due to the law of the case doctrine. This doctrine precludes relitigation of issues decided by the trial court and not reversed on appeal. *Swanson v. Swanson*, 134 Idaho 512, 515-16, 5 P.3d 973, 976-77 (2000). The magistrate court's determination that these accounts are separate property will apply to further probate proceedings, potentially affecting the distribution of assets between Carol and the Heirs.²

The magistrate court's decisions also have an impact on Carol's property rights because of the doctrine of issue preclusion. Issue preclusion (or collateral estoppel) prevents parties from

² The Heirs have in fact cited the magistrate court's ruling that the accounts are separate property to support their arguments in subsequent probate proceedings.

relitigating an identical issue in a subsequent action. It applies where an issue was decided in previous litigation that is identical to an issue in present litigation, there was a final judgment on the merits in the previous litigation, and the party against whom the issue is asserted was a party or in privity with a party in the previous litigation. *Ticor Title Co., v. Stanion*, 144 Idaho 119, 124, 157 P.3d 613, 618 (2007). The magistrate court's rulings can be used to prevent Carol from pursuing her community property claim to the accounts in a separate proceeding because the community or separate character of the assets has already been decided by the magistrate court.

The district court's handling of the appeal creates a catch-22 situation for Carol. On the one hand, the district court essentially told Carol that she was wrong to appeal the magistrate court's decision and that she should have pursued her community property claims in a separate action. On the other hand, if Carol had not appealed the magistrate court's decision she would be bound by the magistrate court's rulings on community property issues, which would likely preclude the separate action the district court suggested she should pursue. Whatever its reasons for failing to review the community property issues decided by the magistrate court, the effect of the district court's decision is to strip Carol of her community property rights.

C. The district court abused its discretion in awarding attorney fees on appeal.

The district court awarded attorney's fees on appeal under I.C. § 12-121 on the grounds that the appeal from the magistrate court's order was frivolous, unreasonable and without foundation. *R.*, p. 294. An award of attorney fees is reviewed for abuse of discretion. To prove an abuse of discretion requires reviewing three factors: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of its discretion and consistent with legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. *Fox v. Mountain*

West Elec., Inc., 137 Idaho 703, 711, 52 P.3d 848, 856 (2002). In awarding attorney's fees on appeal the district court acted outside the boundaries of its discretion and inconsistently with applicable legal standards.

The district court abused its discretion by awarding attorney's fees in a case of first impression. Whether the community property presumption applies under the elective share statute is a matter of first impression. No Idaho appellate court has decided the issue. A case of first impression "does not constitute an area of settled law," and thus awards of attorney fees are inappropriate. *Purco Fleet Services, Inc. v. Idaho State Dept. of Finance*, 140 Idaho 121, 126, 90 P.3d 346, 351 (2004). This Court has frequently held that "A party is not entitled to attorney's fees if the issue is one of first impression in Idaho." *Westover v. Cundick*, 161 Idaho 933, 937, 393 P.3d 593, 597 (2017); *Fuchs v. State, Department of Idaho State Police, Bureau of Alcohol Beverage Control*, 152 Idaho 626, 632, 272 P.3d 1257, 1263 (2012); *Lane Ranch Partnership v. City of Sun Valley*, 145 Idaho 87, 91, 175 P.3d 776, 780 (2007); *SE/Z Construction, LLC v. Idaho State University*, 140 Idaho 8, 14, 89 P.3d 848, 854 (2004).

Attorney fees are also not appropriate where a party makes a good faith argument for the extension of existing law. *Courtney v. Big O Tires, Inc.*, 139 Idaho 821, 825, 87 P.3d 930, 934 (2003); *Hartman v. United Heritage Property and Cas. Co.*, 141 Idaho 193, 200, 108 P.3d 340, 347 (2005); *Lincoln Land Co., LLC v. LP Broadband, Inc.*, 163 Idaho 105, 408 P.3d 465 (2017). In arguing that the community property presumption should apply to claims under the elective share statute, Carol was making a good faith argument for the extension of existing law to a category of claims in which the presumption had not been applied in previous case law. Her arguments were reasonable and fairly debatable. It is improper for a court to award attorney's fees where the question at issue is fairly debatable. See *C&G, Inc. v. Rule*, 135 Idaho 763, 769,

25 P.3d 76, 82 (2001) (“When a party pursues an action which contains fairly debatable issues, the action is not considered to be frivolous and without foundation”).

Finally, the district court abused its discretion by awarding attorney’s fees while ignoring legitimate issues of fact and law that Carol raised on appeal. As discussed previously, the district court ignored issues of fact and law concerning community property decided by the magistrate court. These decisions of the magistrate court were prejudicial to Carol’s property rights. In deciding that Carol’s appeal was frivolous, the district court ignored considerable argument and authority that the magistrate court’s holdings on community property issues were in error. This was an abuse of discretion. The district court had no discretion to ignore legitimate issues raised on appeal and then find that the appeal was pursued frivolously.

V. CONCLUSION

For the foregoing reasons, the district court’s decision should be reversed.

RESPECTFULLY SUBMITTED this 24th day of July, 2019.

WHITE PETERSON

By: _____

Brian T. O’Bannon

*Attorneys for Personal Representative/
Appellant Carol McCoy Brown*

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July, 2019, I filed the foregoing electronically through the iCourt system, which caused the following parties or counsel to be served by electronic means, as set forth below:

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I further certify that some of the participants in the case are not registered iCourt users and have not electronically appeared and require paper/mail service and that on 24TH day of July, 2019, a true and correct copy of the above and foregoing document was served upon the following by method indicated below:

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