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Idaho Supreme Court
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IN THE SUPREME COURT OF IDAHO

In the Matter of the Estate of: MICHAEL ORION BROWN, Deceased.	)	DOCKET NO. 46926-2019 District Court Case No. CV 2016-319-C

RESPONDENTS' 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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STATEMENT OF CASE

A. NATURE OF THE CASE

Appellant Carol McCoy Brown ("Carol") appeals from the order of the District Court, acting in its appellate capacity, affirming the Magistrate's denial of her Petition for an Elective Share in Augmented Estate (the "Petition"). Carol is the surviving spouse of Michael Orion Brown (the "Decedent"). Carol sought an increased award of the decedent's estate via an elective share of the augmented estate—which is comprised of a portion of the decedent's quasi-community property (property acquired while domiciled out of state and would be community property had it been acquired while domiciled in Idaho) and a portion of the surviving spouse's quasi-community property.

The elective share statute is only available to a surviving spouse in limited circumstances. For example, a surviving spouse only has an elective share claim if the decedent owned quasi-community property. A decedent can only own quasi-community property if he or she acquired wealth in a common law state, while married, but before being domiciled in Idaho. Once the amount of the surviving spouse's share of the augmented estate is calculated, it is first satisfied by property or wealth the surviving spouse receives upon the decedent's death. Idaho Code section 15-2-207. The purpose of this offset is to prevent the surviving spouse from electing a share of the probate estate when he or she has otherwise received a fair share of the couple's total wealth. Idaho Code section 15-2-202 Comments to Official Text. "The surviving spouse rather than the executor or the probate court has the burden of asserting an election, as well as the burden of proving the

matters which must be shown in order to make a successful claim to more than he or she has received." Idaho Code section 15-2-201, Comment to Official Text.

The present proceeding concerns approximately $385,836.00 (the "Subject Funds") that the decedent set aside for his children and grandchildren in accounts payable on death ("POD") that came from the his retirement and the sale of his separate real property. The Petition argued that Carol was entitled to a portion of those funds as part of the augmented estate of the decedent. As will be discussed in greater detail below, the Magistrate denied the Petition and the District Court affirmed the Magistrate's decision. Additionally, pertinent on appeal, at no time did Carol make a community property claim to the Subject Funds.

B. STATEMENT OF FACTS

The Decedent worked for the United States Forest Service from 1960 or 1961 through his retirement in 1995. R. p. 186. Other than inherited property, which he sold in 2013 for $50,075.00, the Decedent did not have any other source of income. R. p. 186. The Decedent and Carol married in 1991. R. p. 186. Carol also worked for the Forest Service for approximately 29 years, until her retirement in 2011. R. p. 187.

When the Decedent retired, he began receiving retirement annuity payments from the federal government. R. p. 187. Carol and the Decedent maintained separate bank accounts and a joint bank account. R. 187. They each deposited money (Carol from her salary, the Decedent from his annuity) into their respective personal accounts. R. 187. From these personal accounts, each then contributed money on a monthly basis to the joint account. R. p. 187. Despite having been married to Carol for only 11.8% of the time the Decedent earned his retirement, he contributed

$2,000 of his approximately $3,500 annuity benefit each month to the joint account. R. pp. 191–92. From the joint account, Carol and the Decedent paid bills, contributed to the household expenses, and spent money as they wished as a couple. R. p. 187. The Decedent and Carol treated the money in their respective personal accounts as their own separate funds. R. p. 187.

During their marriage, Carol and the Decedent accumulated many assets of value, including a home and real property in McCall, multiple vehicles, trailers, a horse barn, and a tractor. R. p. 187. The Decedent set up various POD bank accounts naming his adult children and grandchildren as beneficiaries. R. p. 187. The Magistrate found that the only possible source for the money in the POD accounts, other than the Decedent's inherited property, was the retirement annuity that the Decedent received each month from the federal government. R. p. 187. Over the years, the Decedent was able to set aside the entirety of the Subject Funds for his children and grandchildren in these POD accounts. R. p. 188.

The Decedent died on December 4, 2016. R. p. 188. The Magistrate found that "[a]ccording to Carol, [the Decedent] did not leave a will." R. p. 188. The Subject Funds in the POD accounts were distributed to the Decedent's children (including the Respondents herein, Michael J. Brown and Dorraine Pool referred to herein as the "Heirs") and grandchildren. R. p. 188. Carol claimed entitlement to all of the Subject Funds and brought the Petition for the purpose of acquiring the Subject Funds.

C. COURSE OF PROCEEDINGS

Carol was appointed as the personal representative of the Estate of Michael Orion Brown (the "Estate"), Carol filed her Petition contemporaneously with a temporary restraining order and

a motion for preliminary injunction aimed at obtaining the Subject Funds. The preliminary injunction was denied. After the Petition was filed, and before it was heard, Carol filed a Petition for Restoration (the "Restoration Petition") in which she attempted to have the Subject Funds turned over to the Estate pursuant to the elective share statutes. The Magistrate denied Carol's Restoration Petition, making the preliminary finding that Carol's elective share, if any, appeared to be satisfied based upon the wealth Carol received. R. p. 161.

The Magistrate subsequently heard Carol's Petition, which it also denied, based primarily on Carol's failure to meet her burden of proof on the threshold inquiry as to whether the Subject Funds were quasi-community property. Carol appealed to District Court arguing that the Magistrate Court (1) failed to "restore" the property to the Estate, (2) erred in denying Carol's elective share claim, and (3) erred in awarding discretionary costs.

On appeal before the District Court, Carol's counsel was pointedly asked whether Carol had proven the Subject Funds were quasi-community property to which counsel responded that Carol was not claiming the Subject Funds were quasi-community property. The District Court affirmed the Magistrate's ruling, finding that the elective share does not encompass community property and that Carol had failed to prove the Subject Funds were quasi-community property. The District Court also awarded costs and fees pursuant to Idaho Code section 12-121. Carol appeals the decision of the District Court.

Before this Court, Carol now alleges that the District Court erred by not applying the community property presumption to quasi-community property (even though she represented on intermediate appeal that she was not claiming the Subject Funds were quasi-community property).

Additionally, Carol argues that the District Court erred by not addressing her community property claim (which was not raised below).

ADDITIONAL ISSUES ON APPEAL

The heirs should be awarded costs and attorney's fees pursuant to Idaho law, including Idaho Code sections 12-121 and 15-8-208, and I.A.R. 40 and 41.

STANDARD OF REVIEW

The Idaho Supreme Court has described the standard of review for appeals taken from a district court sitting in its appellate capacity:

> The Supreme Court reviews the trial court (magistrate) 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 those findings. If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure. Thus, this Court does not review the magistrate court's decision directly. Instead, we are procedurally bound to affirm or reverse the district court's decision.

Campbell v. Parkway Surgery Ctr., LLC, 158 Idaho 957, 354 P.3d 1172, 1176 (2015) (internal quotations and citations omitted).

A discretionary decision is reviewed for an abuse of discretion. *Hunt v. Hunt*, 137 Idaho 18, 20, 43 P.3d 777, 779 (2002). A discretionary decision will be upheld if the decision-making court "(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason." *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018).

ARGUMENT

As an initial matter, responding to Carol's arguments on appeal is rendered somewhat difficult and confusing given that many either (i) were not raised below or (ii) seek to avoid her actual arguments made below. Additionally, Carol mischaracterizes the holdings of and supporting authorities of the Magistrate and intermediate appellate court. Reviewing her actual arguments below and the decisions of the Magistrate and District Court resolves this confusion and illuminates the District Court's reasoning for awarding attorney fees under I.C. 12-121. Accordingly, this section will first summarize Carol's arguments below and the lower courts' decisions, then address Carol's arguments in the appropriate context.

1. CAROL'S ARGUMENTS TO THIS COURT AVOID WHAT SHE ACTUALLY ARGUED PRIOR TO THIS APPEAL.

Throughout the proceedings before the Magistrate and on appeal before the District Court, Carol maintained that the elective share statutes encompass community property—an assertion that is clearly inconsistent with the plain language of the elective share statutes and was rejected by the District Court. This issue is now notably absent from Carol's list of issues on appeal. However, this issue has direct bearing on all of Carol's listed issues on appeal.

The elective share statutes address limited situations where married couples acquire property while domiciled out of state and where a surviving spouse is left without a fair share of said wealth upon the death of his or her spouse. To ensure only a fair share is obtained by the surviving spouse, several considerations are taken into account, including the decedent's quasi-community property (property obtained by the decedent while domiciled outside of Idaho), the surviving spouse's quasi-

community property, creating an augmented estate from this quasi-community property, and then factoring in wealth the surviving spouse obtained from the decedent during life and at his death. Accordingly, he elective share statutes address quasi-community property, an augmented estate (which is comprised of quasi-community property), and an elective share thereto. The elective share statutes do not address community property, as that is addressed elsewhere in Idaho Code. *See* Idaho Code 15-2-102.

Carol has repeatedly misunderstood this concept. This began with her Petition, which invoked the elective share statutes and referred to community property. *See* r. pp. 24–33. It persisted throughout her subsequent filings, which need not be recited herein. It continued through trial on Carol's Petition where, in her opening statement, Carol asserted that the Subject Funds were community property and therefore part of the augmented estate. Tr. pp. 23–24; 32–34. Carol did not mention quasi-community property other than to state that the "quasi-community property statutes have no purpose other than to provide that property that was acquired by a married couple outside of the state is to be treated the same as community property." *See id,* with specific quotation from p. 34, ll. 10–14. Carol continued, "[t]his is a community property claim. And there's no distinction made between assets acquired outside of the state and within the state."

At trial, Carol's counsel stated, "Your Honor, it is not our intention today to present any testimony. We intended to simply rest on the pleadings and the record in this case and submit our case." Tr. p. 15, ll 11–14. The Magistrate, apparently baffled by Carol's position, attempted to gain clarification and give Carol additional opportunity to prove her claim by demonstrating that the

Subject Funds were quasi-community property, as required in order for Carol to utilize the elective share statutes to make a claim thereto:

> THE COURT: Okay. Do you believe you have a burden of providing what is quasi-community property, when it was acquired, where it was acquired, those sorts of things?
>
> MR. O'BANNON: No Your Honor. It's our position that there is no meaningful distinction between quasi-community property and community property.
>
> THE COURT: So you don't believe that you need to show me that the property was quasi-community property because – well, just reading from 15-2-201, quasi-community property is all personal property wherever situated and all real property situated in this state which as heretofore been acquired or is hereafter acquired by the decedent while domiciled elsewhere, and which would have been the community property of the decedent and the surviving spouse had the decedent been domiciled in this state, et cetera.
>
> You don't believe you have any need to show me this was property that would have been community property had it been acquired here?
>
> …
>
> MR. O'BANNON: …And it's our position that that is illogical, and that there is no basis for making a distinction between property acquired outside of the state and property acquired in the state.
>
> THE COURT: …As to community property in Idaho, that's divided – that's not divided today. That's not what we do today. We're just talking about the augmented estate. So I – I mean, that's how I'm understanding it.
>
> But you see that differently?
>
> MR. O'BANNON: Yes, Judge. We don't see any distinction between it. Quasi-community property is simply property that was acquired outside of Idaho during the marriage…
>
> If it was acquired outside of Idaho during the marriage, then it's treated as if it's community property under Idaho law.
>
> …

Tr. pp. 40–42. After this discussion the Court went so far as to tell Carol, while she still had time to present evidence: "I think officially that you, as the petitioning party, have a burden to show me what is quasi-community property in order for you to then have a 50 percent share in it." Tr. p. 44, ll. 21–25. Despite this specific direction from the trial, Carol presented no evidence as to the quasi-

community property nature of the Subject Funds, relying instead on her assertion that the Subject Funds were presumed to be community property and the mistaken belief that the elective share applies to community property. Tr. p. 44, ll. 21-25, pp. 144-46.

The Magistrate ultimately denied Carol's Petition for the chief reason that Carol failed to prove that the Subject Funds were quasi-community property, proof essential under the elective share statutes. Specifically, in its Order Denying Petition For Elective Share ("Order"), the Magistrate held that (1) Carol made "no attempt" to prove what was quasi-community property, and (2) Carol "did nothing to counter the obvious fact that the only possible source of funding these accounts was [the Decedent's] separate property." R. p. 190. While the analysis could have simply ended there[1], the Magistrate additionally held that (3) the Heirs proved that the source of the Subject Funds was the Decedent's separate retirement benefits using Carol's own testimony; (R. pp. 190–91); (4) the Decedent's retirement was not entirely community property as Carol asserted; (R. p. 191); (5) the Decedent contributed more than half of his retirement to the community; (R. p. 191) (6) the community portion of the Decedent's retirement was only 11.8% (R. p. 191); and (7) that Carol had received far more than her ½ share of the quasi-community augmented estate (R. p. 194).

Carol appealed to the District Court arguing that the elective share statutes apply to community property and that she did not have any burden to prove the character of the Subject

[1] R. p. 190 ("While the analysis can simply end here, the Court will address her other arguments.").

Funds because they were presumed to be community property. In her Reply Brief to the District Court, Carol stated:

> The Heirs' argument rests almost entirely on their bold assertion that the elective share statute has no application to community property. This assertion is made as if it is an obvious fact, without any need to cite authority. The Heirs have cited no case law in support of their assertion because none exists. They have offered their own interpretation of the elective share statute, which they present as settled law…
>
> Idaho has a community property system. There is no separate "quasi-community property" system. If the elective share statute has no application to community property, it has no purpose at all….
>
> What is really at issue in this case is not a purposeless distinction between community property and quasi-community property…Carol has a community property claim to the decedent's accounts. The elective share statute appears to have the purpose of allowing a surviving spouse to assert a claim against a decedent's estate for community property that was transferred out of a decedent's estate without her consent...

R. pp. 271–72.

Carol concluded her briefing to the District Court by stating: "[t]here is no existing authority for the proposition that the elective share statute has no application to community property claims." R. pp. 281.

Before the District Court, Carol also took issue with how the Magistrate reached its conclusion that that the Heirs had rebutted any presumption that the Subject Funds were community property. The Magistrate reached this conclusion by evaluating all the testimony—including Carol's own testimony via testimony at trial and numerous verified pleadings. *See* R. p. 26, ¶¶ 13, 17–18; p. 27, ¶¶ 20, 24; p. 28, ¶ 28; pp. 30, 33 (verification), 75, 81 (verification); Tr. pp. 50–51. Despite having relied upon these assertions earlier in the case (when Carol believed

that her testimony regarding the source of the Subject Funds would work to her benefit)[2], Carol argued to the District Court that the Magistrate could not rely on her testimony and verified assertions because she "had no personal knowledge of the accounts and how they were funded, so her statements regarding how she believed they were funded were not evidence of the source of the funds." R. p. 278.

At oral argument on intermediate appeal, Carol maintained focus on her community property argument and was elusive towards the District Court's inquiries about quasi-community property. *See generally*, Tr. pp. 3–4. In the following colloquy with the Court, Carol made clear that she believed her elective share claim had nothing to do with quasi-community property:

> THE COURT: …Now, in terms of whether any of this property is quasi-community property, do you agree that your client failed to show that it's, quote, quasi-community property?
>
> MR. O'BANNON: I don't agree that our client had any duty or any burden to show that it was quasi-community property.
>
> THE COURT: Okay. And so is that the same thing as saying you didn't undertake to show that and did show it because you didn't show that it was acquired out of state?
>
> MR. O'BANNON: We didn't believe that it was necessary to show that it was acquired out of state.
>
> THE COURT: Okay.
>
> MR. O'BANNON: We disagree with the Magistrate Court's interpretation of the statute.
>
> THE COURT: You disagree that that's part of the definition of quasi-community property, or that that's part of what you were required to show to prove entitlement to an elective share?
>
> MR. O'BANNON: We disagree that it was part of the burden of proving an elective share.
>
> THE COURT: All right. And so then I guess I want to try once more again with the very narrow question: Did you prove that this property was quasi-

[2] See R. p. 75.

> community property? I understand that you don't think you had an obligation to do that, but, hypothetically, if you did, did you carry that burden?
>
> MR. O'BANNON: No, we do not claim that it was quasi-community property.

Tr. p. 4, ll. 14:15–25, 15: 1–19.

The District Court ultimately affirmed the Magistrate, determining that the elective share statute only addresses "'quasi-community property,' not plain old 'community property.'" R. p. 288. The District Court further held that Carol "undoubtedly bore the burden of proving that the [Subject Funds] constituted 'quasi-community property'" and because Carol admittedly did not even present evidence that the Subject Funds were quasi-community property, the "magistrate correctly held that the elective-share statutes don't require the return of those monies to Michael's estate, nor do they entitle Carol to an elective share." R. p. 291.

As Carol's claim to date has been strictly limited to an elective share claim, the District Court's ruling was similarly limited. As explained by the District Court in its Decision:

> The magistrate correctly held that the elective share statutes don't require the return of [the Subject Funds] to Michael's estate, nor do they entitle Carol to an elective share. **Whether those monies constitute plain old "community property," and whether their transfer to the Heirs and Michael's grandchildren can be avoided under the common law, is beyond the scope of this appeal because [it] is beyond the scope of the petition filed and pursued by Carol and adjudicated by the Magistrate.**

R. p. 291 (emphasis added). The District Court further clarified in a footnote, "Carol simply didn't petition under the common law for a return of community property. Instead, Carol insisted that the elective-share statutes were the vehicle for obtaining her fair share of both community property

and quasi-community property." R. p. 291, n. 2. Therefore, the Magistrate and the District Court only ruled on the only claim raised by Carol—her elective share claim.

Carol continues to confuse concepts of the elective share and community property claims before this Court. The Court will note that the first line of the Statement of the Case in Carol's brief reads: "this case involves **a community property claim** of a surviving spouse against assets of her deceased husband's estate." Appellant's Brief, p. 1 (emphasis added). She mixes community property principles into an elective share analysis even though a community property claim and an elective share claim are distinct and discrete with different procedures and governing law. For example, Carol asserts the Magistrate erred by offsetting certain portions of Carol's elective share claim, claiming "[e]ven if Michael made gifts to Carol, there is no authority under Idaho law that the gifts could be offset against her share of community property." Appellant's Brief, p. 8. However, the Magistrate was not addressing a community property claim because Carol failed to raise one. In an elective share claim, offsets are a necessary consideration. *See* Idaho Code sections 15-2-203 and 15-2-207.

Carol's underlying claim is based upon a fundamental misunderstanding of the elective share statute. Carol is admittedly trying to utilize the elective share statutes as a procedural mechanism for her to acquire a share of the Subject Funds that she asserts are "community property." However, the elective share statute provides a procedural mechanism for a surviving spouse to acquire only a share of the "quasi-community property" of a decedent.

The District Court provides a thorough explanation as to why the elective share statutes apply only to quasi-community property and not community property. This important ruling can

be summarized with the following statement: "To be clear, the elective share statute mentions only 'quasi-community property,' not plain old 'community property.'… It is perfectly clear that quasi-community property and community property aren't the same thing." R. pp. 288–289.

With this clarification as to what Carol actually claimed (an elective share), what she actually argued (community property is part of elective share), and what the courts below actually ruled (community property is not part of elective share and Carol failed to prove her elective share)—the arguments relative to the issues on appeal, will be more meaningful and clear.

2. CAROL'S FIRST ISSUE ON APPEAL IS FUNDAMENTALLY FLAWED.

Carol's first issue on appeal is "whether the district court erred in holding that the community property presumption does not apply to quasi-community property." This first issue is fundamentally flawed in three ways. First, it raises an argument for the first time on appeal. Second, it does not accurately reflect what the district court actually held. Finally, even if Carol is correct that the district court erred in how it applied the community property presumption to quasi-community property, the issue is moot because the Magistrate already found that the Heirs rebutted any presumption that the Subject Funds were community property.

a) Carol's argument that the community property presumption should apply to quasi-community property should be disregarded by this Court because it is being raised for the first time on appeal.

Carol argues, as her first issue on appeal, that "[t]he district court erred in holding that the community property presumption has no application to quasi-community property." This argument inaccurately implies that Carol made this argument before the lower courts. As more fully explained above, Carol narrowly limited her argument below to the following: the elective share statute can be

used to recover community property, the Subject Funds are presumed to be community property, and therefore Carol had no burden to prove where, when, or how the Subject Funds were acquired. Carol never argued that the community property presumption **applies** to quasi-community property. Carol's counsel flatly stated that Carol did "not claim that [the Subject Funds were] quasi-community property." Tr. p. 4, ll. 15:18-19.[3] Therefore, the District Court could not possibly err by failing to apply a community property presumption to quasi-community property, if the question of quasi-community property was not even at issue to Carol.

While Carol asserts before this Court that this argument is a "issue of first impression in Idaho" (Appellant's Brief, p. 5), it is more appropriately characterized as a matter of first impression in this case and should therefore be rejected. "The longstanding rule of this Court is that we will not consider issues that are presented for the first time on appeal." *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991). As Carol did not argue below that the community property presumption should apply to quasi-community property, as she expressly disavowed any such argument, it cannot be considered for the first time on appeal.

b) The District Court did, in fact, determine that the community property presumption could apply to quasi-community property.

The Heirs respectfully submit that Carol's very characterization of her first issue on appeal is fundamentally flawed because it does not accurately represent an opinion of the District Court. Contrary to Carol's brief, the District Court actually did hold that the community property

[3] If there remains any doubt or skepticism regarding what Carol asserted on appeal to the District Court, the Heirs ask the Court to read her Appellant's Brief and Appellant's Reply Brief submitted to the District Court (R. pp. 204-34, 268–81), and the transcript of oral argument before the District Court (Tr. pp. 1–10).

presumption could apply to quasi-community property. The District Court explained that the presumption could not apply wholesale to quasi-community property as that would result in property impossibly being both community property and quasi-community property at the same time. However, the District Court opined that the community property presumption could apply to that portion of the definition of quasi-community property which evaluates whether the subject property **would have been** community property had it been acquired in Idaho.[4] R. pp. 289–291. Therefore, Carol's first issue on appeal must fail as the District Court could not have "erred" in failing to make a ruling that it actually did make.

c) **Even assuming error, Carol's argument regarding a community property presumption applying to quasi-community property is moot.**

Even if the community property presumption somehow applies to quasi-community property, Carol's argument in this regard would still fail because the Magistrate observed that the Heirs had overcome any such community property presumption.

In its decision on Carol's Restoration Petition, the Magistrate found that the Heirs had "adequately rebutted the presumption that the property in question is community property." R. p. 160. In the Order, the Magistrate stated, "[e]ven though it is not the Heirs' burden to 'disprove' Carol's elective share petition, the Heirs went ahead and did just that. They proved with certainty through the

[4] "Quasi-community property" is defined as "[1] all personal property…and all real property… [2] acquired by the decedent while domiciled elsewhere and which [3] *would have been community property of the decedent and the surviving spouse had the decedent been domiciled in this state at the time of its acquisition….."* I.C. 15-2-201.

testimony, including Carol's testimony, that the source of the funds in the POD accounts had to be Michael's separate retirement benefits." R. p. 190–91.

Carol's argument regarding the presumption is therefore moot. If she succeeded in convincing this Court that the Magistrate committed reversible error, as affirmed by the District Court, there would be nothing to be gained by remanding to impose a presumption that the Magistrate already found had been overcome. "An issue is moot if…a favorable judicial decision would not result in any relief…." *State v. Abdullah*, 158 Idaho 386, 463, 348 P.3d 1, 77 (2015). It is the policy of this Court not to decide moot issues. *Id.* Accordingly, Carol's argument fails.

3. THE DISTRICT COURT DID NOT ERR BY REFRAINING FROM RULING ON THE COMMUNITY PROPERTY ARGUMENT.

In her second issue on appeal, Carol argues that the District Court erred by not ruling on the Magistrate's rejection of Carol's community property argument. However, as Carol never presented a community property claim before the Magistrate, the District Court appropriately refrained from ruling on a claim that had not been presented and adjudicated below.

Carol did not make a community property claim, she made an elective share claim. Carol admitted that the only claim she had asserted was that of her elective share. Tr. p. 5, ll. 18: 5-18. When the Magistrate considered community property principles, it did so **not** in the context of ruling on a claim of community property, as such a claim or petition was never made to the Magistrate. Instead, the Magistrate addressed Carol's arguments of community property as she made them in the context of her elective share claim.

The Magistrate noted that Carol had failed to prove any property was quasi-community property and recognized that such failure was "fatal to her elective share petition." R. p. 190. The Magistrate then went on, "[w]hile the analysis can simply end there, the Court will address her other arguments." R. p. 190. Accordingly, the Magistrate was addressing the arguments Carol raised with respect to her elective share petition, not ruling on an independent community property claim. Even Carol admitted that the community property argument was "not an essential part" of the Magistrate's ruling. Tr. p. 5, ll. 19:3–4.

In fact, it was not until intermediate appeal that Carol first asserted that her community property argument constituted a claim outside of the elective share statutes. Specifically, in her Appellant's Brief to the District Court, Carol argued that "[h]er claim exists independently of the elective share statute or the Probate Code…." R. p. 211. This was the first time she had asserted any semblance of a community property claim outside of her elective share claim.

The District Court recognized that Carol's attempt to obtain the Subject Funds based upon a community property argument was "beyond the scope of this appeal because it is beyond the scope of the petition filed and pursued by Carol and adjudicated by the magistrate." R. p. 291. The District Court explained further that Carol "simply didn't petition under the common law for a return of community property. Instead, Carol insisted that the elective-share statutes were the vehicle for obtaining her fair share of both community property and quasi-community property." R. p. 291, n. 2.

The Heirs recognize that unpled claims may be decided by a trial court pursuant to I.R.C.P. 15(b), but that did not happen in this case. Carol's community property claim was not tried expressly or implicitly. Carol did not move to amend the Petition to include a common law community property

claim. Carol did not assert that she had a community property claim independent of her elective share claim before the Magistrate. Carol's community property claim could not have been tried by implied consent because Carol did not present any evidence at trial on the Petition. Accordingly, the Magistrate could not have ruled on that claim because it had not been raised.

Contrary to her assertion, Carol is not prejudiced by the Magistrate addressing her community property arguments. There is a significant difference between explaining that a party's arguments are flawed and ruling on a claim raised by a party. Here, the Magistrate addressed the community property arguments Carol raised in the context of her elective share claim. As the District Court noted, Carol could still make a community property claim. The fact that the Magistrate addressed the same arguments that could be raised in that unpled claim does not prejudice that claim even if the Magistrate's analysis demonstrates that those arguments would not prevail.

As Carol never made an independent claim for community property before the Magistrate, the District Court did not err by refusing to consider it on appeal. *See Oregon Shortline R. Co. v. City of Chubbuck*, 93 Idaho 815, 817, 474 P.2d 244, 246 (1970) (holding that issues that are not raised in pleadings or argued or decided by the trial court are not considered by an appellate court). The same principle applies before this Court as well.

Alternatively, and if this Court did consider the Order to be a decision on an unpled community property claim, probate decisions on community property versus separate property are not appealable orders. Idaho Code section 17-201 outlines which probate orders are appealable. "The decision whether property in a decedent's estate is community or separate property is not one of the judgments or orders listed in I.C. § 17-201" and therefore not an appealable order. *Matter of*

Freeburn's Estate, 97 Idaho 845, 848, 555 P.2d 385, 388 (1976). Insomuch as the Magistrate's decision could be viewed as determining Carol's community property claim, it would not be an appealable order and the District Court could not err in refraining from addressing it.

4. THE DISTRICT COURT WAS NOT REQUIRED TO REWEIGH THE EVIDENCE SUPPORTING THE MAGISTRATE'S DECISION

Carol asks this Court to remand to the District Court so it can reweigh the evidence. Specifically, Carol points to her argument on intermediate appeal that the "magistrate court erred in concluding that the funds in the decedent's accounts derived almost entirely from his retirement account." Appellant's Brief, p. 7; R. p. 212. Carol confirms this argument in her brief to this Court, stating, "[a]s stated in Carol's appellate brief to the district court, the evidence in the record does not support this conclusion." Appellant's Brief, p. 7.

The Magistrate found that the source of the Subject Funds was the Decedent's retirement. The Magistrate noted that the Heirs "proved with certainty through the testimony, including Carol's testimony, that the source of the funds in the POD accounts had to be Michael's separate retirement benefits." R. pp. 190–91. As noted above, this was largely based on Carol's own verified pleadings and trial testimony, which she argued on intermediate appeal could not be relied upon. The Magistrate properly weighed the evidence and made its determination. The District Court declined Carol's invitation to simply reweigh the evidence on appeal as it was rendered unnecessary by the District Court's holding on the quasi-community property issue.

The District Court's decision to refrain from reweighing the evidence could not be error as it is an inappropriate endeavor to reweigh evidence on appeal. In fact, this Court has noted that such a

request is a basis for awarding fees on appeal. *See Belstler v. Sheler*, 151 Idaho 819, 827, 264 P.3d 926, 934 (2011) ("Normally, this Court will award attorney fees pursuant to I.C. § 12-121 if the appeal merely invites the Court to reweigh the evidence or second guess the lower court…."). As Carol asks this Court to remand to the District Court to reweigh the evidence, that request must be denied.

5. THE MAGISTRATE'S DECISION AS TO THE NATURE OF THE SUBJECT FUNDS WAS SUPPORTED BY LEGAL AUTHORITY.

Carol argues that the Magistrate's view that the retirement income was "almost entirely separate property" was contrary to Idaho Code section 32-906 and that "the magistrate court cites no relevant authority in support of its conclusion." Appellant's Brief pp. 7–8. This is not accurate.

The Magistrate did, in fact, rely on case law supporting its view of the nature of the Decedent's retirement. Carol is well-aware of this. While the entire record is not before this Court[5], there are glimpses into the Magistrate's legal basis with what is in the record. For example, Carol cites to her Appellant's Brief to the District Court, page 224 of the record, in support of the contention that she argued that the Magistrate "did not cite any authority for its conclusion that the retirement income was separate property in proportion to the number of years the decedent worked prior to marriage." That page includes a footnote wherein Carol admits, "[i]n its Decision Re: Attorney's Fees and Costs, the magistrate court acknowledges that 'this Court agrees with the *Ramsey* [*v. Ramsey*, 96 Idaho 762, 535 P.2d 53 (1975)] decision and its application of a percentage rule to the accrual of retirement

[5] The Heirs represent that this issue was raised and addressed by the Magistrate in subsequent filings. This will become apparent below. However, Carol did not include pertinent portions of the record that apply to this argument. It should be noted that "this Court will presume that the absent portion supports the findings of the" lower court. *Hansen v. White*, 163 Idaho 851, 420 P.3d 996, 1000 (2018).

benefits.' Decision Re: Attorney's Fees and Costs, p. 4." Appellant's Brief, p. 8; R. p. 224, n. 6. In her reply brief to the District Court, Carol titled an entire section, "The magistrate court's reliance on *Ramsey* was misplaced." R. p. 278.

Therefore, Carol's assertion that the Magistrate did not rely on authority in making its decision is belied by her own briefing on intermediate appeal. Carol does not contest that basis on appeal, but merely, and disingenuously, asserts the notion that the Magistrate rendered its conclusion without a legal basis, which is demonstrably false.

6. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT AWARDED FEES PURSUANT TO IDAHO CODE SECTION 12-121.

Carol argues that the District Court abused its discretion in awarding fees under Idaho Code section 12-121 because "[w]hether the community property presumption applies under the elective share statute is a matter of first impression." This argument contains two major flaws: (1) it does not fairly reflect what was presented to the District Court or the basis on which the District Court relied in awarding fees and (2) it relies upon a matter of first impression not argued before the District Court.

First, Carol's argument fails to take into consideration what was raised before the District Court. Before the District Court, Carol argued that the elective share statutes provide a procedural mechanism for a surviving spouse to recover community property. Carol went so far as to call the Heirs' argument to the contrary "puzzling." R. p. 273. In fact, in response to the Heirs' request for attorney's fees, Carol stated, "[t]here is no existing authority for the proposition that the elective share statute has no application to community property claims." R. p. 281. The issue before the District Court, therefore, was not whether the community property presumption applies to quasi-community

property, but rather whether the elective share statute provides a procedural mechanism for a surviving spouse to seek community property. As such, the District Court awarded fees against Carol, not because she was arguing for an unsupportable extension of the elective share statutes to community property.

The District Court correctly and artfully pointed out that no part of the elective share statutes included community property. *See* R. pp. 288–89. In exercising its discretion to award fees, the District Court cited *Doble v. Interstate Amusements, Inc.*, 160 Idaho 307, 309–10, 372 P.3d 362, 364–65 (2019), wherein this Court awarded attorney fees under Idaho Code section 12-121 because "Doble's argument is nothing more than an appeal for the courts to extend the law to include other conduct that…is not fairly included in the language of the [statute]." The District Court recognized that Carol's argument "entails stretching the language of Idaho's elective-share statutes well beyond their plain meaning, so as to cover a subject [community property] they simply don't cover." R. p. 294. As Carol based her appeal on seeking an interpretation of the elective share statutes to include that which the plain language did not include, the District Court was within its discretion to award fees under Idaho Code section 12-121.[6]

Second, as noted above, this is the first time that Carol is invoking an argument she claims is "of first impression." Carol never argued that the community property presumption should be applied to quasi-community property. Carol even stated that she was not claiming the Subject Funds to be quasi-community property. Carol did argue for the community property presumption, but that was

[6] Carol also describes her argument as an extension of existing law. Appellant's Brief, p. 11. This Court in *Doble* determined that a argument that the Court should interpret a statute to include that which it does not is not a good faith argument for the extension of existing law. *Doble*, 160 Idaho at 309–10, 364 P.3d at 364–65.

only to apply it to community property she sought in the elective share. Even her argument against the Heirs' claim for attorney fees on appeal showed the limited scope in which Carol argued the community property presumption. *See* R. p. 281 ("There is no existing authority for the proposition that the elective share statute has no application to community property claims."). Accordingly, this assertion of first impression to bar the District Court's award of attorney's fees is inapplicable because the issue relied upon was not raised to the District Court.

In sum, Carol argued that the elective share statutes should apply to community property claims. The District Court determined that the plain language of the statute did not allow for such an extension and, pursuant to *Doble*, awarded attorney's fees. This award was not an abuse of discretion.

7. THIS COURT SHOULD AWARD ATTORNEY'S FEES ON APPEAL.

The Heirs request an award of attorney's fees on appeal pursuant to Idaho Code sections 12-121 AND 15-8-208, and I.A.R. 40 and 41. In reviewing this request, the Heirs ask this Court to review the journey this has been.

Carol filed her Petition. Despite the language of the comments to the statute that it was her burden to prove all elements of her claim,[7] Carol presented no evidence at trial. She argued that the elective share included community property to which a community property presumption applied. The Magistrate found that Carol did not carry her burden in any way. The Heirs sought an award of fees pursuant to Idaho Code section 12-121. The Magistrate exercised its discretion, in what it considered "a very close call," and denied the request. R. p. 285.

[7] See Idaho Code section 15-2-201, Comment to Official Text, "The surviving spouse rather than the executor or the probate court has the burden of asserting an election, as well as the burden of proving the matters which must be shown in order to make a successful claim to more than he or she has received."

On appeal, Carol continued to argue that the elective share statutes included community property. Carol confirmed that she had only sought the Subject Funds by way of an elective share and that she did not claim that the Subject Funds were quasi-community property. The District Court explained that the elective share statutes only included quasi-community property and not community property and explained that Carol's vehicle for seeking the Subject Funds under a community property argument was improper. The District Court exercised its discretion in favor of awarding fees to the Heirs, recognizing that Carol's appeal attempted to stretch the language of the statutes to include that which they do not. R. p. 294.

Despite the District Court's instructions on how to properly pursue a community property claim and its thorough explanation that the elective share statutes do not encompass community property claims, Carol appealed to this Court. In her appeal, she is mischaracterizing the decisions of the courts below and asserting issues for the first time. She asserts, incorrectly, that the District Court failed to hold that the community property presumption has no application to quasi-community property—even though Carol never argued as much to the District Court and admitted to the District Court that she was not claiming the Subject Funds to be quasi-community property. Additionally, she assigns error to the District Court for not addressing a claim (common law community property claim) that she never made to the Magistrate and is not part of her Petition, which is the subject of this appeal.

Carol's appeal here is a continuation of her ignoring the plain language of the elective share statutes, which, pursuant to *Doble* (which the District Court cited to in awarding fees), provides a basis for attorney's fees under Idaho Code section 12-121. Carol's changing positions do not save

her appeal from being subject to Idaho Code section 12-121. Even if an appellant raises new issues on appeal that could be valid, this Court cannot consider them and they cannot be the basis to legitimize an otherwise frivolous appeal. *See Kinsela v. State, Dept. of Finance*, 117 Idaho 632, 635–36, 790 P.2d 1388, 1391–92 (1990) (holding that issues raised for the first time on appeal are not considered, however meritorious, in an award of fees under Idaho Code section 12-121).

As Carol's appeal (1) is based upon an argument to extend clear statutes to issues not covered therein; (2) relies upon mischaracterized rulings of the lower courts; (3) raises new issues on this subsequent appeal; and (4) asks this Court to force the District Court to reweigh the evidence, her appeal is frivolous and fees should be awarded pursuant to Idaho Code section 12-121.

Alternatively, the Heirs request costs and attorney fees from Carol, personally, pursuant to Idaho Code section 15-8-208. That Section provides:

> (1) Either the district court or the court on appeal may, in its discretion, order costs, including reasonable attorney's fees, to be awarded to any party:
>
> (a) From any party to the proceedings;
>
> (b) From the assets of the estate or trust involved in the proceedings; or
>
> (c) From any nonprobate asset that is the subject of the proceedings. The court may order the costs to be paid in such amount and in such manner as the court determines to be equitable.
>
> (2) This section applies to all proceedings governed by this chapter including, but not limited to, proceedings involving trusts, decedent's estates and properties, and guardianship matters. Except as provided in section 12-117, for the payment of costs, this section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, unless such statute specifically provides otherwise.

This matter falls within this section as it pertains to the Decedent's probate, which is an estate proceeding. As such, this Court has discretion, as it determines to be equitable, to make an

award of costs and fees from any party to the proceeding to another party. Due to the questionable nature of Carol's claims presented below and on appeal, this Court should award fees to the Heirs.

CONCLUSION

For the reasons set forth above, the Heirs respectfully request that this Court affirm the District Court and award the Heirs fees and costs on appeal.

DATED this 21st day of August, 2019.

RANDSLAW, PLLC

By: /s/ Kirk A. Melton
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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August, 2019, I caused a true and correct copy of the foregoing RESPONDENTS' BRIEF to be served by the method indicated below, and addressed to the following:

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