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### Matter of Estate of Brown Appellant's Reply Brief Dckt. 46926

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Carol McCoy Brown

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

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**APPELLANT'S REPLY BRIEF**

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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. INTRODUCTION

On August 21, 2019, Dorraine S. Pool and Michael J. Brown (the “Heirs”) filed their Respondent’s Brief. The Heirs present various arguments, including arguments that Carol Brown is raising different issues on appeal from those raised before the lower courts, that the magistrate court did not rule on any community property issues, that the magistrate court’s characterization of the decedent’s income was supported by authority, and that the district court did not err in awarding attorney’s fees. This Reply Brief is filed pursuant to IAR 35(c) in response to these arguments.

## II. ARGUMENTS IN REPLY

### A. Carol’s case on appeal is consistent with the case she presented to the lower courts.

The Heirs argue that Carol is presenting a different case on appeal from what she presented to the magistrate court and the district court. The record shows that Carol’s case is entirely consistent with the case she presented to the lower courts. Carol took the position before the magistrate court from the day she filed her petition that Michael’s accounts were either community property or quasi-community property, and that in either case the community property presumption should apply. R., pp. 26-30. The Heirs incorrectly state that Carol did not “claim” the accounts included quasi-community property. The record shows otherwise. Carol’s position was that the funds were either community property or quasi-community property, that the community property presumption should apply in either case, and that it was not her burden to prove the funds were community property or quasi-community property, but the Heirs’ burden to prove they were separate property.

The magistrate court decided that under the elective share statute the burden of proof was on Carol to prove that the accounts were quasi-community property, thus implicitly rejecting Carol's argument that the community property presumption applies. R., pp. 189-90. The magistrate court also went further and decided that Michael's accounts were not community property but were almost entirely separate property, and that Carol had no claim to the accounts. R., pp. 190-95. The Heirs argue that the magistrate court simply held that Carol had not met what they assert was her "burden" of proving that the accounts were quasi-community property. The magistrate court's order speaks for itself. It clearly states that the source of the funds in the accounts is Michael's retirement income, and that this income is "almost entirely separate property." R., p. 191. The order does not simply hold that Carol's elective share claim failed because she did not meet her burden of proof. It decides the issue of the characterization of Michael's accounts as community or separate property. As stated in Carol's opening brief, the magistrate court's adverse rulings on community property issues, and the adverse effect these rulings would have on Carol in pursuing her claim to the accounts and on further proceedings in the probate action, was a significant factor in her decision to appeal the magistrate court's order.

Carol appealed these rulings to the district court. Before the district court she argued that the legislature intended for the community property presumption to apply under the elective share statute, and that the magistrate court had erred in its determinations regarding the characterization of the accounts as separate property. R., pp. 219-233. The district court rejected Carol's argument that the community property presumption should apply under the elective share statute, and simply ignored the community property issues decided by the magistrate court,

apparently thinking its job was done once it affirmed the magistrate's decision to deny Carol's elective share claim.

Carol has raised the same issues before this Court: the community property presumption should apply under the elective share statute, and the magistrate court erred in its determination that the accounts were separate property. The fact that Carol may have raised additional issues or made additional arguments before the district court is of no consequence. Nothing requires Carol to appeal every adverse ruling of a lower court. The significant point is that Carol raised the same issues before the lower courts that are raised in this appeal.

**B. Carol's first issue on appeal was raised before the lower courts and is not moot.**

The Heirs argue that Carol's first issue is raised for the first time on appeal. As already stated, Carol took the position from the beginning that the accounts were either community property or quasi-community property, and that either way the community property presumption applied. Carol's appellate brief to the district court argued that the magistrate court erred by failing to apply the presumption to the accounts, and that the legislature intended the presumption to apply under the elective share statute. R., pp. 216-22. Carol has consistently taken the position that quasi-community property is simply a form of community property, and that the community property presumption should apply to it.

The Heirs further argue that the district court held that the community property presumption applies to quasi-community property. The district court's opinion speaks for itself. That court agreed with the magistrate court that a petitioner under the elective share statute bears the burden of proving that the subject property is quasi-community property. As pointed out in Carol's opening brief on appeal, this amounts to a reverse presumption that property is separate

property until proven to be quasi-community property. The petitioner must prove the source of the property to meet this burden, and in most cases will be unable to do so.

Finally, the Heirs rather bizarrely argue that this issue is moot because the magistrate court already decided that the community property presumption was rebutted. A case is moot when “the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.” *Goodson v. Nez Perce County Board of Commissioners*, 133 Idaho 851, 853, 993 P.2d 614, 616 (2000). The portion of the magistrate court’s opinion that decided the community property presumption had been rebutted and the accounts were separate property is source of the issues raised on appeal that the district court chose to ignore. In relying on the magistrate court’s holding that the community property presumption was rebutted, the Heirs contradict their own argument that Carol is not prejudiced by the magistrate’s decision. The district court’s implied affirmation by inaction of the magistrate’s decision is on appeal before this Court. An active controversy exists regarding these issues, and the magistrate’s decision does not render the issues in this appeal “moot.”

**C. Community property issues were raised before the magistrate court, the magistrate court considered and decided these issues in its opinion, and its rulings were adverse to Carol’s interests.**

The Heirs argue that the magistrate court could not have ruled on community property issues because they were not raised by Carol’s claim. The record clearly shows that community property issues were raised in Carol’s petitions to the magistrate court and were briefed and argued repeatedly before the magistrate court by both parties because the parties saw them as relevant to Carol’s claim. R., pp. 85-88; 100-01; 107-09; 115-20; 150-58; 160-61; 163-74. Due to the lack of evidence regarding the source of most of the funds in Michael’s accounts, Carol

based her claim to the accounts on the community property presumption and argued that the Heirs had the burden to prove that the accounts were separate property. The Heirs attempted through evidence and argument to persuade the magistrate court that the accounts were separate property. While the Heirs now assert that Carol did not raise these issues and the magistrate court did not decide any community property issues, the magistrate court's order speaks for itself. That court considered and accepted the Heirs' arguments regarding the source of the funds in the accounts, the characterization of Michael's retirement income, and the availability of an offset to the Heirs for any community property that might be in the accounts.<sup>1</sup> The court concluded that the accounts were almost entirely separate property, and that Carol had no claim to any funds of the accounts. R., pp. 190-95. Issues are appealable if they are raised before a lower court or if there is an adverse ruling from a lower court. *McPheters v. Maile*, 138 Idaho 391, 397, 64 P.3d 317, 323 (2003). Issues concerning the characterization of the accounts were raised before the magistrate court, and the court's conclusions were adverse to Carol. Carol had the right to appeal the magistrate court's conclusions.

The Heirs also argue that Carol is not prejudiced by the magistrate court's consideration of her community property claims. If Carol had the opportunity to litigate these issues before the magistrate court, the issues were litigated, and the magistrate court reached a conclusion on the merits, Carol is bound by the court's conclusions in both the probate action and in any separate

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<sup>1</sup> The Heirs argue that the magistrate court applied the offset only in the context of calculating her possible elective share claim. However, the magistrate court's erroneous finding that Carol received "gifts" of separate property from Michael during the marriage could also have an adverse impact on Carol's ability to make a community property claim to the accounts and on the settlement of the estate in subsequent probate proceedings.

action. The record shows that these issues were litigated before the magistrate court, and that the court reached conclusions on the merits of Carol's community property claims in its order.<sup>2</sup>

Finally, the Heirs argue that a decision of a probate court regarding the characterization of property as separate or community is not appealable, citing *Estate of Freeburn*, 97 Idaho 845, 555 P.2d 385 (1976). The Heirs seem to suggest that once a probate court has decided whether a decedent's property is community or separate this decision cannot be challenged on appeal. Appellate courts have many times in the past considered probate courts' decisions on the characterization of a decedent's property. See, e.g., *Estate of Hull v. Williams*, 126 Idaho 437, 443, 885 P.2d 1153, 1159 (Ct. App. 1994) (reversing finding that decedent's assets were separate property); *Matter of Eliassen's Estate*, 105 Idaho 234, 237-40, 668 P.2d 110, 113-16 (1983). What the Court actually held in *Estate of Freeburn* was that an interlocutory decision of a probate court regarding whether property is community or separate is not an appealable order. The *Freeburn* Court went on to conclude that the interlocutory decision regarding the characterization of property could be reviewed on appeal of a final order because upon appeal "the court may review the verdict or decision and *any intermediate order or decision, if excepted to, which involves the merits or necessarily affects the judgment, except a decision or order from which an appeal might have been taken.*" *Id.* at 848, 388 (emphasis in original).<sup>3</sup> Here, the order appealed from was the magistrate court's order denying Carol's elective share claim. This is an appealable order under I.C. 17-201. The magistrate court's decisions regarding the characterization of Michael's property were contained within this appealable order.

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<sup>2</sup> Unsurprisingly, the Heirs have taken a very different position in probate proceedings before the magistrate court, in which they have freely cited the magistrate court's order as having decided community property issues.

<sup>3</sup> This is why Carol had no choice but to appeal the magistrate court's order or be bound by its determinations of the separate or community character of Michael's property. The failure to appeal an appealable order would make the magistrate court's decisions unreviewable.

**D. Carol did not ask the district court to reweigh evidence.**

The Heirs argue that Carol merely asked the district court to reweigh the evidence and that the district court did not err in declining to do so. The Heirs are mistaken. Carol did not ask the district court to reweigh evidence; she argued that the magistrate court's factual conclusions were not based on substantial evidence and contradicted the evidence in the record. This is entirely different from weighing evidence. Weighing evidence means deciding which piece of contradictory evidence is more credible, a task that is for the trier of fact. *DeBaca v. McAfee*, 109 Idaho 800, 802, 711 P.2d 1320, 1322 (Ct. App. 1985). Here, there is little or no dispute about the evidence. The magistrate court simply ignored evidence that contradicted its finding that the source of the funds in the accounts must be Michael's retirement income. Moreover, the magistrate court applied the wrong legal standard in making its finding. The community property presumption can only be rebutted by evidence showing with reasonable certainty and particularity that property derives from a separate source. *Stahl v. Stahl*, 91 Idaho 794, 798, 430 P.2d 685, 689 (1967). The magistrate court essentially concluded that because Carol did not know of any source other than Michael's retirement income, and there was no evidence of another source, the source must have been Michael's retirement income. This lacks any certainty or particularity, and it puts the burden on Carol to prove an alternative source to resolve the uncertainty. This is inconsistent with the case law holding that the community property presumption must be rebutted with evidence showing with reasonable certainty and particularity that property derived from a separate source.

**E. The magistrate court did not cite relevant authority to support its characterization of Michael's retirement income.**

The Heirs assert that Carol falsely claimed that the magistrate court relied on no authority when it concluded that Michael's retirement income was separate property. They quote from Carol's appellate brief, then proceed to misrepresent what the brief actually says. Carol argued that the magistrate court cited no relevant authority in support of its characterization of Michael's retirement income, while acknowledging that although the magistrate court 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)." Thus, Carol's brief already informed the Court of the authority the magistrate relied on, the information the Heirs assert was withheld. As discussed at length in Carol's appeal to the district court, this case was not relevant authority because it considers the division of a retirement account in a divorce, not the characterization of retirement income received during marriage.

**F. Carol's argument regarding attorney's fees is consistent with the argument presented to the district court.**

The Heirs assert that Carol's argument that the district court erred in awarding attorney's fees does not reflect what Carol argued on appeal to the district court. The record does not support this assertion. In her brief to this Court, Carol argues that the district court abused its discretion in awarding attorney's fees because the case involved matters of first impression and because the district court ignored relevant issues raised on appeal that were supported by argument and authority. Carol argued to the district court that the magistrate court should have applied the community property presumption in deciding her elective share claim because the legislature intended the presumption to apply to claims under the elective share statute. R., pp.

219-20. This is the matter of first impression referenced in the argument regarding attorney's fees. Carol also argued to the district court that it should not award attorney's fees because the case involved issues for which there was no existing authority. R., p. 281. Much of Carol's argument to the district court focused on the community property issues decided by the magistrate court, and the reasons that the magistrate court's rulings were in error. R., pp. 222-233. As already discussed herein, these decisions were contained within the court's order, were adverse to Carol, and were appealable. These are the issues the district court ignored in its opinion on appeal.

**G. This Court should not award attorney fees on appeal.**

The Heirs argue that Carol's appeal to this Court, like her appeal to the district court, is frivolous, and that an award of attorney's fees is appropriate. As set forth in the opening brief on appeal, the district court erred in finding that Carol's appeal was frivolous because she presented reasonable arguments on matters of first impression and because the district court ignored legitimate issues properly raised on appeal that were supported by relevant argument and authority. The Heirs argue that Carol should have followed the district court's "instructions" regarding how to properly pursue her community property claim instead of filing this appeal. As previously stated in her opening brief to this Court, Carol could not follow the district court's suggestion to pursue her claim in a separate action because the magistrate court had already decided the relevant community property issues, the district court had ignored these issues on appeal, and she would be bound by the magistrate's decision. While the Heirs argue that Carol should not have pursued this appeal, if she had followed the district court's instructions and filed a separate action, they would surely have argued that Carol was bound by the magistrate court's

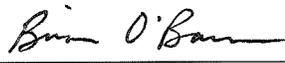
decisions regarding community property issues, as they have done in subsequent proceedings in the probate action. They cannot have it both ways. If Carol is bound by the magistrate court's decisions on community property issues those issues are appealable, and an appeal that includes issues supported by argument and relevant authority is not frivolous. Carol's appeal is not frivolous, and an award of attorney's fees to the Heirs is not appropriate.

### III. CONCLUSION

For the foregoing reasons, the district court's decision on appeal should be reversed.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of September, 2019.

WHITE PETERSON

By:   
\_\_\_\_\_  
Brian T. O'Bannon  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 12<sup>th</sup> day of September, 2019, I filed the foregoing *Appellant's Reply Brief* 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 12<sup>TH</sup> day of September, 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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