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Ariz. R. Crim. P. 31.24



DIVISION ONE
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RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:) 1 CA-CV 11-0261
)
THE FRANCIS E. O'DONNELL, JR.,) DEPARTMENT E
IRREVOCABLE TRUST #1 To #10)
)
_____) **MEMORANDUM DECISION**
KATHLEEN E. O'DONNELL,) (Not for Publication
) - Rule 28, Arizona
) Rules of Civil
Plaintiff/Appellee,) Appellate Procedure)
)
v.)
)
KATHLEEN M. O'DONNELL; FRANK E.)
O'DONNELL, JR; COLLEEN O'DONNELL)
FLORES, individually and as the)
mother of Connor Flores and Carson)
Flores; and KIRK O'DONNELL,)
individually and as the father of)
Annabella Julia O'Donnell,)
)
Defendants/Appellants.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. PB 2009-001179, CV 2010-000257

The Honorable Gary E. Donahoe, Judge

AFFIRMED

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N O R R I S, Judge

¶1 This appeal arises out of the probate court's extensive and detailed findings of fact, conclusions of law, and judgment in favor of Appellee Kathleen E. O'Donnell ("Katie") against Appellant Kathleen M. O'Donnell ("Trustee") concerning irrevocable trusts established by Appellant Francis E. O'Donnell, Jr. ("Frank").

¶2 On appeal, Trustee, joined by Frank and his children and grandchildren, argues the Arizona probate court did not have subject matter jurisdiction to adjudicate the issues in dispute; and even if it did have jurisdiction, the court misapplied Missouri law and made factual findings not supported by the evidence. We disagree with these arguments and affirm the probate court's judgment.

FACTS AND PROCEDURAL BACKGROUND¹

¶13 Frank married Katie in Missouri on May 26, 1990. At the time of their marriage, Frank was a successful ophthalmologist and investor with substantial premarital assets, most of which were identified in an accounting report listing Frank's assets and liabilities as of May 25, 1990.

¶14 The day before their marriage, and shortly thereafter, Frank, as settlor, established 12 irrevocable trusts ("trusts") naming his sister, an Arizona attorney, as Trustee of all the trusts.² Although the trust documents contained a choice of law provision that specified Missouri law would govern the interpretation, construction, and administration of the trusts, Trustee was an Arizona resident and administered the trusts in Arizona. See *infra* Part I.

¶15 As the probate court found and as the record confirms, Frank established the trusts for a number of reasons: first, to protect his assets from creditors as he was concerned about potential malpractice claims and his involvement in high-risk

¹As discussed *infra* ¶ 30, we will uphold the court's factual findings unless clearly erroneous.

²Frank established the first four trusts (Trusts No. 1-4) on May 25, 1990; another six trusts (Trusts No. 5-10) on November 29, 1990; and two more trusts (Descendants' Trust and Insurance Trust) on November 22, 1991. Frank is the grantor, beneficiary, and successor trustee of Trusts No. 1-10. While Katie was not a named beneficiary under the Descendants' Trust, she was a beneficiary under Trusts No. 1-10 during her marriage to Frank as a "spouse of [Frank] living with [him]."

investments; second, to support dependents, including his children from a prior marriage; third, to ensure continuity in asset management if he became incapacitated; and fourth, to "trac[e]" his premarital property in the event of a divorce. The probate court found Frank did not create these trusts "thinking that divorce was a possibility in the near future."

¶16 During their 18-year marriage, Katie had the primary responsibility of raising the children, while Frank was the income earner and managed the finances. As the probate court found, Frank never disclosed to Katie the relevant terms of the trusts, and Katie had complete trust in Frank that he was managing -- in Katie's words, "our money" -- in her best interests; therefore, Katie never read the trust documents or any of the documents Frank asked her to sign, including a number of waivers of marital rights.³ During the course of their marriage, and according to financial statements summarized by the parties in their joint pretrial statement, the value of the trusts increased from Frank's initial contribution of \$3 to \$5 million dollars, to between approximately a high of \$170 million (2004) and a low of \$102 million (2007).

³The probate court found the waivers were void because Katie did not sign them knowingly and intelligently. Trustee does not challenge this finding on appeal.

¶17 Between 1990 to 2000, Frank became less active as an ophthalmologist and instead began to focus his energy on investment activities with a close friend, Jonnie Williams ("Jonnie"). Among Frank's various investments, his interests in two entities -- Lasersight, Inc. and Star Scientific, Inc. -- are at the center of the disputed factual issues in this appeal. See *infra* Part III.

¶18 In February 2008, Frank and Katie separated. On March 5, 2008, Katie filed a Petition for Dissolution of Marriage in Missouri. In her dissolution petition, Katie alleged, among other things, Frank had transferred marital assets into the trusts in breach of his fiduciary duties and in fraud of Katie's marital rights. Katie then sought to amend the petition and join Trustee in the dissolution proceeding.⁴

¶19 On May 20, 2009, Trustee filed a Petition for Determination of Trust Matters ("Trustee's Petition") in the Superior Court of Maricopa County, Arizona ("probate court") and asked that court to determine whether Katie was a beneficiary

⁴Trustee attempted to intervene in the dissolution proceeding, but the Missouri court denied her motion to intervene.

under the terms of the trusts and whether Trustee had breached any fiduciary duties owed to Katie.⁵

¶10 On July 10, 2009, the Missouri court denied Katie's request to amend the dissolution petition and join Trustee. In its ruling, the court explained that since "Arizona is the principal place of administration of the trust[s]" under Missouri law, the Arizona court had the "exclusive authority" to determine the trust-related issues, including "the authority to declare whether [Katie had] any interest in the trust[s] and to interpret the terms of the trust[s] pertaining to any such interest." On July 30, 2009, the probate court overruled Katie's assertion that it lacked subject matter jurisdiction.⁶

¶11 On February 9, 2010, the probate court granted Trustee's motion for partial summary judgment, finding that under the terms of the trusts, Katie had ceased to be a beneficiary of the trusts when she separated from Frank in February 2008.⁷ The court, however, recognized Katie was still

⁵Katie also filed a separate civil action against Frank and Trustee in the superior court, alleging various tort claims. The probate court consolidated the civil action with the probate action, but stayed the civil action pending resolution of Trustee's Petition and the Missouri divorce proceeding.

⁶On appeal, Trustee argues the probate court lacked subject matter jurisdiction; we disagree. See discussion *infra* Part I.

⁷Katie does not challenge this ruling on appeal.

entitled to pursue "any and all valid claims that she may have in the Missouri proceedings." On November 2, 2010, the probate court, in denying a motion to dismiss filed by Frank, reiterated it had subject matter jurisdiction to determine "whether a person has any beneficial interest in trusts administered by a trustee located in Arizona."

¶12 On November 17, 2010, the Missouri court affirmed the probate court should decide whether the trust assets were "marital in nature under Missouri law," noting this determination would not "prejudice the ability of the Missouri court to eventually address the equitable distribution of the property and debts of the parties along with the other issues involved in the dissolution proceeding." The Missouri court reserved to itself the "equitable distribution of the property and debts of the parties along with the other issues involved in the divorce proceedings." As relevant to this appeal, the principal issue before the probate court narrowed to whether Katie had a marital interest in the trust assets.

¶13 After an eight-day bench trial, the probate court issued a 42-page judgment containing detailed findings of fact and conclusions of law. The probate court reiterated its prior ruling that it had jurisdiction for "proceedings involving a trust" under Arizona Revised Statutes ("A.R.S.") sections 14-

10202 (2011) and 14-10203 (2011) and found Katie had a marital interest in the assets held in the trusts based on several alternative theories, discussed as relevant *infra* ¶¶ 34-35, 37-38, and accompanying footnote 13.

DISCUSSION⁸

I. Jurisdiction to Determine Whether Katie Had a Marital Interest in the Trust Assets

¶14 On appeal, Trustee first argues the probate court did not have subject matter jurisdiction to decide whether Katie had a marital property interest in the trust assets because it did not have subject matter jurisdiction over Frank and Katie's marriage. We disagree.

¶15 Under the Uniform Trust Code adopted by both Missouri and Arizona, the court in the trust's principal place of administration has jurisdiction over the trustee and the beneficiaries as to trust administration matters. Mo. Ann. Stat. § 456.2-202 (West 2008); A.R.S. § 14-10202. Here, because Trustee was an Arizona resident and administered the trusts in Arizona, thus making Arizona the trusts' principal place of administration under Missouri law, the probate court had

⁸The issues discussed in Part I and Part II present questions of law we review *de novo*. *In re Marriage of Pownall*, 197 Ariz. 577, 581, ¶ 15, 5 P.3d 911, 915 (App. 2000) (*de novo* review for issues of law). The standard of review for issues in Part III is discussed *infra* ¶ 30.

jurisdiction to determine trust-related issues, including whether Katie had any interest in the trust assets arising out of her marriage to Frank. See Mo. Ann. Stat. § 456.1-103(17) (West 2008) ("Principal place of administration" of trust is trustee's usual place of business where trust records are kept, or trustee's residence if trustee has no such place of business); A.R.S. § 14-10203(A) (superior court has exclusive jurisdiction of proceedings in this state brought by trustee or beneficiary concerning the administration of trust). Further, the probate court was correct in applying Missouri law because the trust instruments specifically provided so. See *supra* ¶ 4. By determining whether Katie had a marital interest in the trust assets, the probate court did not overstep the jurisdictional boundaries and engage in a division of marital assets, a power reserved exclusively to the Missouri court.

¶16 In attacking the subject matter jurisdiction of the probate court, Trustee also asserts under Missouri law, marital property can only "materialize" through a decree of dissolution which, because Frank and Katie are Missouri residents, could only be issued by the Missouri court. In making this argument,

Trustee relies on Mo. Ann. Stat. § 452.330.2 (West 2008),⁹ which defines marital property “only” for the purposes of a dissolution proceeding, and *Sumners v. Service Vending Co., Inc.*, 102 S.W.3d 37 (Mo. App. 2003), which held a spouse’s marital property ownership interest in stock could only “materialize” through a dissolution decree. Trustee’s reliance on § 452.330.2 and *Sumners* is misplaced.

¶17 Section 452.330.2 creates a statutory presumption that all property acquired by either spouse during marriage is marital property, subject to certain exceptions. *Jenkins v. Jenkins*, 368 S.W.3d 363, 367 (Mo. App. 2012). Under § 452.330.2, the commencement of a dissolution proceeding does not modify the marital property rights of either party, or create new ones: it simply puts into play the right of a spouse to implement his or her marital property rights -- such as the right to seek an equitable distribution -- in the event the marriage is dissolved.

¶18 To be sure, under Missouri law, a spouse does not have a presently enforceable ownership interest in marital property until a court has issued a decree of dissolution, and *Sumners* illustrates this point. *Sumners*, 102 S.W.3d at 45. There, the

⁹“For purposes of sections 452.300 to 452.415 [governing dissolution proceedings] only, ‘marital property’ means all property acquired by either spouse subsequent to the marriage” Mo. Ann. Stat. § 452.330.2.

wife claimed a presently enforceable marital property ownership interest in corporate stock owned by her husband and argued her marital interest gave her the right to object to a buy-sell agreement between her husband and the corporation, which authorized the corporation to redeem the stock from her husband when he terminated his employment with it. *Id.* at 45. The court rejected the wife's argument that she had a presently existing property right in her husband's stock even though he had purchased it with marital assets. *Id.* The court explained the wife's marital property ownership interest in the stock could only "materialize via a decree in a domestic relations case" *Id.*

¶19 In contrast with the wife's argument in *Sumners*, here, Katie did not ask the probate court to enforce any ownership interest she might have in the trust assets. Instead, the issue before and decided by the probate court was whether, in the first instance, Katie had a marital property interest in the trust assets. The probate court held she did. But, whether Katie has a presently enforceable ownership right in specific trust assets and to what extent are issues that still must be resolved by the Missouri court. We agree with the Missouri court's conclusion that whether Katie *factually* had a marital interest in the trust assets was a "determination which the

Court in Arizona [was] well suited to making and that finding [would] not prejudice the ability of the Missouri court to eventually address the equitable distribution of the property and debts of the parties along with the other issues involved in the dissolution proceeding.”

¶20 For these reasons,¹⁰ we conclude the probate court had jurisdiction to determine whether Katie had a marital property interest in the assets of the trusts administered in Arizona.

II. Marital Fraud Claim under Missouri Law

¶21 Trustee next argues the probate court misapplied Missouri law in finding Katie had a marital property interest in the trust assets because they were owned by “one of the [t]rusts,” not by Frank, and thus cannot be marital property. While we agree that under Missouri law, normally property owned by a third party is not marital property, *see Loomis v. Loomis*, 158 S.W.3d 787, 790 (Mo. App. 2005), and Mo. Ann. Stat. § 456.5-504 (West 2008) (beneficiary’s interest in discretionary trust is not property interest subject to creditor’s claims), the core issue here, however, is whether Frank transferred marital assets into the trusts and thereby converted them into non-marital trust assets.

¹⁰Trustee also argues that as a matter of law, Katie could not assert a marital fraud claim because marital property could not exist without a dissolution decree. We disagree for reasons discussed *supra* Part I.

¶122 Missouri courts have found property "placed" in trust during a marriage is still subject to division at dissolution. See *Jenkins*, 368 S.W.3d at 368 (just as "name on the trust does not impact the classification of the property in the trust," mere creation of a trust does not remove trust property from determination that it is marital property) (quoting *Selby v. Selby*, 149 S.W.3d 472, 488 (Mo. App. 2004)); *Seggelke v. Seggelke*, 319 S.W.3d 461, 467 (Mo. App. 2010) (while trustee may hold legal title, "the equitable interest in the trust is subject to classification and division by the trial court"). Even property placed in trust under the name of one spouse may be deemed marital property. See *Selby*, 149 S.W.3d at 488 (re-characterization of marital property as non-marital simply because it is placed in trust is against public policy).

¶123 Here, Frank's creation of irrevocable, spendthrift, and discretionary trusts does not exempt the assets he placed in those trusts from Missouri marital property laws or allow him to shield marital assets in those trusts and then call them non-marital. Although the trust assets were in Trustee's name, this is not the end of the inquiry. The issue here is whether Frank committed a fraud on the marriage by placing what should have been marital property into the trusts in an attempt to change the character of the property from marital to non-marital. We

agree with the probate court -- the creation of the trusts does not destroy Katie's marital property interest in the trust assets.

¶24 Trustee further asserts Katie was not, as a matter of law, entitled to pursue a fraud on marital rights claim. Trustee argues there are only two limited avenues under Missouri law for Katie to claim an interest in the trust assets under such a theory. First, under *Loomis*, when a spouse "has intentionally secreted or squandered an asset in anticipation of divorce, the court may hold that spouse liable for the value of the asset by awarding it to that spouse." 158 S.W.3d at 790. Second, under Mo. Ann. Stat. § 474.150(2) (West 2008),¹¹ a

¹¹Mo. Ann. Stat. § 474.150 provides in part:

- (1) Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking from him without adequate consideration and applied to the payment of the spouse's share, as in case of his election to take against the will.
- (2) Any conveyance of real estate made by a married person at any time without the joinder or other written express assent of his spouse, made at any time, duly acknowledged, is deemed to be in fraud of the marital rights of his spouse, if the spouse becomes a surviving spouse, unless the contrary is shown.

surviving spouse can attack the deceased spouse's transfers made in fraud of marital rights. Trustee argues that because the probate court found Frank had not transferred the assets to the trusts "in anticipation of divorce," Katie could not attack those transfers under *Loomis*. Additionally, because Katie is not -- and cannot be -- "a surviving spouse," Trustee argues she cannot challenge Frank's transfers under § 474.150(2). While these arguments may be correct, we do not agree Katie has only two legal theories -- *Loomis* and § 474.150(2) -- to protect her marital property rights.¹²

¶25 In *Reinheimer v. Rhedans*, 327 S.W.2d 823 (Mo. 1959), the Missouri Supreme Court recognized a wife could assert a marital fraud claim even though her husband was still alive. *Id.* at 829. In rejecting the same argument Trustee raises here -- that § 474.150 limits the right to bring a marital fraud claim to only a surviving spouse -- the court stated:

Our courts have not yet been required to decide whether . . . a wife may sue to protect her marital rights while her husband is still alive. The [Probate] Code, generally, contains no express limitation on or prohibition of this right, so far as we have found. We do not construe section 474.150 as an attempt to eliminate or limit

¹²Contrary to what Trustee argues, the probate court did not conclude § 474.150(2) creates a cause of action for Katie during Frank's lifetime. Instead, the probate court held § 474.150(2) does not prevent Katie from bringing a marital fraud claim even though she is not a "surviving spouse."

the right of a spouse to sue to set aside a deed for fraud at any time, if indeed the power of courts of equity to entertain suits of that nature may be limited by the legislature. Under the prior law a wife was permitted to sue in advance of her husband's death to protect her inchoate dower. We deem it proper here to consider [the wife's marital fraud claim] on the merits.

Id. at 829 (citation omitted). We agree with the probate court's reading of *Reinheimer* that § 474.150, which creates a cause of action only for a surviving spouse, is not the only avenue to assert a marital fraud claim and does not eliminate Katie's right to sue Frank during his lifetime for marital fraud.

¶26 Trustee suggests more recent Missouri cases have not followed *Reinheimer*, citing *JAS Apartments, Inc. v. Naji*, 230 S.W.3d 354 (Mo. App. 2007), and *Estate of Bernskoetter*, 693 S.W.2d 249 (Mo. App. 1985). We disagree; in our view, both cases are consistent with *Reinheimer*.

¶27 In *JAS Apartments*, the wife refused to join in a contract her husband had entered into with a buyer to sell real property, thus preventing the issuance of title insurance to close the transaction. 230 S.W.3d at 357. In seeking specific performance of the contract, the buyer asked the court to declare the sale was not a fraud on the wife's marital rights under § 474.150. *Id.* at 359. Even though the husband "had not

predeceased his wife and they remained married," the court held the issue of whether the husband's conveyance would constitute marital fraud was ripe for adjudication because § 474.150 does not "eliminate or limit the right of a spouse to sue to set aside a deed for fraud *at any time*," citing *Reinheimer*. *Id.* at 360 (emphasis in original) (citation omitted). Further, the court held that although the buyer was not a "surviving spouse" and thus could not "initiate an action to attack a conveyance as being in fraud of marital rights" under § 474.150, it nonetheless had standing to seek a declaratory judgment. *Id.* at 360. Therefore, *JAS Apartments* is consistent with *Reinheimer*; while § 474.150 gives a surviving spouse the right to attack a conveyance for marital fraud, a spouse is entitled to sue to set aside a deed for fraud "at any time."

¶28 *Estate of Bernskoetter* also does not undermine *Reinheimer*. There, a surviving husband sued under § 474.150, alleging his deceased wife had transferred monies in fraud of his marital rights over the course of 20 years. 693 S.W.2d at 251. After determining the husband had established all the elements for a marital fraud claim, the court ruled he was not subject to the defenses of laches and acquiescence for not having challenged the wife's conduct earlier, explaining

[t]he husband here couldn't have done much of anything to have stopped what was going

on. During the marriage he should not have been required to file some type of suit to stop his wife's activities or recover assets He could have only filed for dissolution -- and this court will not now fault him for failing to disrupt what was a happy and viable marriage of close to 50 years which stopped only by the wife's sudden and unexpected death.

Id. at 254. In our view, this quoted passage suggests a defrauded spouse can either sue as a surviving spouse under § 474.150, or bring a marital fraud claim in connection with a dissolution petition. Therefore, *Estate of Bernskoetter* is also consistent with *Reinheimer* and permits a spouse to sue for marital fraud during the lifetime of the other spouse.

¶129 For these reasons, we conclude Katie could bring a marital fraud claim during Frank's lifetime, and § 474.150 does not limit her ability to do so.

III. Specific Assets: Lasersight, Inc. and Star Scientific, Inc.

¶130 Finally, Trustee argues the probate court misapplied Missouri law in finding the stock she held as trustee in two publicly traded corporations -- Lasersight, Inc. and Star Scientific, Inc. -- and the proceeds from her sale of that stock, were marital assets. Trustee also argues insofar as the probate court made factual findings in applying Missouri law, its findings were "clearly erroneous or unsupported by substantial evidence." Although the parties state the standards

applicable to our review of these arguments somewhat differently, it appears they agree that whether the probate court properly applied Missouri law presents issues of law subject to our de novo review. *In re Marriage of Pownall*, 197 Ariz. at 581, ¶ 15, 5 P.3d at 915. And, it also appears they agree that insofar as the probate court made factual findings supporting its characterization of the stock and stock proceeds, we should review those findings under a "clearly erroneous" standard of review. Under that standard, we will uphold a trial court's factual finding if it is supported by any reasonable evidence or based on a reasonable conflict in the evidence. See *In re Non-Member of State Bar of Ariz.*, *Van Dox*, 214 Ariz. 300, 304, ¶ 15, 152 P.3d 1183, 1187 (Ariz. 2007); *Moreno v. Jones*, 213 Ariz. 94, 98, ¶ 20, 139 P.3d 612, 616 (2006) (reviewing court will uphold trial court's findings of fact unless clearly erroneous as not either "supported by reasonable evidence or based on a reasonable conflict of evidence") (citation omitted).

¶31 Applying these principles to Trustee's arguments and our review of the record, we hold the probate court did not mis-apply Missouri law in deciding Katie had a marital property interest in the stock and stock proceeds and the probate court's findings supporting its decision are not clearly erroneous.

A. *Missouri Law*

¶132 Under Missouri Law, all property acquired by a spouse after marriage and before a decree of legal separation or dissolution of marriage is presumed to be marital property regardless of whether title is held individually or by the spouses in some form of co-ownership. Mo. Ann. Stat. § 452.330(3). A spouse challenging this presumption bears the burden of proving, by clear and convincing evidence, that property acquired during marriage nevertheless falls within an exception to this presumption. *Engeman v. Engeman*, 123 S.W.3d 227, 233-34 (Mo. App. 2003). Under Missouri law, clear and convincing evidence is evidence that "instantly tilts the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true." *Randolph v. Randolph*, 8 S.W.3d 160, 168 (Mo. App. 1999).

B. *Lasersight Stock*

¶133 Trustee argues that using trust assets she, as trustee, not Frank, invested \$50,000 in exchange for stock in Lasersight, and therefore, the monies she received from subsequently selling the stock were trust assets free from any marital property claim asserted by Katie. Alternatively, Trustee argues Katie failed to provide necessary evidence that

under Missouri law, the value of this stock increased because of Frank's marital labor. See *Moore v. Moore*, 189 S.W.3d 627, 632 (Mo. App. 2006) (to the extent marital assets or labor contribute to any increase in value of premarital separate property, that portion of increased value is marital property); Mo. Ann. Stat. § 452.330.2(5). We do not need to address Trustee's alternative argument because the record supports the probate court's factual finding that during marriage, Frank, not Trustee, actually funded the acquisition of the Lasersight stock, and thus, Katie had a marital property interest in both the stock and the proceeds from its subsequent sale.

¶134 As the probate court found, on September 29, 1987, Frank and Jonnie, as founders of Lasersight, each received 100 shares of stock in the company which, at the time, was an inactive shell corporation. Indeed, at trial the Trustee's expert suggested Frank's accountants had failed to list the Lasersight stock on Frank's premarital separate property accounting report because Lasersight was not engaged in any business activities and was not generating any income.

¶135 Lasersight remained inactive until June 29, 1991 -- after Frank had married Katie -- when it acquired all of the outstanding capital stock of J.T.T. International, Inc. from that corporation's founder. In July 1991, Frank and Jonnie each

contributed \$50,000 to Lasersight as additional paid in capital. In return for this \$50,000 contribution, Lasersight issued 332,500 shares of stock which by January 17, 1992, had been transferred to one or more of the trusts. Although at trial Trustee testified she, using trust assets, had actually contributed the \$50,000, Lasersight represented in a November 1991 prospectus for an initial public offering that Frank had "contributed \$50,000 to the Company as additional paid in capital." The probate court relied on the prospectus and rejected the testimony of Frank and Trustee that Trustee, not Frank, had actually funded the \$50,000.

¶136 Having reviewed the record, we cannot say the probate court's factual finding regarding the source of the \$50,000 was clearly erroneous. The parties presented the probate court with conflicting evidence regarding the \$50,000, and essentially, the probate court made a credibility determination in rejecting the testimony of Frank and Trustee that Trustee had contributed the \$50,000 to Lasersight in exchange for the stock. Although Trustee criticizes the probate court's reliance on the prospectus, credibility determinations are uniquely the responsibility of the finder of fact. See *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002) (trial court, as finder of fact, is in best position

to judge witnesses' credibility); *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13, 972 P.3d 676, 680 (App. 1998) (reviewing court will defer to trial court's determination of witnesses' credibility and the weight to give conflicting evidence); see also *Engeman*, 123 S.W.3d at 234 ("When characterizations of property as marital or separate rest on an assessment of witness credibility [] [reviewing court] defers to the trial court's determination of that credibility.") (citation omitted). Further, except for their own testimonies, neither Trustee nor Frank presented any corroborating evidence showing the source of the \$50,000 contribution, which was made during Frank's marriage to Katie. Accordingly, the probate court's finding that Katie had a marital property interest in the Lasersight stock and its sale proceeds was not clearly erroneous.

C. Star Scientific, Inc.

¶137 Beginning in 2001 and subsequently, Trustee began to sell stock she held in Star Scientific, Inc. for substantial sums. The probate court found and the record reflects the proceeds from Trustee's sale of the Star Scientific stock was the primary source for almost all of Trustee's subsequent acquisitions and investments. The probate court further found Katie had a marital property interest in the Star Scientific

stock, the proceeds from its sale, and Trustee's subsequent acquisitions and investments funded by those sale proceeds.

¶138 On appeal, Trustee challenges this conclusion, arguing that under Missouri law, the Star Scientific stock was the product of an exchange of property Frank owned before marriage, and thus, Katie did not have a marital property interest in either the stock or its proceeds. See Mo. Ann. Stat. § 452.330(2)-(3) (presumption of marital property can be overcome by a showing property acquired during marriage was "in exchange for property acquired prior to the marriage"). The probate court rejected this argument, finding Trustee had failed to show by clear and convincing evidence the Star Scientific stock had been acquired "in exchange for property acquired prior to [Frank's] marriage" to Katie.¹³ *Id.* Having reviewed the record, we cannot say the probate court's finding that Trustee had failed to carry her burden of proof is clearly erroneous.

¹³The probate court also found Katie had a marital property interest in the Star Scientific stock and its proceeds on two other grounds: first, even assuming the stock started as Frank's separate property, Trustee's transfer of the stock to Regent Court Technology, a partnership entity created after Frank's marriage, transmuted it to marital property; and second, the stock derived its value primarily from Frank's marital labor. Given our determination concerning the probate court's finding that Trustee failed to carry her burden of proof regarding Frank's acquisition of the stock before marriage, we do not need to address Trustee's arguments on appeal concerning these alternative theories.

¶139 Before Frank married Katie, he and Jonnie began to invest in a publicly traded company, C.A. Blockers, Inc., that initially was in the business of attempting to develop technology to reduce the health risks associated with cigarette smoking, but then began to manufacture cigarettes and cigars under private label arrangements with third parties for resale. In November 1989, C.A. Blockers sold all of its manufacturing equipment to Jonnie and Frank to satisfy loans and advances they had made to it for approximately \$283,235. As part of the transaction, C.A. Blockers leased the equipment from Jonnie and Frank for a one-year period, and also pledged other collateral to Jonnie and Frank to secure its performance under the lease (collectively, "equipment"); it then defaulted under the lease terms. Approximately a year later, in December 1990, after Frank had married Katie, Jonnie and Frank terminated the lease with C.A. Blockers because of the default. C.A. Blockers then ceased all manufacturing activities.

¶140 On November 14, 1990, third parties incorporated Star Tobacco Corporation, a Virginia corporation. According to a "Consent of Directors," on December 3, 1990, Frank sold "certain assets and liabilities relating to a cigarette manufacturing business" to Star Tobacco and received 100 shares of Star

Tobacco common stock in exchange. Subsequently, Frank transferred his 100 shares of Star Tobacco stock to Trustee.

¶41 At some point -- the record does not reveal when -- Regent Court Technologies, which in filings with the Securities and Exchange Commission ("SEC") and in other documents was described as a general partnership comprised of Jonnie and Frank, acquired from Jonnie "certain intellectual property rights, including without limitation" patent applications and patent rights (collectively, "patent rights") that it licensed to Star Tobacco -- which by then had changed its name to Star Tobacco and Pharmaceutical, Inc. ("STPI"). Shortly thereafter, Trustee transferred 90 of the original 100 shares of the Star Tobacco stock to Regent Court Technologies.

¶42 In February 1998, STPI entered into a reverse merger with a publicly held company, Eye Technology, Inc. ("ETI"). ETI acquired all of the STPI stock held by Regent Court Technologies and the other STPI shareholders in exchange for several thousand shares of preferred stock. As the record reflects and the probate court found, STPI became

a wholly-owned subsidiary of ETI. The former STPI shareholders (Regent Court Technologies, Jonnie, Jonnie's trusts and the Descendants' Trust) acquired 90% of the voting power of ETI. ETI was a publicly traded company. In the reverse acquisition, STPI essentially was paying Eye Technology 10% of STPI in order to become a public

company so that STPI could raise money through public stock offerings without having to go through an IPO process.

¶43 In February 2000, after the preferred stock had been converted into common stock, Trustee reacquired the Star Scientific stock from Regent Court Technologies, which by then was operating as a limited liability company. Subsequently, over a period of years, Trustee sold the stock for substantial sums. The probate court found and the record reflects, the "value" of Star Scientific's stock "arose" from the patent rights Regent Court Technologies had licensed to Star Scientific's predecessor, STPI.

¶44 Based on this sequence of events and transactions, Trustee argues the Star Scientific stock and the proceeds she obtained from its sale originated from Frank's initial receipt of the 100 shares of stock in Star Tobacco. Even though Frank acquired the 100 shares after he married Katie, Trustee argues Frank had obtained the shares from Star Tobacco in exchange for the equipment which, she points out, he had obtained from C.A. Blockers before marriage. See *supra* ¶ 39. The probate court rejected this argument. Although the court found Frank had proven by clear and convincing evidence that he owned "an interest in the tobacco manufacturing equipment prior to marriage," the court explained it was

not left with the abiding conviction that it was only the tobacco equipment that gave rise to Frank's initial 100 share interest in Star. The evidence is equally as compelling that Frank's interest in Star resulted from a combination of Frank's inventorship and his close association with Jonnie. Frank has failed to prove by clear and convincing evidence that the 100 shares of Star stock acquired after the marriage was not marital property.

Having reviewed the record, we cannot say the probate court's finding, as quoted above, was clearly erroneous.

¶145 The record reflects that both before and after Frank married Katie, Frank worked closely with Jonnie in a variety of business ventures and transactions. At trial, witnesses explained that Frank served as Jonnie's "sounding board." Indeed, although at trial Trustee asserted Jonnie had put the Lasersight "deal . . . together," she also acknowledged Frank "could identify the new technology." Similarly, Frank testified he was the one who decided he and Jonnie should go into the tobacco business: "He [Jonnie] put the decision to me" and "this is what I said to him. I said we've tried with [C.A. Blockers] . . . to reduce the harm of tobacco. . . . [But] if you're not in the industry, it won't happen. . . . So I said look, I think we should do it. Let's go ahead and we'll acquire the equipment and if it turns out that we're in that business, we need to be in that business."

¶146 The record thus substantiates the findings of the probate court that "Jonnie frequently has relied on Frank's knowledge of science to assist [him] in testing ideas and theories in conjunction with development of technology. Frank has acted as Jonnie's sounding board on scientific and technology issues." Accordingly, we cannot say the probate court was clearly erroneous in finding that the evidence was "equally as compelling that Frank's interest in Star resulted from a combination of Frank's inventorship and close association with Jonnie."

¶147 For these reasons, we affirm the probate court's factual findings that Katie had a marital property interest in the Lasersight stock, the Star Scientific stock, and the proceeds from the sale of that stock.

CONCLUSION

¶148 For the foregoing reasons, we affirm the probate court's judgment. We award Katie, the prevailing party on appeal, her costs incurred on appeal, contingent upon her compliance with ARCAP 21. See A.R.S. § 12-341 (2003).

/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Judge

/s/
JON W. THOMPSON, Judge