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See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
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**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

In re the Marriage of:) 1 CA-CV 09-0338
)
KANWALJIT GADHOK,) DEPARTMENT C
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules
) of Civil Appellate
VINOD K. NANGIA,) Procedure)
)
Respondent/Appellee.)
)
_____)
DINESH NANGIA; RAMESH NANGIA;)
SHARDA GULATI; SANGEETA WADHWA)
)
Intervenors/Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FN2006-001513

The Honorable Susanna C. Pineda, Judge

AFFIRMED

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I R V I N E, Presiding Judge

¶1 Petitioner/Appellant Kahnwaljit Gadhok ("Wife") asks this court to reverse the trial court's grant of summary judgment in favor of Respondent/Appellee Vinod Nangia ("Husband") on grounds that Husband failed to rebut the presumption that Husband intended to make a gift to the community when he added her name to the TD Waterhouse #3 ("TDW3") account during their marriage. In addition to her request for a reversal of summary judgment, Wife asks this court to remand the case to the trial court to properly dispose of the assets and to reverse the trial court's award of attorneys' fees to Husband. Intervenors/Appellees Dinesh Nangia, Ramesh Nangia, Sharda Gulati, and Sangeeta Wadhwa ("Intervenors") are participants as claimants to a portion of the money claimed by Wife. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Prior to Husband and Wife's marriage on February 16, 1995, Intervenors had TD Waterhouse ("TDW") accounts in the State of Maryland. Intervenors are Husband's brothers, sister and niece. Intervenors were the sole owners of the proceeds of these accounts. At some point, Husband's name was added to the accounts with the understanding that Husband would only have an

interest in the accounts if he contributed money to them. In 1998, Husband added Wife's name to the TDW3 account. In August 1999, the TDW3 account was closed and, along with several other TDW accounts, transferred to the TDW9. At the time, Husband had contributed nothing to any of the accounts and thus had zero interest in them. The contents of all TDW accounts were placed into the TDW9 account, of which Husband was the sole named owner. The consolidation, however, was not intended to change Intervenors' ownership interest in the account. Intervenors continued to make deposits into the consolidated account.

¶3 Husband did not contribute to any of the family accounts until June 2002. At this time, he transferred 19,056 shares of GE stock, fifteen shares of Textron stock, and twenty shares of Allied Signal/Honeywell stock to the TDW9 account. These transfers were the only contributions Husband made to any of the family accounts.

¶4 Wife filed a petition for dissolution of marriage on April 19, 2006. Prior to trial, the trial court found that most of the property issues were resolved under Rule 69 agreements at a settlement conference before Judge Pro Tem Barry Brody.¹ The

¹ Rule 69 of the Arizona Rules of Family Law Procedure provides that agreements between parties "shall be binding if they are . . . made or confirmed on the record before a . . . judge pro tem or . . . court reporter or other person authorized to accept such agreements."

remaining property issues to be resolved at trial were: (1) ownership of the TDW9 account; (2) spousal maintenance; and (3) attorneys' fees at trial. Prior to trial, Intervenors filed a claim that they were the rightful owners to some of the disputed accounts.

¶15 Wife claimed she owned a one-half interest in the entire TDW9 account; a one-half interest in Husband's claim of sole and separate property in the TDW9 account; and a one-half interest in Intervenors' claim of \$126,242 in the Bank of America #1029 account because the accounts were community property. Husband claimed Wife had zero interest in the TDW9 account because his deposits to the account were from his sole and separate GE stock, owned prior to marriage. Moreover, he argued that although he added Wife's name to the TDW3 account in 1998, he had zero interest in that account and it was later merged into the TDW9 account, of which he was named the sole owner.

¶16 Husband retained an expert, Susannah Sabneker, for purposes of tracing the source of funds deposited into and distributions made from the TDW accounts, including Husband's investments into them, and trace deposits and withdrawals from and to Husband, Wife, and third parties. The expert concluded that Husband's only contribution to the TDW accounts was the June 2002 transfer of stock shares. All shares of GE and Textron

stock were a pre-marital asset; the twenty shares of Allied Signal/Honeywell stock (valued at \$871 at the time the petition for dissolution of marriage was served), however, were acquired after Husband and Wife married. Wife did not retain an expert to trace and investigate funding of the TDW9 account.

¶7 Husband filed a motion to appoint a family law master to address the complex tracing issue associated with the disputed account. Wife asked the court to deny Husband's motion, citing cost and time concerns. She continued to argue that the account was community property. The trial court granted Husband's motion and appointed Renee Jenkins ("Jenkins") as Special Master in a signed minute entry dated May 5, 2008. Jenkins was one of three experts recommended by Wife's former attorney in a letter to Husband's attorney.

¶8 Jenkins submitted her report to the court and parties on August 26, 2008. The report identified the scope of her services as agreed to by the parties:

a) A review of the report dated October 29, 2007, prepared by Husband's expert, Susannah Sabnekar CPA/ABV DABFA. This report traces activity in multiple TD Waterhouse brokerage accounts . . . and the deposit and withdrawal activity of a Bank of America checking account . . . held jointly by Husband and Wife;

. . . .

b) Additional investigation of the source of 19,056 shares of General Electric stock [GE stock], 15 shares of Textron stock, and 20 shares of Allied

Signal/Honeywell stock transferred to the current TD Waterhouse account [TDW9] by Husband in June 2002;

These stocks are known as Asset 8a in this report.

- c) Additional investigation of the source of 5,744 shares of General Electric stock [GE stock] transferred to the current TD Waterhouse account [TDW9] by Intervenors in June 2002; and,

These stocks are known as Asset 8b in this report.

- d) Addressing additional questions posed by Dr. Gadhok within the scope of the engagement.

¶9 Jenkins also identified the claims of the parties:

The claims of all parties center on the ownership of certain TD Waterhouse accounts and the excess of deposits over withdrawals in a joint checking account held at Bank of America. The focus of this report is to review the tracing of the source of funds in the following two accounts (the Sabnekar report):

- TDW9 is the final TD Waterhouse account holding the portfolio assets of all prior TDW accounts and Assets 8a and Asset B, as well. The total value of the account was \$1,615,770 after Husband made a single investment of stocks claimed to be sole and separate property (total value \$559,759) in June 2002. As of March 31, 2006 (April 7, 2006 is the approximate Date of Service) the value of the account had grown to approximately \$2,033,150 and is held in a restricted account pending the court's ruling on its ownership.
- The assets of TDW1/TDW2/TDW3 were transferred to TDW9 in August 1999 (when TDW3 was closed).

- The assets of TDW4/TDW5 were transferred to TDW9 in August 1999 (when TDW5 was closed).
- The assets of TDW6/TDW7 were transferred to TDW9 in November 1999 (when TDW7 was closed).
- Asset 8b (i.e., 5,744 shares of GE stock) were transferred by the Intervenor to TDW9 in June 2002.
- Asset 8a (i.e., 19,056 shares of GE stock, 15 shares of Textron stock, and 20 shares of Allied Signal/Honeywell stock) was transferred by Husband to TDW9 in June 2002 and is the only investment made by Husband in the "family accounts."

- BOA #1029 is relevant to the litigation because its activity includes deposits and withdrawals of Intervenor related cash (net \$126,242) directly as individuals and indirectly through some of the TDW accounts. The net amount of \$126,242 represents the sum of the Sabnekar report amount of \$112,263 plus additional adjustments of \$13,979.

¶10 Jenkins concluded that she located "no evidence" in her investigation to support Wife's claim that Husband owned these accounts and commingled funds from these accounts into the community's accounts. She noted that the case was complex and difficult to understand and she questioned the "family partnership" agreement between Intervenor and Husband which lacked a formal written partnership agreement and a separate bank account or ledger. Jenkins also questioned the process of Husband paying the taxes and Intervenor reimbursing him for their share of the tax burden, the trust agreement identifying the Intervenor's interest in the accounts as Husband's sole and

separate property, and that Wife was named as the recipient of TDW assets.

¶11 Jenkins stated, however, that "[n]one of these arguments can be used, within the scope of my duties, to override the simple fact that the underlying source documentation presented to me supports the conclusion that the Intervenor[sic] are the original source of their combined funds and that Husband's sole and separate property can be easily traced to his General Electric Company employment and Textron employment prior to the marriage." Jenkins recommended that "[w]ife's claim should be limited to one-half (50%) of the *de minimus* contribution of 20 shares of Allied Signal/Honeywell stock . . . to the 'family account,'" which is valued at \$724 on the date of transfer into TDW9. She recommended that the court find Husband's claim that the TDW9 account involves his sole and separate property (GE shares and *de minimus* Textron shares) because this conclusion is supported by "clear and convincing" evidence that he is entitled to 32% of the total value of the account. Jenkins was not persuaded by Wife's argument that Husband used his sole and separate contribution as collateral prior to marriage, which was later released as collateral and returned to Husband, concluding that the property did not lose its character as sole and separate property. Finally, Jenkins concluded that the court should find that Intervenor's claim of

68% ownership in the account is supported by the requisite "preponderance" of the evidence standard and found that they were owed excess of deposits over withdrawals totaling \$126,242 from Husband's and Wife's joint Bank of America account. Wife filed an objection to Jenkins' report which was overruled by the trial court.

¶12 Husband then filed a motion for partial summary judgment, asking the court to adopt Jenkins' report as an order. The trial court granted Husband's motion and adopted the Jenkins' report. The parties set a date for trial on the issue of spousal maintenance, attorneys' fees, and other issues not presented to this court on appeal.

¶13 Wife filed a motion arguing that the summary judgment motion was untimely. Judge Pineda granted the motion, explaining later at trial that the previous summary judgment motion was untimely. Wife filed a motion to clarify issues at trial. The trial court said the trial was limited to the issue of the TDW3 account. Wife filed a motion for further clarification.

Intervenors responded:

It is acknowledged that the matter of the TD Waterhouse/AmeriTrade account may involve consideration of [the] other accounts. However, the examination of other accounts should be limited to how they relate to the account in issue - the TD Waterhouse/AmeriTrade account. Therefore, to that extent, the Intervenors acknowledge that the examination of the TD

Waterhouse/AmeriTrade account may involve various aspects of the Bank of America No. 1029 account, the Bank of America investment accounts, the GE stocks and the \$275,000 treasury bill.

¶14 Husband responded by noting that Jenkins had considered and analyzed the Treasury Bill in her report. At a status conference on March 25, 2009, the trial court stated that the only issues for trial were: the TDW account (community in nature); Bank of America Investment Account; Bank of America #1029; General Electric Stock; and \$275,000 Treasury Bill; possible attorneys' fees; award to Intervenors and possible interest on funds; contempt regarding payment of household expenses.

¶15 Husband filed another motion for partial summary judgment on the TDW account issue, which included two attachments from both Jenkins and expert Susan Sabenkar stating that the conclusions in their reports remain unchanged. Wife responded by noting that the funds in the disputed account were previously held in her name during marriage and she did not authorize husband to remove her name. The trial court granted Husband's summary judgment motion on March 26, 2009, concluding that Wife presented no evidence to dispute any of the evidence presented by Husband. The court noted that

[a] review of [Wife's] objection to the Special Master's Report indicates that her opposition is based on her conclusory claim

that funds were commingled however she fails to present any evidentiary support to back her claim Here, at most, Wife has made self-serving assertions without factual support. Such assertions will not defeat a motion for summary judgment.

Therefore, the trial court awarded Husband 32% of the TDW9 account minus a portion for the twenty community shares of Allied Signal/Honeywell stock and Intervenors 68% of the account.

¶16 In a minute entry dated October 6, 2008, the trial court made findings regarding attorneys' fees, awarding Husband \$20,000 and Intervenors \$27,142 in attorneys' fees from Wife. In a signed minute entry dated April 17, 2009, the trial court affirmed her summary judgment ruling and ordered Wife to pay additional attorneys' fees and costs in the sum of \$10,000 to Husband and \$2,000 to Intervenors. Wife appealed.

DISCUSSION

¶17 Wife presents three issues for review: (1) did the trial court err by granting summary judgment in favor of Husband based on the Special Master's report that focused on tracing issues but ignoring legal presumptions under the law; (2) did the trial court improperly use the special master; and (3) if

this court reverses summary judgment then it should also reverse the award of attorneys' fees to Husband.²

¶18 Both Husband's expert and Special Master Jenkins independently traced the TDW and Bank of America #1029 accounts. Each concluded that "both the [Wife] and the [Husband] had zero investment in the TDW3 account when it was transferred to TDW9. This is not a legal conclusion as the [Wife] claims Based on their conclusions, [Husband], with zero investment in the account, could not make a gift to the [Wife] as the [Wife] claims. Likewise, with zero investment in the account, [Wife] could not claim an interest in the account." Therefore, Husband argues, because he had zero interest in the TDW3 account when he added Wife's name to it, he had zero interest to gift when the TDW3 account was closed and its contents were transferred to the TDW9 account.

¶19 We agree. The rule "mandates the entry of summary judgment after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's

² In her opening brief, Wife presented an additional issue: that the dissolution decree did not properly dispose of all property because it did not address the parties' Treasury Bills. In her reply brief, however, Wife withdrew this claim as an individual assignment of error, noting that the Treasury Bills issue was addressed in the Sabnekar/Jenkins report. She asks that the Treasury Bills issue be incorporated into the first two arguments regarding adoption of the Special Master's report.

case, and on which that party will bear the burden of proof at trial." *Nanini v. Nanini*, 166 Ariz. 287, 290, 802 P.2d 438, 441 (App. 1990).

¶20 Wife filed her petition for dissolution in April 2006. The trial court granted Husband's summary judgment motion in March 2009. At no point during the nearly three year period did Wife present any evidence to support her conclusory claims that the TDW account became community property by legal presumption when her name was added to the TDW3 account during marriage. Despite having adequate time for discovery, Wife failed to produce evidence that Husband had any interest in the TDW3 account at the time Husband added her name to the account in 1998. Therefore, summary judgment on the TDW9 account was appropriate.

¶21 Wife next argues that when Special Master Jenkins concluded that Wife had no interest in the TDW9 account, she "implicitly, if not explicitly," made a legal conclusion that no legal presumptions applied to the account. Wife asserts that although special masters are permitted to make legal conclusions under some circumstances, "this type of appointment would apply to an arbitrator who hears evidence." Therefore, Wife concludes, because Jenkins was never given authority to make legal conclusions or recommendations and because the order appointing her did not comply with Rule 72 of the Arizona Rules of Family

Law Procedure, the trial court improperly adopted Jenkins' report.

¶22 We disagree. Rule 72 of the Arizona Rules of Family Law Procedure provides that "[u]pon stipulation and application by the parties, or on the court's own motion, the court may appoint a family law master who is an attorney or other professional with education, experience, and special expertise regarding the particular issues to be referred to the master." Ariz. R. Fam. L. P. 72 (emphasis added). Rule 72 also describes the powers of the special master: "The order of reference appointing a family law master shall specify the particular issues referred to the family law master and shall fix the time and place for beginning and closing the hearings and for filing the master's report." *Id.* The rule states that a special master may rule upon the admissibility of evidence, unless directed otherwise by the order, and if requested, "shall cause a record to be made of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 104, *Arizona Rules of Evidence*, for a court sitting without a jury." *Id.*

¶23 In Husband's petition for appointment of a family law master to investigate the complex tracing issue of the TDW9 and Bank of America #1029 accounts, Husband provided a letter from

Wife's former attorney³ identifying three special master recommendations. From that list, Husband selected Renee Jenkins. Wife later filed a motion objecting to the appointment of a special master, which the trial court rejected. Wife also filed a timely objection to Jenkins' report.

¶24 A review of Jenkins' resume reveals her substantial experience in forensic accounting. Given Wife's allegations, the parties needed an experienced forensic accountant to trace the TDW9 and Bank of America #1029 accounts. In her report, Jenkins describes the scope of the engagement as established by the parties to be a review of Sabnekar's report, additional investigation of the General Electric, Textron, and Allied Signal/Honeywell stock contributions to the TDW9 account as well as 5744 shares of General Electric stock deposited into the account by Intervenors in June 2002, and addressing additional questions posed by Wife.

¶25 Rule 72 does not require a special master to be an attorney as Wife suggests. Jenkins was a qualified forensic accountant. She was recommended by Wife's former attorney. She did not make any legal conclusions in her report. Therefore, the

³ From the time that Wife filed the petition for dissolution until the date of trial, Wife had five attorneys. She represented herself at trial.

trial court's adoption of Jenkins' report was not an improper use of a special master.

¶26 Since we are not reversing the trial court's grant of summary judgment, we do not address Wife's request that we also reverse the trial court's award of Husband's attorneys' fees. Husband and Intervenors request attorneys' fees and costs under Rule 21 of the Arizona Rules of Civil Appellate Procedure. We deny Husband's request for attorneys' fees because Rule 21 is not a substantive basis for an award of fees. As the prevailing party, however, Husband is entitled to an award of his costs on appeal. Because Intervenors' request for attorneys' fees and costs was untimely, we deny it. We also note that Intervenors were not represented by an attorney on appeal.

CONCLUSION

¶27 For the foregoing reasons, we affirm.

/s/

PATRICK IRVINE, Presiding Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Judge

/s/

DONN KESSLER, Judge