DIVISION ONE
FILED: 10/04/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 11-0710
	)	
ARLENE A. STACH,	)	DEPARTMENT D
	)	
Petitioner/Appellant,	)	**MEMORANDUM DECISION**
	)	
v.	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
GERALD D. PETERSON,	)	Civil Appellate Procedure)
	)	
Respondent/Appellee.	)	
	)	

Appeal from the Superior Court in Mohave County

Cause No. L8015DO201007095

The Honorable Randolph A. Bartlett

AFFIRMED

Harvey R. Jackson, Attorney At Law — Lake Havasu City
Attorney for Petitioner/Appellant

Silk Law Office — Lake Havasu City
By Melinda Silk
Attorneys for Respondent/Appellee

K E S S L E R, Judge

¶1 Arlene A. Stach ("Wife")[1] appeals from a decree of dissolution of marriage that concluded funds in the parties' joint bank accounts were Gerald D. Peterson's ("Husband") separate property. For the reasons stated below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND[2]

¶2 The parties were married on November 4, 2007. Both were 85 years old and had acquired various real property and personal bank accounts prior to the marriage. Specifically, Wife had three pre-marital Chase bank accounts totaling approximately $68,452, and a residence. Prior to the marriage, Husband had two Bank of America accounts, two Edward Jones accounts, and two residences. The funds in Husband's premarital accounts totaled approximately $299,907.

¶3 In the first month of marriage, the parties opened joint Chase savings account 6954 with $47,144 from Wife's pre-marital accounts. Soon thereafter, the parties deposited $5,000

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[1] Pursuant to the decree of dissolution, Appellant's former last name of Stach was restored. We therefore amend the caption and order the use of this caption for all further proceedings on appeal.

[2] Wife failed to provide citations to the record as required by Arizona Rule of Civil Appellate Procedure ("ARCAP") 13(a)(4). Wife also failed to provide this Court with a transcript of the trial proceedings. *See* ARCAP 11(b)(1) (appealing party shall order certified copy of transcript if that party intends to argue that a finding or conclusion is not supported by or is contrary to the evidence).

from Husband's premarital account, $20,347 from Wife's premarital account, and $144,316 from the sale of Husband's separate property residence. The parties also held a Chase joint checking account 2669 which contained both parties' pensions and social security income and deposits from the joint savings account 6954 and Husband's separate property accounts.

¶4 In April 2008, title to these joint accounts transferred to both parties as Trustees to the Gerald & Arlene Peterson Living Trust ("Trust"). According to the terms of the Trust, property transferred to the Trust retained its community or separate property nature. In March 2009, the parties purchased three certificates of deposit ("CDs") in the amount of $54,000 each from funds in joint savings account 6954.

¶5 In July 2009, Wife opened an individual Chase account 7508 with $10,000 from joint savings account 6954. On March 15, 2010, Wife transferred another $40,000 from joint savings account 6954 to her individual account 7508. Wife subsequently withdrew all these funds in January 2011, and the record does not indicate what became of these funds.

¶6 The trial court concluded that the majority of funds in the Chase accounts could be traced to Husband's separate property deposits and, therefore, retained their separate property character. Accordingly, the court ordered Wife to

return the $40,000 she withdrew from the joint account and awarded Husband all three CDs as his separate property. Wife filed a motion for new trial, which the trial court denied.

¶7 Wife filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-2101(A)(1) and (5) (Supp. 2011).

DISCUSSION

¶8 Wife contends the evidence does not support the conclusion that funds in savings account 6954 can be traced to Husband's separate property. We review the trial court's characterization of property *de novo*. *In re Marriage of Pownall*, 197 Ariz. 577, 581, ¶ 15, 5 P.3d 911, 915 (App. 2000). Nevertheless, "all evidence and reasonable conclusions from the evidence are to be viewed in a light most favorable to supporting the decision of the trial court regarding the nature of property as community or separate." *Noble v. Noble*, 26 Ariz. App. 89, 92, 546 P.2d 358, 361 (1976).

¶9 Generally, property acquired during marriage is presumed to be community property unless acquired by gift, devise, or descent. A.R.S. § 25-211(A)(1) (Supp. 2011). Property purchased with funds from separate property remains that spouse's separate property. *Nace v. Nace*, 104 Ariz. 20, 23, 448 P.2d 76, 79 (1968). Separate property may be

"transmuted to community property by commingling, gift, agreement or otherwise." *Muchesko v. Muchesko,* 191 Ariz. 265, 271, 955 P.2d 21, 27 (App. 1997).

¶10 Where separate funds are placed into a joint account, there is no presumption that the owner of the funds intended to gift half of the funds to the other spouse. *Noble,* 26 Ariz. App. at 93, 546 P.2d at 362 (citing *O'Hair v. O'Hair*, 109 Ariz. 236, 239, 508 P.2d 66, 69 (1973)). However, "parties may, [by] their intent, transmute the character of separate property to community property." *Id.*

¶11 The trial court found Husband did not intend to transmute his separate property into community property by depositing his separate funds into a joint account. Wife cites *Stevenson v. Stevenson* in support of her claim that the parties' use of the funds shows Husband intended to make a gift. 132 Ariz. 44, 643 P.2d 1014 (1982). *Stevenson* held the deposit of separate funds into a joint account did not indicate a gift absent clear and convincing evidence of such intent. *Id.* at 46, 643 P.2d at 1016. Due to conflicting evidence regarding the husband's intent, *Stevenson* affirmed because the trial court's conclusion was supported by the husband's evidence. *Id.* Here, Wife has not provided us with transcripts of the trial proceeding, so we presume the transcripts support the trial

court's ruling on this issue. *See Johnson v. Elson*, 192 Ariz. 486, 489, ¶ 11, 967 P.2d 1022, 1025 (App. 1998). Accordingly, we affirm the trial court's conclusion as to Husband's donative intent.

¶12 Wife next argues that community and separate funds were commingled to such an extent that it is no longer possible to trace the funds used to purchase the CDs. Arizona law provides that where separate and community property are commingled, "the entire fund is presumed to be community property unless the separate property can be explicitly traced." *Cooper v. Cooper*, 130 Ariz. 257, 259, 635 P.2d 850, 852 (1981); *see also Martin v. Martin*, 156 Ariz. 440, 443, 752 P.2d 1026, 1029 (App. 1986). The party claiming a separate property interest in the commingled funds has the burden of proving his or her separate property interest by clear and satisfactory evidence. *Cooper*, 130 Ariz. at 259-60, 635 P.2d at 852-53; *Martin*, 156 Ariz. at 443, 752 P.2d at 1029.

¶13 The assets at issue here are funds in joint savings account 6954: the funds used to purchase the three CDs and the $40,000 Wife was ordered to repay Husband. The trial court found that despite commingling of community and separate property funds, "said commingling was **not** to the extent that the

funds could not be traced back to the original source of the funds." (Emphasis in original.)

¶14 The trial exhibits do not demonstrate that all of the commingled funds can be sufficiently traced.[3] Nonetheless, because we do not have the benefit of reviewing the trial transcripts, we must presume the record supports the trial court's finding that all of the money at issue in account 6954 can be traced to Husband's separate funds. *See Johnson*, 192 Ariz. at 489, ¶ 11, 967 P.2d at 1025.

ATTORNEYS' FEES ON APPEAL

¶15 Husband requests that this Court award him attorneys' fees and costs on appeal. In the exercise of our discretion, we deny Husband's request for attorneys' fees. Husband is entitled to his costs on appeal upon timely compliance with ARCAP 21(a).

[3] For example, based on the exhibits, in the first two months of the marriage, Wife deposited over $67,000 and Husband deposited over $149,000 into account 6954. The CDs were created on March 3, 2009 in the amount of $54,000 each. Between November 2007 and March 2009, there were several large deposits to account 6954. Although documentary evidence proves many of these deposits came from Husband's separate property accounts or funds, there are also some large deposits that cannot be accounted for by the exhibits, including a $10,075 deposit on December 17, 2007; a $6,000 deposit on February 5, 2008; and an $8,451 deposit on February 2, 2009. Similarly, there were several transfers from savings account 6954 to the parties' joint checking account 2669, which they used to pay community expenses prior to purchasing the CDs, as well as withdrawals on December 10, 2007, October 3, 2008, and October 30, 2008.

CONCLUSION

¶16 For the foregoing reasons, we affirm the trial court's award to Husband.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Presiding Judge

/s/
ANDREW W. GOULD, Judge