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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 01/25/2011  
RUTH WILLINGHAM,  
ACTING CLERK  
BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

IN RE THE MARRIAGE OF: ) 1 CA-CV 09-0762  
)  
ARTHUR KING, ) DEPARTMENT B  
)  
Petitioner/Appellant, ) **MEMORANDUM DECISION**  
)  
v. ) (Not for Publication -  
) Rule 28, Arizona Rules of  
CHRISTINE B. KING, ) Civil Appellate Procedure)  
)  
Respondent/Appellee. )  
)

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Appeal from the Superior Court in Maricopa County

Cause No. FN2008-000531

The Honorable Randall H. Warner, Judge

**REVERSED IN PART; VACATED IN PART; REMANDED**

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**B R O W N**, Judge

¶1 Arthur King ("Husband") appeals from a decree of dissolution allocating two TD Ameritrade accounts and Christine King's ("Wife") 401(k) account. For the following reasons, we reverse the portion of the decree finding that the TD Ameritrade accounts were community property and remand for reconsideration of Wife's withdrawal of funds from those accounts. We also vacate the court's decision regarding Wife's 401(k) account and remand for further proceedings.

#### **BACKGROUND**

¶2 The parties married in 2003, and Husband filed for dissolution in 2008. Both parties entered the marriage with significant assets, including Wife's 401(k) account through her employer. During the marriage, Husband opened two TD Ameritrade retirement accounts (the "accounts") with funds from premarital retirement accounts. Wife withdrew \$188,500 from the accounts without Husband's knowledge or consent, deposited the funds into a community Wells Fargo account, and then transferred the funds into an account she held jointly with her adult son. As a result of Wife's withdrawals, Husband incurred a \$71,630 tax liability.

¶3 The family court found that the accounts constituted community property because "[c]ertain contributions were made to [the accounts] during the marriage that Husband did not establish at trial to be Husband's sole and separate property."

The court found that all but \$17,500 of Wife's withdrawals were used for non-community expenditures and the court took the remainder of the funds into consideration in its equalization calculation. The court also considered Husband's tax liability in its equalization calculation. Ultimately, the court ordered Wife to make a \$131,185 equalization payment to Husband for her withdrawals from the accounts. Additionally, the court rejected Husband's claim that he was entitled to reimbursement for his contributions to Wife's 401(k) during the marriage.

¶4 Husband filed a motion to amend the judgment, for a new trial, and/or for reconsideration. He argued that the accounts were his separate property and that he was entitled to his share of the community contributions made to Wife's 401(k) account during the marriage. Wife responded that the court's ruling regarding the accounts was proper because Husband had contributed community property to those accounts. Wife further argued that Husband's claim regarding her 401(k) account was "de minimis [and] untimely." The court denied the motion without comment and Husband filed a timely notice of appeal.

#### **DISCUSSION**

¶5 Husband contends that the family court erred in awarding Wife one-half the funds she withdrew from Husband's TD Ameritrade accounts because he adequately proved those accounts

were his separate property.<sup>1</sup> He also argues that the court erred in awarding Wife one hundred percent of her 401(k) account. We review de novo the family court's classification of property as separate or community as a question of law. *Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, 523, ¶ 4, 169 P.3d 111, 113 (App. 2007).

#### I. T.D. Ameritrade Accounts

¶6 All property acquired by either spouse during the marriage is community property, except property acquired by gift, devise, or descent. Ariz. Rev. Stat. ("A.R.S.") section 25-211(A)(1) (Supp. 2010). Conversely, property acquired by a spouse before marriage and any profits earned on that property during marriage are that spouse's separate property. A.R.S. § 25-213(A) (Supp. 2010). "Property takes its character as separate or community at the time it is acquired," *Honnas v. Honnas*, 133 Ariz. 39, 40, 648 P.2d 1045, 1046 (1982), and retains its characterization "until changed by agreement of

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<sup>1</sup> As an alternative, Husband contends that the family court erred because Wife never disputed Husband's allegations that the accounts were his separate property; thus, he argues this issue was not properly before the court under *Leathers v. Leathers*, 216 Ariz. 374, 166 P.3d 929 (App. 2007). However, *Leathers* requires only that a party address an issue in the pretrial statement before it can be considered by the trial court. *Id.* at 378, ¶ 19, 166 P.3d at 933. Here, Husband adequately placed the nature of the accounts at issue in the pretrial statement by contending the accounts were his separate property and requesting reimbursement of Wife's unauthorized withdrawals. Therefore, this issue was properly before the family court.

the parties or by operation of law." *Potthoff v. Potthoff*, 128 Ariz. 557, 561, 627 P.2d 708, 712 (App. 1981). The date of acquisition is a question of fact and the party asserting that fact has the burden of proving its truth. See *Woerth v. City of Flagstaff*, 167 Ariz. 412, 419, 808 P.2d 297, 304 (App. 1990) (finding that the party asserting a claim for relief has the burden of proving the facts essential to the claim).

¶7 Husband presented undisputed evidence that he opened the accounts with funds from retirement accounts he owned prior to the marriage. Those funds were acquired prior to the marriage and were therefore Husband's separate property.<sup>2</sup> By extension, the accounts, although opened during the marriage, were also Husband's separate property. See *Rowe v. Rowe*, 154 Ariz. 616, 619, 744 P.2d 717, 720 (App. 1987) (finding that a change in the form of an asset does not change its character as community or separate).

¶8 Although Husband opened the accounts with his own retirement funds, the family court found that Husband failed to establish that certain contributions made to the accounts during

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<sup>2</sup> Husband's trial exhibits establish that he opened one account (8336) with funds from two Chase accounts that were in existence before the marriage, and were therefore Husband's separate property. Moreover, no deposits were made into the Chase accounts during the marriage. Additional exhibits show Husband opened the other account (5355) with funds from a Charles Schwab account that existed prior to the marriage and was therefore Husband's separate property.

the marriage were his sole and separate property. As a result, the court found the accounts had been commingled and were therefore community property. However, "commingling of separate and community funds . . . does not transmute the entire account into a community account so long as the funds remain traceable." *Noble v. Noble*, 26 Ariz. App. 89, 95, 546 P.2d 358, 364 (1976); *In re Marriage of Cupp*, 152 Ariz. 161, 164, 730 P.2d 870, 873 (App. 1986) (transmutation of separate property to community property occurs only when the identity of the property as separate or community is lost). Moreover, transmutation is less likely in instances where the amount of community funds is negligible in comparison to the separate funds. *Noble*, 26 Ariz. App. at 96, 546 P.2d at 365.

¶9 Evidence presented by Husband at trial revealed that during the marriage, only three community deposits totaling \$24,513 were made into account 5355. These deposits comprised roughly one-sixth of the value of the account, which fluctuated between \$129,268 and \$177,373 between October of 2003 and December of 2007. Moreover, these three community transfers were easily traceable—they were the only funds deposited into the account. Accordingly, this account was not transmuted and retained its character as Husband's separate property.

¶10 Likewise, Husband submitted evidence that after opening account 8336, he made three deposits during the

marriage. Specifically, Husband deposited \$93,198.98 from One Investor Annuity, \$23,466.48 from an unspecified account, and \$16,562.13 from H&R Block. The record shows that the funds from both One Investor Annuity and H&R Block were acquired prior to marriage and thus were Husband's sole and separate funds.<sup>3</sup>

¶11 Although Husband testified in general about the transfer from an unspecified account, he provided no evidence those funds were acquired prior to the marriage. Therefore, we find that Husband failed to carry his burden and the funds transferred from the unspecified account are community property. See *Ariz. Cent. Cred. Union v. Holden*, 6 Ariz. App. 310, 313, 432 P.2d 276, 279 (1967) (explaining that the burden of rebutting the community property presumption "is on the one claiming the property to be separate and where there is any doubt in the court's mind, the property will be treated as community property").

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<sup>3</sup> Husband provided uncontradicted evidence at trial that he acquired both the H&R Block and One Investor Annuity accounts prior to marriage, and thus he met his burden of showing that these accounts were his sole and separate property. Exhibit 10 corroborated Husband's testimony that the funds in One Investor Annuity were acquired prior to marriage. As to H&R Block, Husband submitted Exhibit 1, stipulated to by Wife, which revealed that Husband acquired \$10,818 in the H&R Block account before the marriage. In Exhibit 33, also stipulated to by Wife, Husband's certified public accountant reported that in 2005, Husband transferred the then current balance of the H&R Block account, \$16,562, to account 8336.

¶12 In sum, because the deposits into account 8336 were traceable, and Husband adequately proved that he opened the account with his separate funds, the nature of the account as a whole was not transmuted to community property. Therefore, the family court erred when it found that account 8336 was community property.

¶13 Wife argues that even if the accounts were Husband's separate property, the family court's order fully compensated Husband because Wife's withdrawals from the accounts were utilized to benefit the community. Specifically, Wife states, "It was undisputed that Wife used the funds to pay the balances on the Gaffney [home] line of credit and a joint credit card." However, the family court rejected this argument, finding that all but \$17,500 of Wife's withdrawals were used for Wife's separate expenditures.<sup>4</sup> Therefore, to the extent Wife argues that the family court erred in failing to find that the Gaffney house payments constituted community expenditures, we cannot consider her arguments because she did not file a cross-appeal. ARCAP 13(b)(3) ("The appellate court may direct that the

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<sup>4</sup> Wife's unauthorized withdrawals, totaling \$188,500, were transferred to an account that she shared with her son. She subsequently used \$150,700 to pay a line of credit against the Gaffney home, and used the remaining \$17,500 to pay off a credit card. The court found that the funds used to pay the mortgage on the Gaffney home were treated "for equalization purposes as having been awarded to her" because the Gaffney home was "Wife's sole and separate obligation."



judgment be modified to enlarge the rights of the appellee or to lessen the rights of the appellant only if the appellee has cross-appealed seeking such relief." ).

¶14 In sum, we conclude that account 5355 is Husband's sole and separate property with the exception of the community deposits totaling \$24,513. We also conclude that account 8336 was Husband's sole and separate property with the exception of the community deposit totaling \$23,466.48. Accordingly, the family court erred in finding Husband's TD Ameritrade accounts were community property and we therefore remand for reconsideration of the equalization calculation and Wife's unauthorized withdrawals.

## **II. Wife's 401(k)**

¶15 Husband also argues that the family court abused its discretion by awarding Wife one hundred percent of her 401(k). Husband asserts he presented evidence at trial establishing that \$24,575.31 in community contributions were made to Wife's 401(k) during the marriage. In reviewing the apportionment of community property, we consider the evidence in a light most favorable to upholding the family court's ruling and will sustain that ruling if the evidence reasonably supports it. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 346, ¶ 5, 972 P.2d 676, 679 (App. 1998). We will not disturb the trial court's

equitable apportionment of community property absent an abuse of discretion. *Id.*

¶16 According to Exhibit 60, which Wife did not dispute at trial or on appeal, contributions to Wife's 401(k) were made during the marriage and therefore Husband was entitled to an equitable portion of Wife's 401(k). See *Johnson v. Johnson*, 131 Ariz. 38, 41, 638 P.2d 705, 708 (1981) (It is "well settled in Arizona and elsewhere that pension rights, whether vested or non-vested, are community property insofar as the rights were acquired during marriage, and are subject to equitable division upon divorce." (footnotes omitted)). Thus, the family court erred when it failed to award Husband his community interest in the 401(k) account.

¶17 To distribute a retirement account at divorce, a court must first determine whether the present cash value method or reserved jurisdiction method is proper. *Id.* at 41, 638 P.2d at 708. The present cash value method offers advantages over the reserved jurisdiction method, "especially when the anticipated date of retirement is far in the future," and is preferred where "the pension rights can be valued accurately." *Id.* at 41-42, 638 P.2d at 708-09. In contrast, the reserved jurisdiction method is appropriate when pension rights have not yet matured and no community assets are available to satisfy the non-employee spouse's community interest. *Hetherington v.*

*Hetherington*, 220 Ariz. 16, 19-20, ¶ 11, 202 P.3d 481, 484-85 (App. 2008). Because we do not have information on Wife's anticipated date of retirement, the date of maturity, or whether sufficient community assets are available to satisfy Husband's community interest, we are unable to make these factual findings. Accordingly, on remand, the family court shall determine the amount of Husband's interest in Wife's 401(k).

**CONCLUSION**

¶18 For these reasons, we reverse the family court's determination that the TD Ameritrade accounts are community property and remand for reconsideration of the equalization calculation and Wife's unauthorized withdrawals. Additionally, we vacate the family court's ruling on Wife's 401(k) and remand for calculation of Husband's interest. Finally, Wife requests an award of her attorneys' fees on appeal. In our discretion, we decline her request. See A.R.S. § 25-324(A) (Supp. 2010).

/s/

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MICHAEL J. BROWN, Judge

CONCURRING:

/s/

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DIANE M. JOHNSEN, Presiding Judge

/s/

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JOHN C. GEMMILL, Judge