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What's Mine is Yours: Overview of a Commingling Case

Whether in a collaborative setting or in a contested divorce proceeding, counsel may discover the existence of a marital investment account such as a brokerage account, IRA, or 401(k) – to which one spouse claims a partial, non-marital interest. Frequently the spouse claiming the non-martial interest will even provide supporting evidence such as an account statement showing a rollover, deposit, or transfer of pre-marital funds into the marital account.

For example, an attorney recently shared with me the following case where the husband (Bill) found new employment during the marriage and decided to rollover his old Disney 401(k) into a new 401(k) account with Lockheed Martin, his new employer. Bill provided account statements from 2002 to 2006 which supported his claim to $70,000 in rollover funds; however, the documentation was incomplete between 2006 and 2011; several years were missing. From the date of marriage in 2002, Bill worked at Disney until 2006 when he transferred to Lockheed Martin.

As of the date of filing the petition for dissolution of marriage in August of 2013, wife (Judith) claims that this $70,000 rollover and all of the interest thereon is marital because the money had become so commingled and so untraceable that it is now incapable of being specifically identified as the earlier, separate property. She likened this commingling to be akin to mixing Pepsi with water.

Judith pointed out that case law in Florida "says" that an asset thus commingled and now untraceable becomes a marital asset subject to equitable distribution. Bill vigorously disagreed and claimed that this "dowry" or apparent gift to the wife was nothing more than a mistake and that he never intended for both spouses to benefit from the rollover. It was his before the marriage and should be his alone.

Bill and Judith each hired a forensic accountant to help argue their respective points.

The husband's forensic CPA, Mary, acknowledged that the account was indeed commingled. However, she provided a solution to the parties whereby the dollar-weighted allocation method would be used to allocate today's account balance between the two spouses, while setting apart the principal and interest attributable to Bill's rollover of pre-marital funds. Mary thinks this allocation method will be a fair method of untangling the fungible stocks, bonds, and other investments in Bill's 401(k) account.

CPA Mary prepared a list of all the account activity she could find from the date of inception to the date of filing, including employee contributions, employer matching funds, gains, losses, loans taken, and loans repaid. Mary determined that as of August 31, 2013, the marital component is $240,000 and the non-marital balance is $197,000, which balanced with the August account statement that showed a total balance of $437,000.

The question before you now is whether Mary, CPA, has satisfied the 5th DCA's requirement that the original, pre-marital asset be sufficiently traced and is now sufficiently identifiable as to its separate nature. It is the author's opinion that Mary's efforts neither undid any of the commingling nor specifically identified and traced the non-marital asset(s) as we are instructed to do by the 5th DCA in *Archer v Archer*.[1]

More importantly, you might ask, "Why does this matter?" Why does it matter that Mary devised a seemingly equitable solution to this case of commingling?

Let's take a look at a prior case example where Mary was actually found to have perjured herself when asked whether she acted as an advocate for Shelly, a client she had a couple of years ago.

Mary still denies having been Shelly's advocate; however, let's look at what unfolded during the allocation process:

Allocating is Advocacy (and why that matters)

Following a steamy eight weeks of dating, Frank and Shelly decided to marry in June of 2002. They had a wonderful marriage and two lovely children. As it turned out, Frank realized over the last couple of years that he was gay. Shelly was considering a new lover anyway, so they decided to find new life-partners.

Their equitable distribution settlement conference was scheduled for April 8, 2015. To ensure they got the best settlement possible, both spouses wisely hired forensic accountants.

In March of 2004, hard-working Shelly transferred $100,000 from her pre-marital savings account into a newly formed Frank & Shelly marital investment account that held $400,000 in marital funds prior to Shelly's deposit.

Frank and Shelly had each contributed their 2002 and 2003 annual Christmas bonuses to this new account. Shelly liked the idea of being able to manage all of her funds inside of the marital brokerage account, which had lots of investment choices. The Frank & Shelly account was a self-directed, well-diversified portfolio of stocks, bonds, and mutual funds.

On that warm, sunny day in March of 2004, while relaxing poolside and managing her funds within this marital investment account, Shelly decided to invest her pre-marital $100,000 into a high-risk, high-reward hedge fund called IQ Hedge Multi-Strategy Tracker ETF, listed on the NYSE as (QAI). Thinking she would win big on this sure bet, Shelly had a gut feeling everything was going to work out in her favor. She might even double her money!

With Shelly's $100,000 deposit, the Frank & Shelly martial account balance jumped from $400,000 to $500,000.

Looking back to that sunny day in March of 2004, everyone agreed that Shelly retained a separate, identifiable interest in the $100,000 – at least momentarily.

All is well until someone or something or some event stirs the pot.

Let's see what happened to their martial investment account when IQ Hedge Multi-Strategy Tracker ETF went completely belly-up and Shelly lost that $100,000.

Initially, of course, the marital account just fell back to the $400,000 balance and everything was just fine upon equitable distribution (but only if the QAI is traced back to its roots and then to its demise).

In other words, everything is "just fine" only if the $100,000 was traced by a competent forensic accountant and, as a result of this tracing, the QAI loss is attributed entirely to Shelly – resulting in no harm to husband, Frank. In other words, Shelly lost *her* $100,000, which leaves the remaining $400,000 balance in the account to be split equitably. Shelly gets $200,000 and Frank gets $200,000 in an equal distribution scenario because of the tracing efforts.

Here is what happened when the Frank & Shelly marital investment account was allocated between the parties by Mary, CPA, while recognizing Shelly's transfer of $100,000 of non-marital funds to the marital account.

Mary decides to allocate the ending balance of the marital investment account while recognizing Shelly's $100,000 to be a non-marital component. After all, Shelly can prove she brought $100,000 in pre-marital money to the marital account, right? We also have the evidential account statements prior to the date of marriage, right?

Mary decided to mathematically calculate the overall rate of return/rate of growth of the entire marital investment account over the years of the marriage, and then applied that rate of growth to both the marital and non-marital beginning and interim balances to derive the appropriate and fair allocation of the ending balances. The same rate of return is applied to Shelly's $100,000 as it was to all other monies in the account.

In other words, to be fair to both parties, the same rate of return is applied to the entire account regardless of whether there were specific investments in large company stocks, small company stocks, corporate bonds, mutual funds, municipal bonds, etc.

Mary had no idea that Shelly had actually lost the $100,000 on her bad bet. Heck, Shelly hardly remembered this downfall so she didn't say anything about it, and she's too emotionally caught up in the kids' issues to even think about it anyway.

At the settlement conference everyone acknowledged that Shelly transferred $100,000 in pre-marital money to the marital account, but nobody could identify exactly where it was on the day of the meeting. They could not find the QAI fund or any part of it. They decided "in fairness" to allocate to both parties everything else that remained in the marital account. After all, several statements were missing, but Shelly seemed like an honest, albeit forgetful, person.

By definition, a primary goal of the allocation process (although poorly conceived) is to set-aside Shelly's $100,000 (and the growth on that $100,000) for her sole benefit. After all, she earned this money prior to the marriage, right?

Sadly for Frank however, at the moment of allocation he becomes the unwitting insurer of Shelly's earlier $100,000 loss.

Certainly, this would have come as a surprise to Frank and likely would be a surprise to his legal counsel.

Allocating the marital account means that Frank will lose $50,000 and Shelly recovers $50,000 of her $100,000 loss, which is shown as follows:

Allocating the ending balance of $400,000, where Shelly first received $100,000 of her pre-marital contribution, leaves only $300,000 to be distributed "equitably" between her and Frank.

Shelly thence departs the marriage with $250,000 while she was actually due only $200,000 (50% of the marital account). Frank thence departs the marriage with $150,000 while he was actually due $200,000 (50% of the marital account).

As another example, assume the $500,000 grew to $750,000 during the marriage (net of Shelly's $100,000 loss). By allocation, she will first receive the pre-marital $100,000 and then receive 50% of the remaining $650,000. Shelly departs the marriage with $425,000, while she was actually due only $375,000. Frank departs the marriage with $325,000, while he was actually owed $375,000.

Had Mary, CPA, followed the instructions of Florida's 5th DCA, she would have noticed and documented the absence of the original $100,000 investment in IQ Hedge Multi-Strategy Tracker ETF listed on the NYSE as (QAI) and consequently allocated the entire remaining marital portfolio on an equitable basis.

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[1] *Archer v. Archer*, 712 So. 2d 1198 (Fla. 5th DCA 1998). The problem of non-traceability did not exist, however, with respect to other assets in the account. The specific assets subject to this determination are the AT&T stock, the General Electric stock, the FPL Group stock, the Brunswick Corp. stock, the unamortized principal on the three Ginnie Mae mortgage securities, and the Aegis Industries stock.

The remaining assets obtained by the former wife from her mother have become untraceable as a result of being commingled with marital assets during the course of the marriage; therefore, the assets not specifically identified above were properly designated by the trial court as marital assets.

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CRIMINAL & CIVIL APPEALS