

# CV-19-129

BEFORE THE ARKANSAS COURT OF APPEALS

LINDA COLLINS-SMITH

APPELLANT

VS.

NO. CV 19-129

PHILIP SMITH

APPELLEE

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APPEAL FROM THE CIRCUIT COURT OF RANDOLPH COUNTY  
THE HONORABLE ELLEN BRANTLEY, CIRCUIT JUDGE

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**APPELLANT'S ABSTRACT, BRIEF AND ADDENDUM**

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## I. INFORMATIONAL STATEMENT

I. ANY RELATED OR PRIOR APPEAL? No.

II. BASIS OF SUPREME COURT JURISDICTION?

X Check here if no basis for Supreme Court Jurisdiction is being asserted, or check below all applicable grounds on which Supreme Court Jurisdiction is asserted.

- (1) \_\_\_ Construction of Constitution of Arkansas
- (2) \_\_\_ Death penalty, life imprisonment
- (3) \_\_\_ Extraordinary writs
- (4) \_\_\_ Elections and election procedures
- (5) \_\_\_ Discipline of attorneys
- (6) \_\_\_ Discipline and disability of judges
- (7) \_\_\_ Previous appeal in Supreme Court
- (8) \_\_\_ Appeal to Supreme Court by law

III. NATURE OF APPEAL

- (1) \_\_\_ Administration or regulatory action
- (2) \_\_\_ Rule 37
- (3) \_\_\_ Rule on Clerk
- (4) \_\_\_ Interlocutory Appeal
- (5) \_\_\_ Usury
- (6) \_\_\_ Products liability
- (7) \_\_\_ Oil, gas, or mineral rights
- (8) \_\_\_ Torts
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- (10) \_\_\_ Contract
- (11) \_\_\_ Criminal
- (12) X Domestic Relations

IV. IS THE ONLY ISSUE ON APPEAL WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT JUDGMENT? No.

V. EXTRAORDINARY ISSUES?

- appeal presents issue of first impression
- appeal involves issue upon which there is a perceived inconsistency in the decisions of the Court of Appeals or Supreme Court
- appeal involves federal constitutional interpretation
- appeal involves significant issue needing clarification or development of the law, or overruling of precedent
- appeal involves significant issue concerning construction of statute, ordinance, rule, or regulation

VI. CONFIDENTIAL INFORMATION

(1) Does this appeal involve confidential information as defined by Sections III(A) (11) and VII(A) of Administrative Order 19?

\_\_\_\_\_ Yes      X   No

(2) If the answer is "yes ", then does this brief comply with Rule 4-1(d)?

\_\_\_\_\_ Yes    \_\_\_\_\_ No

## **II. POINTS ON APPEAL**

1. The trial court's ruling as to the division of property was clearly erroneous.
2. The trial court erred in finding Appellant had dissipated marital funds.
3. The trial court erred in awarding Appellee attorney's fees.

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#### IV. ABSTRACT

##### 1. SEPTEMBER 12, 2018 HEARING

##### A. Direct Examination of Linda Collins-Smith

We sold a Days Inn Hotel in approximately 2016. The property sold for one million, two-hundred thousand, nine hundred, and nineteen thousand and sixty-four cents. That was the of proceeds we received. **R. 279.** I immediately withdrew approximately 850,000. I put that in an account solely in my name to protect the funds. I knew Phil would take part of it to move to Panama. He would take at least half. He never paid attention to how the business operated. I put the money aside until I had to pay the taxes. I wrote a check the same day I put the money in the bank for four hundred and something thousand because the accountant said I needed to do the taxes. **R. 280.** There was also a three hundred and some thousand and there were the state checks. One was over \$100,000.

We currently own the Rock & Roll Motel. There was a flood that impacted the profitability of that property. It was the worst flood of three in nine years. Our business was just nothing. **R. 281.** The owner of the property we sold was having the same issue. Anyone who was there was staying at churches. There was no construction in town. Everything stopped

for that year. There was no income. Our property was not physically damaged from the flood. **R. 282**

I used the funds in those other accounts to cover the overhead. I am referring to the account where I deposited \$850,000; however, I paid \$500,000 or 600 in taxes. I would also put money in the bank when needed. Phil would have taken the money if I had put too much in there. I do not believe I have engaged in excessive spending or personal purchase. **R. 283.** I do not believe there was any erratic or personal spending or excessive spending on my part from the time we separated, and I filed divorce. In my opinion, there has not been any excessive, erratic or personal spending on my part from any of the accounts. In fact, I have had car trouble and roof trouble. I was gone a lot for four years and Phil did not stay after the roofer to fix our house, so there is water coming in my house. **R. 284-285.**

I think the Court will have more information to make any equitable off-set considerations after the properties sell. I am asking the Court to delay ruling. I withdrew \$56,000 from the Golden Years account and deposited into a non-marital account before the divorce complaint was filed to protect it from Phil. He was erratic and ready to go to Panama. I would transfer the money into the business or personal account as needed. The

money was deposited into one of the accounts identified here today. **R. 308-309.**

**B. Cross Examination of Linda Collins-Smith**

The approximate amount of the proceeds from the sale of the motel was \$1,200,919.64. **R. 312.** I withdrew \$894, 919.64 from the Bancorp South account. **R. 314.** There is a deposit of \$450,000. There was a check written for \$377,725 and one for \$42,718 to pay for taxes. **R. 316.** These amounts subtracted from \$1,200,919.64 leaves a balance of \$574,476.64. **R. 317.** I used this money pay bills for the business and two homes. I did not use it to repair the floor in my home or the roof that has rain coming in multiple locations because I'm not supposed to spend it. I have supplied copies of every check that I have written. **R. 318-319.**

The source of the money deposited into that motel account in January was from the sale of our other property. It is listed as a loan from Olivet, which was another corporation we had, to Rock & Roll Highway 67. The funds could have come from the proceeds of the sale. It depends on where the funds were deposited from before. **R. 321.** The funds were only deposited when necessary to run the business. The funds were also put in our personal account for Phil to live in a house he said he was putting on the market

and did not do, while I live in a house that has no subfloor and leaks. We pay his bills and his credit cards, but there are no funds to me. There was no infusion of funds in February. **R. 322** I cannot tell by the ledger sheet for any month where any money came directly from the First Security account to feed the motel. According to the ledger sheet, the total fed to the hotel for the year was \$100,000. With a part-time employee, I can't tell if it is accurate. I haven't had time to review it. **R. 325**

The flood in Pocahontas may have occurred in spring of 2016. I can't tell if we had to feed the motel every month of 2016 or if it was after the flood. **R. 325-326.**

Our marital money was in the Golden Years account. I removed it so Phil wouldn't skip off with it. I did not put any money that I earned in a paycheck made payable to me in that account. It was used as a savings account. I do not know if his social security checks were the only money to go into that account. My name was on the account and it held marital funds. I took \$56,000 out of our account to protect it. It went into one of those accounts. **R. 326-327.**

No one is holding any money for me. I do not have any money in a safety deposit box. I do not have any money buried in the backyard. I have not loaned anybody money while this has been going on. There is no money

in any type of dwelling that I own or made to live in or utilize. Part of the source for the silver bullion was from Phil's savings that he took out. It was from a Stock account. **R. 334.** Phil had access to the gold or silver. He told me he found it. It is my sworn testimony that I haven't seen any portion of the silver while this divorce has been going on. **R. 336.**

I do not remember a check from our personal account (5069) for \$84,500. After looking at a page shown to me by Mr. Hilburn, I recognized a check in the amount of \$45,500, a cashier check, written out of our joint personal account. I deposited it into one of the other accounts. **R. 351-353.**

I withdrew \$60,000 by cashier's check from First National Bank. I deposited these funds into one of the other accounts. Sixty thousand dollars is a lot of money to me. That is our money that was used to take care of our business. **R. 356-357.** First National Bank is located in Walnut Ridge. The eight hundred fifty-some off thousand dollars was deposited into First Security in Little Rock. The First National Bank account (Izzie) is the one I have used and have access to that doesn't have his name on it. I disperse funds from the Izzie account to other different accounts. During the period of time that I managed all of the corporation affairs, Mr. Smith did not bring any accounting errors to my attention. There have been not text messages,

emails or any form of communicated disputes from him to me regarding my accounting and the way I managed the business. **R. 360-361.**

During the time we sold the hotel, I was audited. I was audited for eight months. Despite all of those audits all of the accounting was correct; not one receipt was off. **R. 361.**

### **C. Direct Examination of Philip Smith**

There is a subfloor. We took up the floor to put new flooring down. It has been sitting in her driveway for three year. She wrote the check for the flooring. She pretty much writes all the checks. It is her fault the flooring is not finished. She would not allow it because she had to be there for everything. Not all of our properties need repairs, but some do. **R. 369.**

I deposited money in our personal marital account after I found out \$58,000 had disappeared. In March 2018, the account showed a balance of \$10,273. I had deposited \$10,000 into the account from my social security. I did not contribute that into the joint account to pay bills. The source of deposits in April 2018 were two deposits; my social check and my judicial retirement check. There was a \$5,000 check written that I don't know what it was for. I am the only person who could have written it. **R. 391-392.**

I have a mortgage on the house I live in. The payment of \$961 a month is automatically withdrawn from our joint account with Bancorp

South. All of mine and Linda's personal bills are paid from this account. I have contributed one-half of every amount that is in there no matter what account it comes out of. Any money left from the 1.2 million dollars is joint money that can be used to pay our bills. She chooses which account to take it out of and remove money out of a particular account. **R. 395-396.**

The taxes paid she paid in 2017 were for the 2016 taxes. The federal taxes were five hundred thousand and something. I don't know exactly how much. The tax returns will show it. There were two checks for \$377,000 to the IRS. There was also a sizable amount due for state taxes. Linda had the burden to take care of the taxes. I still pay my bills out of the joint account. **R. 402-403.** Linda and I pay the utilities our house. I am putting money into that account. All of the money that goes into that account is our joint money—no matter what account it comes out of, its ours. I'm protecting that one account because she robbed out of it. I closed the savings account with her dad's money in it and put that money in our joint account to pay bills. It was about \$9,600. **R. 406.**

#### **D. Cross Examination of Philip Smith**

As of the separation, the Iberia Bank account ending in 7211 was about 107,000 and the most recent is about 374. There has been money removed from several accounts that caused it to diminish and we couldn't

find a corresponding deposit anywhere. There has been some infusion from that account into the Rock & Roll Highway account. That probably accounts for most of the infusion in the Rock & Roll account in 2017. **R. 446-447.** As far as I know, none of the money from the sale of Days Inn went back into that account. There are two Golden Years accounts, number 2201 and 9101, I was depositing my social security retirement in one until I found out there wasn't any money left in the account, except for a couple of thousand. So, I opened the other account. The original Golden Years account was in mine and Linda's name. The second Golden Years account is just in my name. **R. 447-448.** My judicial paycheck was put into the joint bill-paying account. When I retired, I began depositing my judicial retirement check into this Golden Years account because, as far as I knew, we had plenty of money. I didn't know we didn't. I just don't know where it is. **R. 448.**

Looking at the balances on all accounts, it's pretty clear that the only account with any money in it is the account I have taken steps to keep from her. Looking at Defendant's Exhibit 1, I believe that is the amount that should be remaining in that account, but I do not see that amount anywhere in the bank accounts. **R. 450-451**

With each statement, we've highlighted the withdrawal that corresponds to the date of the withdrawal shown on the top page and attached a copy of the check or withdrawal if available and then try to correspond deposits in any other accounts. We haven't been able to find them. I now know that that 38,000 went into an account Linda's, but I do not have access to it. It was not a joint account. I would have been upset if it had gone into a joint account because she did it without my knowledge and tried to hide it from me, but I wouldn't have any real complaint because it stays where you could trace it. **R. 453.** The total amounts that we can't trace are \$287,660.50 and I am asking for half of that. I am asking for \$143,830.29 unless she can account for it. I never wanted anything except her to just tell me what she did with it. If she'll do that and it's legitimate. If she spent it on our bills, that's one thing, but she won't tell me and I can't find it, despite getting some records. **R. 454-455.**

MS. WELLS: Your Honor, I'd ask that Number 10 be entered into evidence.

MS. HUDSON: Your honor, we have the same objection.

MS. WELLS: What are those objection?

MS. HUDSON: We haven't had a chance to go through them, but this is a one-way in and no-way out here. I mean the burden of proof is on them to show that she absconded with the money.

MS. WELLS: The burden—

THE COURT: Well, they're showing transfers and, I'm going to admit.

MS. WELLS: I would ask that 9 be admitted over there objection, as well. **R. 455.**

THE COURT: --let me say, but, in any event, she apparently did pay it to the IRS for whatever it was for and it was apparently for money that the both owed. So, it seems to me that she gets credit for that.

And then we have the remainder of that which we don't know what she did with it. I mean, she, her testimony, I understand that she put it all in various bank accounts, and that is kind of all she said. Now, some of it has apparently been transferred into the account to pay expenses for this Rock & Roll motel that perhaps didn't pay its own way at some point. Other than that, I don't know. So, but you're saying you want half of that, and you also want this other half because these were transfers from other accounts that were--

MS. WELLS: Yes, Your Honor.

THE COURT: Okay.

MS. WELLS: Our position--

THE COURT: Gotcha.

MS. WELLS: -- is that she transferred that bulk of the sale money, the \$894,000, into her number 3377 account and we, then, have all of these other accounts. Well, we see where 450,000 of that 894--

THE COURT: Right.

MS. WELLS: -- came back into the joint account that covered the taxes.

THE COURT: Now, I also don't understand-- I understand they sold the Days Inn for a million two, more or less, what happened to the other 400,000 out of that? I mean, you know, that--

MS. WELLS: That's our question.

THE COURT: Yeah. Okay.

MR. HILBURN: And, Your Honor, you could, and I've had it happen to me before, you file a tax return, send the money in, then you amend when it's all over and you get your money back.

THE COURT: It could be.

MS. HUDSON: Your Honor, I object to that.

THE COURT: Right, I mean, I understand people can do that-

MS. HUDSON: It's testimony--

THE COURT: -- but I also understand that, up until now, all these accounts have been joint, and he has the ability to deal with the IRS and find out what, if any, refunds were made, just like she would have. So, I'm not super troubled by that at this point. Okay. Go ahead. **R. 457-459.**

**E. Redirect Examination of Philip Smith**

I have been separated for two years. I could have kept track of the joint accounts. I just thought she was getting some money out of my account. That's all I thought. **R. 471.**

Money is easier to divide than property. It would be more equitable to sell all of the real estate. That would require us to go through a period of months where we would have to cooperate on things. Frankly, we can't cooperate. Deeds are easy made and easy signed and delivered. The responsibility for repairs to the property would be the person who gets it. It would be a wonderful thing if we could make some agreements. We've tried and we can't. I'd love to work it all out. **R. 473-474.**

There is a recurring automatic withdrawal of 3,000 and 800 from our joint checking account ending in 5096. **R. 477-479.**

**F. Rebuttal Direct Examination of Linda Collins-Smith**

Looking at Plaintiff's Exhibit 5 and 6, there is a \$3,000 amount to Bank of America; \$483 to Bank of America; and \$800 to Bank of America and recur monthly. I've have asked him to stop the payments. We do not have the same income that we had when we had the other property and he has not. Those drafts are for Mr. Smith's benefit. **R. 487.**

**G. Court's Examination of Linda Collins-Smith**

I understand that that I am under oath and that perjury is a crime. I received somewhere in the neighborhood of \$1,200,000 for the sale of the Days Inn. I paid the Internal Revenue a very large portion of that. The taxes that were owed and the next year's taxes are a part of those amounts. The capital gains were paid out of the proceeds. I paid the capital gains I owed on that transaction and then paid the taxes. After paying the taxes there was in excess of \$550,000, which I transferred to other accounts because I was afraid he would get a hold of it. I do not still have \$550,000.

THE COURT: Okay. I want you to explain to me how, in the approximately 19 months since you got \$550, 000 net, you have managed to dissipate it?

MS. COLLINS-SMITH: Well, I think that we have done that. I think

we've shown that. When you have that much that he's taken on this--credit cards for a few years and out of those proceeds--

THE COURT: Okay, \$3,000 a month is some money. I admit.

MS. COLLINS-SMITH: It's more than that. It's three checks. It's one 3,000 plus the others, one's 800 and however much more the other is.

THE COURT: Okay.

MS. COLLINS-SMITH: So, it's a lot more than just 3,000.

THE COURT: Okay.

MS. COLLINS-SMITH: And then no income from him. Those funds have been--

THE COURT: Except while he was a judge, his paycheck was going into your account.

MS. COLLINS-SMITH: I'm talking about since we sold the Days Inn, and we have been separate--

THE COURT: Well, but he's only been retired like nine months, right?

MS. COLLINS-SMITH: I have no idea when he--

THE COURT: Okay. This is kind of like all the questioning of you. We just don't get anywhere. I will tell you, and I'll just be as honest as

I'm going to be on the record, I don't believe you. I do not believe that you have managed to dissipate that amount of money in 19 months. I think you have taken money. You have been dishonest, and you have not told either his attorney or him or the Court where it is.

MS. COLLINS-SMITH: Judge, I'd like to respond, if I could?

THE COURT: Oh, you sure can.

MS. COLLINS-SMITH: During my campaign, and I tried to get that information, during the campaign, and I was trying to do that, after that then I had this surgery and we were going to get some more information. I wish I had not been told I had to be--the day I was in the hospital, to be here. I could have probably gone through there and given you those informations. And I--

THE COURT: Well, you've been out of the hospital three weeks.

MS. COLLINS-SMITH: I've been in the bed too. I've had lung-- yesterday I spent the whole day there. I don't think--and to not believe--that is so-- it's just wrong. I actually have been ill. Maybe you should have talked to the doctor whenever you told me I had to appear in court, Judge.

**R. 490-493.**

## **H. Closing Remarks by Ms. Emis**

I want to begin my closing remarks by discussing tracing. I haven't had that many cases that involved extensive tracing, but I know the burden has always been on me to trace it. It is the responsibility of the Defendant to show that the money was inappropriately spent or hidden in the backyard. There has been no testimony that it wasn't actually deposited. Mr. Hilburn argued that he wasn't able to find it anywhere. That's his argument, but that's not necessarily proof. **R. 505-507.**

THE COURT: Yeah. No, that's really why I'm so curious why, I mean, and let me say, when tracing happens, what I believe is, we have traced to her possession \$1,200,000. As far as I see from that point forward, it is--the duty is on her to show what happened to it. Now, she has shown what happened by the IRS payments. The rest of it, I'm totally mystified. And, based on the testimony I have heard about her ability to manage property and keep records, I don't think it's in her favor that she cannot explain to me where it is. **R. 508.**

### **I. Court's Ruling**

I believe Ms. Collins-Smith knows more about the parties' finances. I do not believe she has been honest. In his testimony, he said she was a hard-working legislator, very intelligent and could manage business and did a good

job. If he said she had integrity, I missed that. That is not my judgment at this point.

People get ideas about what they deserve and what is fair for them to have when divorcing. The law says you have to answer all questions about your finances, fully and openly and disclose them to the Court. I believe she has not done that.

I had a problem trying to assess how much money she owes him. She owes him half the proceeds of the Days Inn sale that didn't go to the IRS or to shore up their other businesses.

I believe she paid expenses for the parties during the time they lived separate and apart. However, until he retired, his judicial paycheck was going in there. They also had money-earning properties. With the exception of the difficult time period they had at the motel, I am not satisfied that a lot of money was necessary to come out; that they needed it to keep themselves afloat.

They had other ways. He was putting a substantial amount of money into the account every month and she had her legislature pay and people were staying at the motel some. There was approximately \$320,000 in bank accounts when they separated. Then they made a million two. Something like a million five was in her hands that I know of and now they have

\$75,000 in the bank. They did pay money to the IRS. I don't believe that over a million dollars was spent on their personal expenses and shoring up the motel.

I am willing to say that maybe \$100,000 of marital funds was used to prop up the motel. The way I understand, they were asking for something like \$287,000 as his half of the proceeds.

MS. EMIS: Your Honor, it's half of the 286. I'm looking desperately for it.

THE COURT: Okay. Right. It's 143 from bank accounts and then there was the money from the--

MS. EMIS: Exhibit 9, 10.

THE COURT: 10. 10 is where he says he wants 143,000, and then he also wanted 287. So, altogether, roughly, if found that to be about \$430,000 that he believes she owes him. I don't think that's way off but I did want to take it down by approximately \$50,000 to reflect the fact that I think as much as \$100,000 had to be used when the motel was not making enough money.

I think she owes him \$380,000 for money traced to her possession at the beginning or coming to her during the marriage. He will keep her part of

the commercial sale to go toward that. Briarwood will also be sold, and he will keep all those funds. The rest he can have a judgment for. **R. 521-524.**

## **2. NOVEMBER 8, 2018 HEARING**

### **A. Direct Examination of Philip Smith**

I have been handed a copy of a check from the State of Arkansas in the amount of \$52,401.38. It is a refund of the 2016 taxes. The second page is a deposit slip corresponding to the check on the first page. **R. 745.** The date on the check is November 27, 2017. The check is dated prior to the depositions, which were taken on December 12, 2017. It was endorsed as “deposit only”. I believe I went to the bank on October 1<sup>st</sup> and asked what the balance of the account was. We left the account open after trial to pay marital bills out of. Since the date of separation, we each routinely put in one-half to pay those. **R. 746-747.** I actually learned of this transaction on October 10<sup>th</sup>, not October 1<sup>st</sup>. Defendant’s Exhibit 6 is a photocopy of a United States Treasury check dated October 4, 2018 made out to myself and Linda in the amount of 428,522.84. **R. 752-754.**

### **B. Cross Examination of Philip Smith**

Defendant’s Exhibit 8 are checks that were signed by Linda except for the ones signed by Tim Loggins. They are drawn on the Rock & Roll

account at First National. The only check that causes me concern is a check signed by Linda made out to Linda for \$3,000. **R. 791.**

**C. Direct Examination of Linda Collins-Smith**

MS. EMIS: All it is, is a -- the total sum of taxes paid in. And the significance of that, Your Honor, is that they're saying, "Hey, we want one half of the tax refund back," and I've always alleged to Mrs. Wells that I believe that that's double-dipping because some of the money that couldn't be accounted for was awarded against her in the judgment, and interestingly enough, they then got a \$450,000 tax refund back.

And our entire allegation is that a portion of the missing money is part of that refund. So, if we have the judgment against and then now that the money's been found, we give half, we have -- she's been doubled dipped.

THE COURT: I understand that. I think that -- I think you may ask. **R. 826-827.**

Both the federal and state checks were returned. Those checks had been sent back and then they were sent to me. Both checks were reissued. They were sent to the Days Inn & Suites. **R. 833.**

**D. Direct Examination of Plaintiff's Witness Eric Young**

My recollection is that the loss for the motel for the last tax year the parties filed was about 138,000. **R. 950.** I discovered a refund was due

when we were tracking these payments. We did not have the detail of the bank accounts when the tax returns were prepared, so that payment was not included when the returns were filed. I then notified the parties. **R. 951.**

**E. Court's Ruling**

It is difficult in a case like this to sort out actual confusion from dishonesty. I have said that I do not believe some things she said. I want it to be clear to the Appellate Court that I do not credit large amounts of her testimony.

The record should be clear. I think some of it is confusion. I think she honestly cannot answer some of the questions. I think some of it is more than that. It is animus towards Mr. Smith and an unwillingness to account for everything she's done.

I don't know if there have been actual attempts to hide money. I learned that she received more than \$400,000 and tried to negotiate them without him. The implications that arise from that are not in her favor. **R. 962-963.**

## V. STATEMENT OF THE CASE

Appellant and Appellee were married in 1995. **Add. 7.** They had two children of the marriage, who are no longer minors. **Add. 8.** Appellant filed for divorce on November 6, 2017. **Add. 1.** Appellee filed an Answer and Counterclaim on November 20, 2017. **Add 7.** The Counterclaim did not assert any claim by Appellee against Appellant for dissipation of marital assets. **Add. 7.** The Counterclaim was never amended.

The case proceeded to trial on September 12, 2018. **R. 249.** The primary issue at trial was the division of marital property. There were only three witnesses at trial. They were Becky O'Donnell, Appellant Linda Smith and Appellee Phil Smith. **R. 250.** Becky O'Donnell was merely a corroborating witness. **R. 250.**

After trial, the trial court ordered that the marital property be divided, as opposed to sold. **Ab. 18.** The trial court also found that Appellant had dissipated marital funds and Ordered Appellant to pay Appellee \$380,000 for said funds. **Ab. 18** Further the trial court Ordered Appellant to pay an additional \$100,000 to Appellee for his interest in a hotel that the Court had awarded to Appellant. **Ab. 18.** Lastly, the Court Ordered Appellant to sell a property that the Court awarded to Appellant (the Briarwood property) and to pay the money over to Appellee towards the

\$480,000 total amount that the court Ordered Appellant to pay to Appellee.

**Ab. 18.** The trial court made other rulings that are not relevant to this appeal.

The Divorce Decree was entered on October 12, 2018. **Add. 12.** A timely Notice of Appeal was filed on November 13, 2018. **Add. 107.**

Appellant then filed a Motion for Reconsideration or for New Trial. **Add. 38.** Appellant then filed an Amended and Second Amended Motions for Reconsideration. **Add. 97.**

The parties received a sizeable tax refund after the divorce case. **Ab. 19.** Appellee filed an Emergency Motion for Contempt and to divide the parties tax refund. **Add. 28.**

The trial court heard the post-trial motions for Contempt, for Reconsideration and for New Trial on November 8, 2018. **R. 708.** The trial court held Appellant in Contempt for not paying \$400,000 of the tax refund over to Appellee's counsel. **Add. 120.** The trial court determined that approximately \$482,000 in money had been "found." **Add. 121.** This was money that was sent to Appellant for state and federal tax refunds. **Add. 121.** The Court Ordered Appellant to pay over \$268,000 from the Tax refunds to Appellee. **Add. 121.** The trial court further reduced the amounts

Appellant owed Appellee down to \$108,068.61. **Add. 122.** The trial court denied Appellants Motion for Reconsideration or New Trial. **Add. 122.**

Appellant filed an Amended Notice of Appeal on December 26, 2018. **Add. 125.** An Amended Decree of Divorce was filed on January 7, 2019. **Add. 127.** The Court entered an Order awarding Attorneys fees to Appellee on January 24, 2019. **Add. 143.**

Appellant filed a Second Amended Notice of Appeal on February 4, 2019. (Note that this Second Amended Notice of Appeal was not made part of the record by the clerk and a Motion to Supplement the Record was filed by Appellant).

## VI. ARGUMENT

1. The trial court's ruling as to the division of property was clearly erroneous.

- A. Standard of Review on Appeal

Arkansas Code Annotated § 9-12-315(a) dictates the division of marital property. The Court in *Farrell v. Farrell*, 2013 Ark. App. 23, 425 S.W.3d 824 (2013) set out the following standard of review as to the division of property and debt:

With respect to the division of property in a divorce case, we review the circuit court's findings of fact and affirm unless those findings are clearly erroneous. *Dial v. Dial*, 74 Ark. App. 30, 44 S.W.3d 768 (2001). The obligations imposed upon a trial court by our property-division statute are quite exacting. Arkansas Code Annotated section 9-12-315(a) (Repl. 2009) provides that "[a]ll marital property shall be distributed one-half to each party unless the court finds such a division to be inequitable." The court may make some other division that it deems equitable; however, when it decides not to divide the property equally between the parties, it must recite its basis and reasons for the unequal division in its order. *Id.*, 2013 Ark. App. 23, 6, 425 S.W.3d at 829.

Additionally, Arkansas Code Annotated § 9-12-315(a)(3)(B) states that "when it appears from the evidence in the case to the satisfaction of the court that the real estate is not susceptible of the division as provided for in this section without great prejudice to the parties interested, the court shall order a sale of the real estate."

## B. Argument

The trial court divided the marital property, as opposed to ordering the property to be sold and the proceeds equally divided. Based on the standard set out in the Arkansas Code Annotated § 9-12-315 as well as the *Dial* and *Farrell* cases, the trial court should have ordered a sale of the real estate.

Appellant and Appellee own numerous parcels of commercial and residential real estate. They own a motel called the Rock & Roll Highway 67 Inn. **Ab. 1.** The court valued it at \$850,000 and it had debt on it of approximately \$510,000. **Add. 129.** The motel needed fixing up and had experienced a downturn so that it operated at a loss due to a flood in that area. **Add. 128, Ab. 1.** Instead of Ordering that the property be sold, the trial court Ordered Appellant to receive this property, but to have to pay \$100,000 to Appellee to buy out his interest. **Add. 128.** Appellant was Ordered to pay the \$100,000 within 60 days of the decree and the remove Appellee's name from the \$510,000 debt on the property. **Add. 129.**

The parties own a 3-acre commercial tract, which the trial court ordered to be sold. **Add 129.** The Court found that the property was worth \$200,000 based solely on the testimony on Appellee. However, Appellants portion of the sale proceeds were to be paid over to Appellee (due to the trial court's finding of dissipation of funds addressed below). **Add. 130.**

The parties own a residence located at 2005 Briarwood Drive. The trial court found that the home was worth \$215,000 with debt of approximately \$55,000. **Add. 130.** The trial court that it would normally award the residence to the plaintiff, but instead the trial court ordered the property sold and all of the funds paid over to appellee towards the Court's award of dissipated funds. **Add. 130.**

The parties own a residence located at 4023 Highway 90. **Add. 131.** The trial court found that the property was worth \$140,000, with debt of \$109,000. **Add. 131.** The trial court awarded this property to the Appellant but ordered that Appellant must remove Appellee's name from the debt within 60 days. **Add. 131.** This property needed significant work – the floor was down to the subfloor and needed new floor installed. **Ab. 2, Ab. 6.** And the roof leaked with water coming into the house. **Ab 2.**

The parties own a residence they called the "Black Rock" residence. **Add. 131.** The trial court assigned it a value of \$50,000 and awarded it to Appellant. **Add. 131.** The trial court acknowledged that the property needed repairs. **Add. 131.**

The parties own two time shares that had no value assigned to them. **Add. 132.**

The parties own a residence at 303 East Maple Street. **Add. 132.** The court did not assign a value to this property, however, the court stated that the property had debt of \$60,000. Appellant was awarded this property, which appeared to have no equity. **Add. 132.** Appellant was also ordered to remove the debt from appellee's name within 60 days. **Add. 132.**

The parties own a residence located at 2205 Evening Drive. **Add. 132.** The trial court found this property to be worth \$200,000, with debt of \$122,000. **Add. 132.** The trial court awarded this property Appellee. The trial court stated in the decree that the parties would cooperate to try to have Appellants name removed from the debt, but the trial court did not set a 60 day deadline for Appellee to remove Appellants name from the debt. **Add. 132.** This further makes refinancing difficult if not impossible for Appellant. The trial court erred in failing to require Appellee to remove Appellants name in 60 days when the trial court had required Appellant to remove Appellee's debt in 60 days.

The parties also own a duplex on Highland Drive **Add. 133.** There is no debt on this property and the trial court found it to be worth \$80,000. The trial court awarded the property to Appellee. **Add. 133.** Here again, we have the Appellee being given the advantage by awarding property to him that had no debt.

Lastly, the parties own a property called the East Broadway Rock Building. **Add. 133.** The trial court found that it had a value of \$50,000 and had no debt. **Add. 133.** The trial court awarded the property to the Appellee. Yet again, the Appellee was given the advantage of being awarded property that had equity and no debt. This is spite of the fact that Appellee is a retired circuit court and district court judge who draws both social security and judicial pension. **Add. 128-129.**

Pursuant to Arkansas Code Annotated § 9-12-315(a)(3)(B), the properties should have been ordered sold due to the prejudice caused to Appellant. The complexity of the parties' property, the state of repair or disrepair as the case may be and the debts associated with the properties, the income disparity between the parties and the resulting inability of Appellant to refinance or otherwise remove Appellee's name from the mortgages, the properties should have been ordered sold. The trial court essentially awarded Appellant all of the properties that had debt on them and required Appellant to remove the debt from Appellee's name within 60 days. This combined with the fact that the Court ordered nearly all of the equity from the properties to be paid over to Appellee by Appellant placed Appellant in an impossible position. Appellant did not and does not have the available

income, cash or equity in the properties to be able to refinance the properties to remove Appellee's name. (The trial court acknowledged that Appellant's term as State Senator ended at the end of 2018 which meant her income ended as well. R 204). Appellant certainly cannot do so with in 60 days.

The Appellee admitted at trial that money is easier to divide than property. R 473. He further stated that "it would be more equitable to sell all of the real estate." **Ab. 12**. He did change his testimony a bit by saying the parties could not cooperate, but his admissions were already on the record.

The trial court erred in failing to order the properties sold and the net proceeds divided equally. Or at the very least, the trial court erred in unequally dividing the marital property and further erred in failing to set out its basis and reasoning for doing so. The trial court's ruling should be reversed and the case remanded.

2. The trial court erred in finding that Appellant had dissipated marital funds.

A. Standard of Review

This Court has stated that "[w]e review divorce cases de novo and will not reverse a circuit court's division of property unless it is clearly erroneous. See *Freeman v. Freeman*, 2013 Ark. App. 693, 430 S.W.3d 824

(Ark. App., 2013) citing *Jones v. Jones*, 2013 Ark. App. 391, 428 S.W.3d 578 (2013).

## B. Argument

The trial court found that Appellant dissipated marital funds.

### **Add.136.**

In so doing, the trial court ordered that Appellant pay over to Appellee \$381,068.61. **Add. 137, Ab. 17-18.**

However, the facts presented at trial and in post-trial hearings do not support the trial court's award.

During the marriage, the parties owned a hotel called the Days Inn in Pocahontas. **Ab. 1.** The parties sold the hotel in 2016 and they received \$1,200,919.64. **Ab. 1.** Appellant testified that she deposited the funds from the sale of the property and segregated \$850,000 of that money to protect it, since Appellee had plans to move to Panama. **Ab. 1.** Appellant testified that she paid the taxes to both the federal and state, which totaled nearly \$800,000. **Ab. 1.** Of the approximately \$400,000 that was remaining, Appellant used those a lot of funds to prop up the parties other business, which was the Rock & Roll motel. **Ab. 1.** There had been a flood in the

town and around the Rock & Roll motel. The business went to nothing and there was no income from the motel. **Ab. 1-2.**

Appellant testified that she did not make any excessive purchases and that she deposited all of the money at issue into the bank accounts that were disclosed to the Appellee and the Court. **Ab. 2-3.**

Appellant further testified that no one is holding money for her and she doesn't have any money in a safe deposit box and none buried in her back yard. **Ab. 3.**

There was no proof whatsoever offered by Appellee that Appellant had mis-spent funds, had blown money or had hid money. In fact, Appellee testified that Appellant had the burden of taking care of the taxes, that his bills were paid out of the joint account. **Ab. 7.** He admitted that he could have kept track of the accounts himself, which means he had an opportunity to go to the bank and get the records himself. **Ab. 12.** But he did not do so.

The Appellee testified that he had identified \$287,660.50 that was unaccounted for. **Ab. 9.** He asked the Court to award \$143,830.29. **Ab. 9.** Appellee did not offer any evidence of wrongdoing by Appellant – he merely said he could not account for. Appellee essentially shifted the burden to Appellant to try to prove a negative – to prove that she had not

done anything nefarious with marital money. Appellant's counsel objected to at trial and pointed out that the burden was on Appellee to prove that Appellant had absconded with the money. **Ab. 9.**

Over Appellant's counsel's objection, the trial court placed the burden on Appellant to prove she had not absconded with money. This was error on the trial court's part. Appellant's counsel again raised the burden of proof issue in a post-trial motion (and amended motions). **Add. 38.** As cited in the motion to reconsider, for new trial and for hearing, this Court has held that basing tracing, identification and valuation of assets solely on testimony renders the notion of tracing virtually meaningless. *McCourt v. Triplett*, CA09-1142 (Ark. App., 2010). In *McCourt*, the Court determined it was the burden of the party seeking to be awarded an amount of funds to prove tracing of funds. *Id.*

The trial court's finding of dissipation of funds based on improper tracing and placing the burden of proof on appellant was in error and should be reversed. Moreover, the trial court awarded Appellee \$381,068.61, when Appellee only testified that he was asking for an award of \$143,830.29. **Ab 9.** Thus, at the very least, the trial court's award should be reduced to the amount testified to by Appellee.

After trial, the parties received approximately \$482,000 in tax refunds from the IRS and state. **Ab. 19.** If this Court reverses the trial court's ruling on dissipation of funds and tracing so that Appellant no longer owes \$381,068.61 to Appellee, then the Court's December 17, 2018 Order should be reversed as well so that Appellant and Appellee each receive one-half of the tax refund. **Add. 120.** Since Appellant has already paid over \$268,000 of said tax refund, the case should be remanded to the trial court for a determination as to how much is owed back to Appellant by Appellee.

3. The trial court erred in awarding Appellee attorneys fees.

A. Standard of Review

With regard to attorneys fee awards in divorce cases, our appellate courts have stated that “[w]e have repeatedly said that attorneys' fees in divorce and support cases are not awarded as a matter of right, but rest with the Chancellor's discretion and will not be disturbed unless that discretion is abused. *Williford v. Williford*, 280 Ark. 71, 655 S.W.2d 398 (Ark., 1983) citing *Bowers v. Bowers*, 257 Ark. 125, 514 S.W.2d 387 (1974); *Ryan v. Baxter*, 253 Ark. 821, 489 S.W.2d 241 (1973); *Wiles v. Wiles*, 246 Ark. 289, 437 S.W.2d 792 (1969).

## B. Argument

The trial court award Appellee \$8500 in its January 24, 2019 Order. This was in spite of the fact that the trial court noted the disparity of the parties ability to earn income and Appellants lack of a ready source of funds. **Ab. 143.** Thus, the trial court appears to have abused its discretion in awarding fees even after stating the court's position on attorney's fees in the divorce decree. Further, if the trial court's ruling regarding the failure to order marital property sold and dissipation of funds is reversed, the award of attorneys fees should likewise be reversed.

## VII. CONCLUSION

The trial court's failure to order the marital property sold, finding of tracing and dissipation of funds and award of attorney's fees should be reversed and the case remanded.

Respectfully submitted,

/s/Danny R. Crabtree

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## VIII. CERTIFICATE OF SERVICE

I, Danny R. Crabtree, do hereby certify that a true and correct copy of the foregoing was filed electronically through the *Eflex* system, which shall notify the following on this \_\_ day of March 2018:

Sam Hilburn  
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Served Conventionally:

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/s/Danny R. Crabtree

## IX. ADDENDUM

### A. Pleadings: Record (“R”)

1. Complaint for Divorce and Motion for Expedited Temporary Hearing, **R. 1** .....Add. 1
2. Response to Counterclaim, **R. 8** .....Add. 5
3. Answer to Complaint, Response to Motion for Expedited Hearing and Counterclaim for Divorce, **R. 10**.....Add. 7
4. Divorce Decree, **R. 56** .....Add. 12
5. Emergency Motion, **R. 88** .....Add. 28
6. Order on Emergency Motion, **R.97** .....Add. 37
7. Motion to Reconsider, for New Trial and Request for Hearing, **R. 99** .....Add. 38
8. Motion for Contempt and Motion for Shortened Time to Respond and Expedited Hearing, **R. 104**.....Add. 43
9. Amended Motion and Brief to Reconsider, for New trial, to Vacate/Strike Order and Request for Hearing **R.120**.....Add. 59
10. Response to Motion for Contempt and Counter-Motion for Contempt, **R. 136**.....Add. 75
11. Reply to Response to Motion for Contempt, **R. 142**.....Add. 81
12. Response to Motion to Reconsider, for New Trial and Request for Hearing and Response to Amended Motion and Brief to Reconsider, for New Trial to Vacate/Strike Order and Request for Hearing **R. 146**...Add. 85

13.	Second Amended Motion and Brief to Reconsider, for New Trial, to Vacate/Strike Order and Request for Hearing, <b>R. 158</b> .....	Add. 97
14.	Notice of Appeal, <b>R.168</b> .....	Add. 107
15.	Petition for Attorney’s Fees, <b>R. 180</b> .....	Add. 109
16.	Response to Petition for Attorney’s Fees, <b>R. 188</b> .....	Add. 117
17.	Order on Post-Trial Motions, <b>R. 191</b> .....	Add. 120
18.	Amended Notice of Appeal, <b>R. 201</b> .....	Add. 125
19.	Amended Divorce Decree, <b>R. 203</b> .....	Add. 127
20.	Order Granting Attorney’s Fees <b>R. 240</b> .....	Add. 143
21.	Second Amended Notice of Appeal <b>Supp. R.</b> .....	Add. 144