WD84855

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

SANDRA KADERLY,

Petitioner / Appellant,

vs.

KEVIN KADERLY,

Respondent / Respondent.

On Appeal from the Circuit Court of Jackson County
Honorable Susan E. Long, Associate Circuit Judge
Case No. 1916-FC10605

BRIEF OF THE RESPONDENT

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Statement of Facts

A. Background to the proceedings below

1. Marriage and separation

Kevin Kaderly ("Husband") and Sandra Kaderly ("Wife") met each other in 2009 (Tr. 135), while Wife was in another marriage (Tr. 38), and began dating when Wife's first marriage ended in 2012 (Tr. 135). Wife lived in a home she had owned in Harrisonville, Missouri, since 2005 during her first marriage (Tr. 38, 225).

In 2013, Husband began residing with Wife at her home in Harrisonville (Tr. 97, 135). They continued living in the Harrisonville home through their marriage, until later moving to Belton in 2019 (Tr. 97, 136).

Husband and Wife were married in February 2017 (Tr. 30, 136). Husband is a superintendent for a commercial construction company (Tr. 32, 127). Wife was employed in her own court reporting business until she sold it, as discussed below at pp. 10-17.

Wife said that in December 2016 or January 2017, she opened a $75,000 home equity line of credit on the Harrisonville home (Tr. 41, 103). In February 2018, Husband and Wife used that line of credit to purchase a property on James A. Reed Road in Kansas City, Missouri, which they titled jointly (Tr. 42, 49, 101, 137, 190, 218). Husband said the plan was to build a home on that property, but that did not happen (Tr. 137).

In July 2019, the parties sold the Harrisonville home (Tr. 47-49, 218). The proceeds of the sale paid off the line of credit used to purchase the James A. Reed property (Tr. 218).

In August 2019, Husband and Wife moved from the Harrisonville home to a split-level home they leased in Belton (Tr. 137, 218). Husband said they were going to lease it for a year, build a home on the James A. Reed property, and then move there (Tr. 137). Husband continued to reside in the Belton home at the time of trial, having taken over the lease by himself in July 2020 (Tr. 40, 127-28, 137).

Wife said that in September 2019, she and Husband separated (Tr. 30). Wife said this was because she caught Husband smoking methamphetamine at home (Tr. 30). She said she moved out from their apartment in Belton and that she moved into a separate apartment until she bought a home in Lake Lotawana, Missouri in summer 2020 (Tr. 40, 118-19, 210).

Husband denied they separated in September 2019, saying they only moved to different addresses then, and did not actually separate until Wife's dissolution filing in November 2019 (Tr. 141, 218). Husband explained he began occasionally using methamphetamine as self-medication after his brother unexpectedly died and he was depressed (Tr. 140). But he said he then was diagnosed with Lynch Syndrome, a form of cancer, and underwent surgery, after which he felt great (Tr. 140-41). He denied using methamphetamine either at the time of the separation or at the time of trial (Tr. 141). Instead, he said six weeks after moving into the Belton home, he suddenly came home one day to an empty home (Tr. 137).

2. Wife's business

a. Wife's testimony and Husband's testimony

In her statement of facts, Wife presents statements about her business as cold facts, when most of them were just her or her expert's testimony (Brief of the Appellant ["Aplt.Br."] 7-11). Husband now corrects this.

Wife said she began a career as a court reporter in 1993 and worked as one since then (Tr. 33). She said that in 2007, she left the company where she had worked since 1994 and opened her own court reporting business with two other people, Glenda Moeller and Judy Bowen, who joined her as partners (Tr. 33-34). She said they called the business "Cooper, Moeller, and Bowen" (Tr. 34). She said that when Ms. Bowen left the business in 2010, she and Ms. Moeller formed their own corporations, SLC II, Inc. ("SLC"), and GRM I, Inc. ("GRM"), respectively, which in turn each became 50% owners of an entity now named "Cooper Moeller" (Tr. 34). An expert witness Wife hired, G. Matthew Barberich, testified Wife had 100% ownership of SLC, which in turn owned 50% of Cooper Moeller, and Ms. Moeller owned 100% of GRM, which in turn owned the other 50% of Cooper Moeller (Tr. 154).

Wife said that in fall 2015, Ms. Moeller wanted to start her own business, which caused issues, and Ms. Moeller also had taken a loan from her 401(k) she was having Cooper Moeller pay back (Tr. 53). She said in fall 2016, she noticed Ms. Moeller had been withdrawing funds from the payroll to pay herself (Tr. 53). She said because of this, she hired an attorney to advise her about the partnership (Tr. 54-55).

Wife said her relationship with Ms. Moeller continued to decline to February 2017, when Ms. Moeller began working for a competitor (Tr. 54-55). She said she had a physical altercation with Ms. Moeller leading her to lock Ms. Moeller out of the business and obtain a restraining order (Tr. 55).

Wife's expert, Mr. Barberich, said SLC then bought out GRM and took a 100% ownership interest in Cooper Moeller (Tr. 154). Wife said she created an entity named "TCG Futures, LLC" ("TCG") in April 2017, doing business as "The Cooper Group," which she said paid GRM $30,000 and SLC took on all of GRM's debt and responsibilities (Tr. 56-57). Wife conceded she was married to Husband when all this occurred (Tr. 93). She said TCG was the same entity as Cooper Moeller, only with a different name, and SLC owned 100% of it (Tr. 34-35, 92). She said TCG had the same employer identification number as Cooper Moeller (Tr. 35). Mr. Barberich said Cooper Moeller's name was changed and it became a Subchapter-S corporation (Tr. 154-55). He said that as of April 14, 2017, Ms. Moeller had no interest in any part of TCG, and instead Wife owned 100% of SLC, which in turn owned 100% of TCG (Tr. 171).

On cross-examination, Wife was asked whether after Ms. Moeller left, she then owned 100% of the business, and she responded, "SLC owned 100 percent" (Tr. 90). When asked, "And who owned SLC?" she responded, "I did" (Tr. 90). When asked, "So however you want to view it, through SLC or yourself, you owned that company; is that right?" she responded, "That's right" (Tr. 90).

Wife introduced purported tax returns for Cooper Moeller dated 2015-2017 listing "SLC II, Inc." and "GRM I, Inc." as its owners and issued them K-1 forms (Ex. 26, pp. 7-9; Ex. 45, pp. 8-13; Ex. 46, pp. 8-13). But on all the purported tax returns Wife introduced for TCG in 2017, 2018, and 2019, Wife was listed personally as the "100%" owner, by name, personal address, and Social Security number (Ex. 27, pp. 11, 25; Ex. 47, pp. 11, 28; Ex. 48, pp. 11, 31). And on her only purported personal tax return Wife introduced, from 2019, she listed income directly from TCG in her Schedule E, not income from SLC (Ex. 54, p. 9), the numbers for which correspond to the purported K-1 TCG issued her directly that year (Ex. 48, p. 11). Wife also introduced a purported tax return for SLC dated 2017 and marked "final tax return" (Ex. 49). Wife's expert, Mr. Barberich, Stated in his report that at some point, Wife "exchanged her 100% ownership interest in SLC II for SLC II's 100% ownership interest in TCG Futures, because TCG Futures was SLC II's sole income producing asset" (Ex. 31, p. 11).

Wife said that when she began TCG, it had over $200,000 in liabilities and was worth less than zero (Tr. 91-92). She then moved some business operations from Cooper Moeller's location in Downtown Kansas City to Harrisonville (Tr. 203-04), which Wife said was for tax purposes (Tr. 60). She said she edited her transcripts out of her home office (Tr. 97). Husband said that at the time of their marriage, Wife was home every day working out of her home office, and continued working from that home office during the marriage (Tr. 144, 203).

Wife said that in spring 2019, a company named Veritext, LLC approached her about selling TCG to it (Tr. 61). She said in February 2020, during the proceedings below, she completed an asset sale of the majority of the assets of TCG to Veritext (Tr. 34). She said TCG then had ten employees (Tr. 34). She said Veritext purchased TCG for $1.95 million, and she entered into a non-compete agreement with Veritext restricting her ability to work as a court reporter within a 50-mile radius of Kansas City for five years (Tr. 36). She said she had received $1,783,502.25 from the asset sale by the time of trial and was to receive approximately $140,000 more, and she deposited these funds into The Cooper Group account at Commerce Bank (Tr. 63, 117).

Wife said her accountant drafted a tax projection of the sale showing she would owe $558,090, which she had not yet paid (Tr. 68). She said Veritext wanted her to stay on and handle the Kansas City area, which she did, and earned $100,000 per year in that role (Tr. 35-36).

Wife said that from the sale proceeds she had received, she used $150,000 to make her employee payroll account whole, purchased two vehicles for her sons, donated money to a charity, purchased and renovated the home in Lake Lotawana, put $1 million into her Northwestern Mutual retirement account, used some to renovate, and put the rest – $83,331 at the time of trial – into an account at Commerce Bank (Tr. 64-65).

Wife testified she did not personally loan TCG any funds, she was never not compensated by it, she kept personal accounts separate from its accounts, and Husband was not involved with the business during the marriage (Tr. 68-70).

Husband disputed this, saying Wife paid personal bills out of TCG after they were married and in fact spent a lot of money from TCG on personal expenses, double what she reported TCG paid her (Tr. 202-03). He said he expended his own labor and funds to upgrade Wife's home office for the business and to help her move the business (Tr. 203-04). He said his support made it possible for Wife to market her business and grow it (Tr. 244-45). Husband argued TCG's sale proceeds were entirely marital property and had to be divided between the parties (Tr. 195).

In a statement of assets and debts Wife filed in April 2020, she did not list any interest in a business, the Commerce Bank account where the proceeds of the sale to Veritext went, or any values for any business assets or retirement assets (Tr. 120-23). This was admitted as Exhibit 217 (Tr. 123), but Wife omits it from the record on appeal. Wife also omits from the record on appeal her Exhibit 36, which she claimed was a proposed settlement agreement with Husband (Tr. 81).

At trial, Wife admitted if her business had gone bust, rather than selling it to Veritext, the marriage would have been financially strapped because she and Husband would have had to pay back the business's obligations (Tr. 93-94). When Husband's attorney suggested this was incongruous with Wife's position now, as "if the business prospered and actually finally went past a zero value to a positive value, that cannot be considered to your and [Husband]'s benefit, it's only to your benefit; is that correct?" Wife responded, "had we not been sitting here today, of course he would receive the benefits of the sale" (Tr. 94). Husband's attorney asked

whether that was "why you're sitting here today," "because you knew that Veritext was interested in your company and you wanted to make sure that you got it all?" (Tr. 94). Wife denied filing for dissolution for this reason (Tr. 94-95).

b. Expert testimony

Both parties presented expert testimony about Wife's business (Tr. 11, 151).

Husband's expert, James Rosenbloom, an attorney and accounting expert, testified the increase in value in Wife's interest in TCG from April 2017 to February 2020 was $1,672,644.38, which he based on comparing the costs of Wife's acquisition of Ms. Moeller's 50% interest in April 2017 compared to the amount realized from 100% sale in February 2020 (Tr. 12, 18).

For the values in 2017, Mr. Rosenbloom used financial statements labeled profits and losses January through December, which included one sheet labeled Cooper Moeller and one labeled TCG (Tr. 25). To determine the value of Wife's interest in TCG in February 2020, he used the asset purchase agreement with Veritext and its associated assumption agreement, seller assignment, bill of sale, and non-competition agreement (Tr. 18). He also reviewed financial statements, including balance sheets and statements of income and expense, and had about four or five full years of those documents (Tr. 22). His report was admitted as Respondent's Exhibit 210 (Tr. 10-11), which is in the record as Petitioner's Exhibit 24.

Mr. Rosenbloom said Wife acquired Ms. Moeller's 50% interest in Cooper Moeller in April 2017, after the parties had married in February 2017 (Tr. 11). He said $1,621,707 of Veritext's purchase price of TCG was attributed to goodwill, but it was uncertain whether that was a long-term capital gain asset or an ordinary income asset, because there was a non-compete agreement but no consideration for it (Tr. 13). It was unclear whether Veritext would treat the goodwill portion as wages; if no W-2 were issued, Wife had the ability to consider it a capital gain, but one were issued, it had to be reported as income, affecting the tax liability for this (Tr. 15).

Wife's expert, Mr. Barberich, was an accountant and not an attorney, and was not providing any legal conclusions (Tr. 151). Mr. Rosenbloom said whereas he used profit-loss statements to determine the values at issue, Mr. Barberich used tax returns (Tr. 25-27).

Mr. Barberich said that when Wife married Husband, the business asset she held individually was her ownership interest in SLC, which owned a 50% interest in Cooper Moeller (Tr. 154). Then, in April 2017, Cooper Moeller became a single-member LLC, no longer a partnership for tax purposes, which SLC solely held, and its name was changed to TCG (Tr. 154-55). He said the first exchange of ownership was SLC acquiring the ownership interest of GRM and taking over all responsibility for Cooper Moeller's debt (Tr. 155). He said Wife then effectively swapped her ownership interest in SLC for SLC's ownership interest in TCG (Tr. 155-56). He said Wife did not individually make any contributions to the exchange of

property or create or use a shell company, but instead had an intended holding company for the better part of a decade (Tr. 156).

Mr. Barberich said the increase in value of Wife's business interest during the marriage was at most $144,444 (Tr. 162). He said this was just the change in revenue from $1.5 million to $1.65 million, which he analyzed from 2015 to 2019 (Tr. 157, 152). He said he also conducted a market approach to his valuation, and Veritext's sale was in line with tendency of participants in the market (Tr. 160). He said the sale price to Veritext was the fair market value of the business at time it was sold (Tr. 161). He said the fair market value of the business at the time of the marriage, which he obtained from revenue, was $1.49 million for the twelve months preceding the marriage, or $1.5 million for the twelve months preceding the buyout of GRM's interest (Tr. 161-62).

Mr. Barberich said he did not rely on the Cooper Moeller transaction that occurred in 2017 because there were extenuating circumstances and so it might not have reflected fair market value (Tr. 163). He said it very well may have been that in April 2017, TCG had a negative net worth (Tr. 163, 174). He said it did not appear Wife contributed any money to the business, but instead paid herself fair market wages, which increased during the marriage (Tr. 163-64).

B. Proceedings below

In November 2019, Wife filed a petition for dissolution of marriage in the Circuit Court of Jackson County (D6). Husband answered and filed a counter-petition (D7), which Wife answered (D8).

During discovery, Husband's counsel tried to get documents from Wife about TCG's sale to Veritext, but Wife did not provide them (Tr. 95-96, 133-34). At trial, Wife was unable to give a reason for this (Tr. 96).

Therefore, in May 2020, Husband moved to file an amended counter-petition adding TCG and Veritext as parties to the case (D9), which Wife opposed (D10). The court allowed Husband to add TCG but not Veritext (D13), and Husband then did so (D14), which Wife also answered (D16). This enabled Husband's counsel to obtain documents about the sale including the buy-sell agreement (Tr. 96, 134).

In his first amended counter-petition, Husband alleged in paragraph 16, "TCG Futures LLC d/b/a The Cooper Group, is a Company formed by the Petitioner and said Company has conducted business during the course of the parties' marriage" (D14 p. 3). In her answer, Wife responded, "Petitioner, Sandra Kaderly, admits that she was the owner of TCG Futures, LLC d/b/a The Cooper Group and that the entity conducted business during the marriage as alleged in paragraph sixteen (16) of Respondent's First-Amended Counter-Petition for Dissolution of Marriage, but denies that said entity continues to exist as specifically identified in paragraph sixteen (16)" (D16 p. 2).

The case proceeded to a trial over two days in December 2020 (Tr. 2). No party asked the trial court to make findings of fact and conclusions of law on any issue (D5 pp. 17-18). The only witnesses were Husband, Wife, and their experts (Tr. 2). The parties agreed each of their proffered exhibits, except depositions, would be admitted (Tr. 5). 56 of Wife's exhibits were

admitted into evidence (Tr. 2), of which she includes all but one (Exhibit 36) in the record. 17 of Husband's exhibits were admitted into evidence (Tr. 2), of which Wife includes omits all but one (Exhibit 200) from the record.

In its judgment, the court found the proceeds from the sale of TCG "are part marital and part non-marital," because Wife "owned one-half the company prior to the marriage and she acquired the other one-half the company during the marriage. The company sold for 1.95 million of which $975,000.00, one-half (50%), is Petitioner's non-marital property. The remaining $975,000.00, one-half (50%), is found to be marital property" (D30 p. 7). It stated it considered the parties' experts' testimony, which "varied widely," and incorporated that consideration into its findings (D30 p. 7).

The court found:

> Prior to the marriage, in 2007, [Wife] opened her own court reporting business and added two partners. Then in 2010, again prior to the marriage, the business was owned by [Wife] and Glenda Moeller, with each having a fifty percent stake in the company. In April of 2017, after [Wife]'s marriage to [Husband], [Wife] acquired Glenda Moeller's onehalf [*sic*] interest in the business and the Limited Liability Company was re-named TCG Futures, LLC doing business as "The Cooper Group". On February 10, 2020, [Wife] sold her entire business interest to Veritext, Inc. for the contracted sum of 1.95 million Dollars ($1,950,000.00).

(D30 p. 6).

It further found Wife

> admits that she acquired one-half of her interest in TCG Futures/The Cooper Group after the date of the marriage. [Wife] testified that she paid Ms. Moeller $30,000.00 cash out of the business account and that she assumed over $200,000.00 in

> liabilities on behalf of The Cooper Group as part of the sale of the business from Ms. Moeller to [Wife]. [Wife] testified the same terms were available to her if she wanted to walk away from the business and sell her interest in the business to her then business partner Ms. Moeller. [Wife] further testified that the business was in bad shape at the time she acquired the entire portion of the business and that it had a negative net worth at the time of the acquisition.
>
> A business interest acquired during a marriage is marital property. During the marriage [Wife] used her marital efforts together with some help from [Husband] to build the value of the company. [Wife] testified that for approximately two years during the parties' marriage, she operated her business primarily out of the marital home. [Wife] also testified that Veritext, the acquiring company, is a national company that was looking to gain a foothold in the Kansas City market at the time of the sale which operated to raise the value of the company in general. The transfer documents evidence that [Wife] was being paid $1.95 million because [Wife] had built up the company's value running it as TCG Futures, LLC/The Cooper Group.

(D30 pp. 6-7) (paragraph number omitted).

The court then found Wife's assets and expenditures from the funds she received from the sale, which it set aside to Wife, including her Lake Lotawana house (D30 p. 7). It included the $975,000 half of the sale it found to be marital in its table calculating the division of the marital estate, and found the total worth of the Estate was $993,453 (D30 pp. 10-11). Based on this table, it determined "$238,906.50 is the difference in the martial estates between the parties" and so ordered "an equitable division of the property requires that [Wife] pay to [Husband] the sum of $200,000.00 to provide for an equitable division of the property" (D10 p. 11).

In its tables stating what each party received, for Wife the court included both her assets and expenditures from the funds from the sale of TCG, as well as those in the table of the rest of the marital estate (D10 p. 11). Because half the TCG sale proceeds were marital, Wife's Lake Lotawana house purchased with those proceeds had a "potential marital interest," and the court was dividing it to Wife, the court ordered Husband to "execute a Quit Claim Deed evidencing this transfer of potential marital interest" (D30 p. 14).

Wife timely moved the court to amend the judgment (D31). When the court denied that motion (D36), she timely appealed to this Court (D37).

Argument

Standard of Review as to All Points

In a judge-tried case, the standard of review from *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976), applies. *In re Marriage of Woodson*, 92 S.W.3d 780, 785 (Mo. banc 2003).

The trial court's judgment will be affirmed "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Murphy*, 536 S.W.2d at 32. This Court will "view the evidence and the reasonable inferences drawn from the evidence in the light most favorable to the judgment, disregard all evidence and inferences contrary to the judgment, and defer to the trial court's superior position to make credibility determinations." *Houston v. Crider*, 317 S.W.3d 178, 186 (Mo. App. 2001).

"In reviewing the trial court's decision, this Court is primarily concerned with the correctness of the trial court's result, not the route taken by the trial court to reach that result." *Trimble v. Pracna*, 167 S.W.3d 706, 716 (Mo. banc 2005). The judgment below "will be affirmed under any reasonable theory supported by the evidence …." *Id.*

I. All of Wife's points and arguments violate Rule 84.04, preserving nothing for review[1] and requiring dismissal.

(Response to All Appellant's Points)

All of Wife's four points and their arguments are improper. The Court should decline to address any of them, and instead should dismiss her appeal.

A. Points I, II, and IV each improperly challenge multiple alleged errors and invoke several *Murphy v. Carron* grounds.

Wife's first point argues three separate errors: the court (1) "erred in finding that one-half of the membership interest in TCG was acquired by her individually;" (2) "erred in finding that one-half of TCG was a marital asset;" and (3) "erred in finding that one-half the sale proceeds from the sale of TCG was a marital asset" (Aplt.Br. 23). It argues this is for three separate legal reasons: "because the finding" – she does not say which one – (1) "is against the weight of evidence, [2] is a misaplication [*sic*] of the law and [3] is an abuse of discretion" (Aplt.Br. 23).

Wife's second point argues four separate errors: the court (1) "erred in finding that the one-half interest in TCG acquired after marriage was marital property, [2] erred in finding that $975,000 of the TCG sale proceeds was marital, [3] erred in failing to set apart to [Wife] 100% of the TCG sale proceeds as [her] non-marital property and [4] erred in ordering [her] to pay [Husband] $200,000 as an equitable division" (Aplt.Br. 24). It argues this, too, is for three separate legal reasons: "because the finding" – she again does

[1] Rule 84.04(e) requires each of an appellant's arguments to "include a concise statement describing whether the error was preserved for appellate review" and "if so, how it was preserved …." Wife fails to include this for any point.

not say which one – "[1] is against the weight of evidence, [2] is a misapplication of the law and [3] is an abuse of discretion" (Aplt.Br. 24).

Finally, Wife's fourth point argues three separate errors: the court (1) "erred in finding that $975,000 of the TCG sale proceeds was marital property," (2) "erred in failing to set apart to [Wife] 100% of the TCG sale proceeds as [her] non-marital property and [3] erred in ordering a $200,000 payment to [Husband] for an equitable division of property" (Aplt.Br. 26). It argues this, too, is for three separate legal reasons: "because the court's finding" – she again does not say which one – a (1) "is against the weight of the evidence, [2] is a misapplication of law, and [3] is an abuse of discretion" (Aplt.Br. 26).

These points violate Rule 84.04(d). First, each alleges multiple different errors, preserving nothing for review. "A point relied on claiming the circuit court erred at three separate times and in three separate ways is multifarious and preserves nothing for review." *Spence v. BNSF Ry. Co.*, 547 S.W.3d 769, 780 n.15 (Mo. banc 2018) (declining to review all but one of the alleged errors in multifarious point). "Generally, multifarious claims of error preserve nothing for appeal and are subject to dismissal." *Eighty Hundred Clayton Corp. v. Lake Forest Dev. Corp.*, No. ED110390, 2022 WL 2920499 at *4 (Mo. App. July 26, 2022) (dismissing points arguing multiple errors).

Second, they all allege at least two *Murphy v. Carron* bases for error, arguing "the finding," without stating which finding alleged to be error, was *both* against the weight of the evidence *and* a misapplication of law. This also does not comply with Rule 84.04(d) and "preserves nothing for appellate

review." *Koeller v. Malibu Shores Condo. Ass'n, Inc.*, 602 S.W.3d 283, 287 (Mo. App. 2020) (dismissing point in part for this reason).

Under the standard of review from *Murphy v. Carron*, this Court "can reverse [a] court-tried judgment *only* if [1] no substantial evidence supports it, or [2] it is against the weight of the evidence, or it erroneously [3] declares or [4] applies the law." *Hagan v. Hagan*, 530 S.W.3d 608, 610 (Mo. App. 2017) (emphasis in the original). So, "[t]hese being the *only* reasons to reverse any court tried case, each of [an appellant's] points [on appeal from a court-tried judgment] should specify some *Murphy v. Carron* basis for relief." *Id.* (emphasis in the original).

Because points "*shall* identify the challenged actions and 'the legal reasons for the appellant's claim of reversible error,'" it is "self-evident that [the appellant] should identify the specific *Murphy* claim [he] assert[s] as to each of [his] points …." *Smith v. Great Am. Assur. Co.*, 436 S.W.3d 700, 703 (Mo. App. 2014) (citing Rule 84.04(d)(1)(A)-(B)) (emphasis the Court's). This requires "expressly identify[ing] a *Murphy* ground" in the point itself. *Id.*

But this means each point only may identify *one Murphy* ground for relief, and separate *Murphy* grounds must be set out in separate points:

> A point relied on should contain only one issue, so multiple contentions about different issues should not be combined into a single point. The reason is each challenge involves a distinct analysis. A not-supported-by-substantial-evidence and an against-the-weight analysis are distinctly different. Each of these, in turn, is different from a claim that the trial court erroneously declared or applied the law. This means each *Murphy* ground is proved differently from the others and is subject to different principles and procedures of appellate review.

> A point that includes multiple issues is multifarious and preserves nothing for appellate review.

Koeller, 602 S.W.3d at 287 (citations, quotation marks, and bracket omitted).

Here, Wife's Point I, II, and IV claim findings are *both* "against the weight of the evidence" *and* "misapplication of law." But this is an important distinction because each standard impacts how the Court views the facts.

A challenge for misapplication of law presupposes factual findings are correct, and instead challenges the application of the law to those facts as found. *Est. of Elder v. Est. of Pageler*, 564 S.W.3d 742, 748 (Mo. App. 2018). This "is a separate and distinct challenge from a challenge that one or more factual underpinnings of the judgment are … against the weight of the evidence." *TracFone Wireless, Inc. v. City of Springfield*, 557 S.W.3d 439, 446 n.13 (Mo. App. 2018). Therefore, factual findings are unchallengeable in a point about misapplication of law, and are just taken as true. *Id.* at 446-47.

Conversely, an against-the-weight argument *does* challenge the factual findings, and involves "reviewing the record" and "defer[ring] to the [circuit] court's factual findings when the factual issues are contested and when the facts as found by the [circuit] court depend on credibility determinations." *Prevost v. Silmon*, 645 S.W.3d 503, 512 (Mo. App. 2022) (citation omitted).

Wife's first, second, and fourth points ignore this crucial distinction. Just as with the appellant's point in *Koeller*, which also was dismissed because it, too, argued the trial court's decision "is against the weight of the evidence and misapplies the law," 602 S.W.3d at 287. Wife's first, second, and fourth points here preserve nothing, either.

The Court should decline to reach Wife's first, second, or fourth points.

B. Points II, III, and IV seek to present against-the-weight-of-the-evidence arguments without addressing any of the required factors.

As the Court held in *Koeller*, a "contention that the judgment is against the weight of the evidence is governed by *Houston v. Crider*," which states a required four-step process for analyzing this. 602 S.W.3d at 287-88 (quoting *Houston*, 317 S.W.3d at 187).

Wife knew this, because she cites *Houston* in her brief, including laying out this analytical framework (Aplt.Br. 28, 30-31). In the argument over her first point, she then attempted to follow it (Aplt.Br. 31-37). (Husband addresses this below at pp. 43-47.)

But then, despite making against-the-weight challenges in the rest of her Points II, III, and IV (Aplt.Br. 24-26) – and besides simultaneously stating misapplication-of-law challenges in Points II and IV, Wife failed to adhere to the *Houston* framework at all (Aplt.Br. 37-67). Nowhere in the argument over any of those points has Wife "identified the favorable evidence supporting the trial court's finding or acknowledged the trial court's decisions about the credibility of the evidence presented. Instead, [she has] only cited the evidence favorable to [her] position." *Koeller*, 602 S.W.3d at 288.

So, like the plaintiffs in *Koeller*, Wife "ha[s] not followed these mandatory requirements" of the *Houston* rubric, rendering her arguments in Points II, III, and IV unpreserved. "Failure to follow the applicable framework means the appellant's argument is analytically useless and provides no support for his or her challenge." *Id.* (citation omitted).

C. Point III presents an against-the-weight-of-the-evidence argument, but its corresponding argument section also argues lack of substantial evidence.

While in Point III Wife states an against-the-weight argument, in the argument over it she presents a lack-of-substantial evidence argument (Aplt.Br. 54). She states, "the Court's finding that $975,000 of the TCG sale proceeds was marital … is both a misapplication of law and without substantial evidence in the record to support the judgment" (Aplt.Br. 54).

"[A]gainst-the-weight-of-the-evidence' challenges are not the same as 'not-supported-by-substantial-evidence' challenges …." *Sauvain v. Acceptance Indem. Ins. Co.*, 437 S.W.3d 296, 299 n.1 (Mo. App. 2014). Instead, they are "separate and distinct challenges" that cannot be included in one single point. *Id.*

Here, the only *Murphy* ground Wife identified in her third point was an against-the-weight challenge (Aplt.Br. 25). Rule 84.04(e) requires an appellant's argument "shall substantially follow the order of 'Points Relied On,'" "[t]he point relied on shall be restated at the beginning of the section of the argument discussing that point," and "[t]he argument shall be limited to those errors included in the 'Points Relied On.'"

So, a claim of error in the argument not set out in the point is not before the Court. *Brizendine v. Conrad*, 71 S.W.3d 587, 593 (Mo. banc 2002) ("an argument not set out in the point relied on but merely referred to in the argument portion of the brief does not comply").

Therefore, Wife's substantial-evidence argument in the argument over her third point is not preserved. The Court should disregard it, too.

D. All of Wife's against-the-weight arguments are unreviewable because she has failed to give the Court the full record on appeal.

The Court also should decline to reach any of Wife's points because she has failed to provide all the evidence from the trial court. This forecloses any argument the court's findings were against the weight of the evidence.

It is the appellant's duty to provide the record on appeal. Rule 81.12(b)(2)(A) and (c)(1). Rule 81.16(a) specifically mandates "[i]f original exhibits are necessary to the determination of any point relied on, they shall be deposited in the appellate court by the appellant." This Court's Rule 4 requires an appellant to deposit exhibits on or before the date of her brief.

When an exhibit is omitted from the record on appeal, "its intendment and content will be taken as favorable to the trial court's ruling and as unfavorable to the appellant." *State v. Hawkins*, 328 S.W.3d 799, 810 n.3 (Mo. App. 2010). Any "exhibits admitted into evidence at trial" that "are not filed on appeal … are presumed to support the trial court's findings." *In re J.M.*, 1 S.W.3d 599, 600 (Mo. App. 1999). So, where the record does not include all of the "documents necessary for this court to determine the issue presented, our review is impossible and the claim of error must be dismissed." *Wallace v. Wallace*, 269 S.W.3d 469, 478 (Mo. App. 2008).

Therefore, when an appellant fails to deposit all exhibits admitted in the trial court, it forecloses any argument challenging the evidentiary support for findings, because the appellant has not provided this Court all the evidence. *See, e.g.*, *Bridgeman v. Bridgeman*, 63 S.W.3d 686, 692 (Mo.

App. 2002); *Wallace*, 269 S.W.3d at 478; *Angel v. Angel*, 356 S.W.3d 357, 363 (Mo. App. 2011); *Jenkins v. Jenkins*, 368 S.W.3d 363, 370 (Mo. App. 2012).

Here, Wife omits one of her exhibits from the record and omits all but one of Husband's. The "intendment and content" of all these missing exhibits therefore must "be taken as favorable to the trial court's ruling and as unfavorable to" Wife, *Hawkins*, 328 S.W.3d at 810 n.3, and they "are presumed to support the trial court's findings." *J.M.*, 1 S.W.3d at 600. Accordingly, review of Wife's challenges to the trial court's findings as being against the weight of the evidence "is impossible and [her] claim[s] of error must be dismissed." *Wallace,* 269 S.W.3d at 478.

E. Wife wholly fails to view the evidence most favorably to the trial court's judgment and allow for its credibility determinations.

Finally, none of Wife's arguments obey the the standard of review requiring deference to the trial court's credibility determinations and viewing the evidence most favorably to its decision. Instead, they are "replete with a presentation of the record on appeal recited in a light most favorable to *[Wife]'s* view of the evidence as opposed to the requirement that we view the evidence in a light most favorable to the *judgment*, including deference to the circuit court on credibility determinations." *Prevost*, 645 S.W.3d at 517 n.5 (emphasis in the original).

As no party request findings of fact, this Court must consider the trial court's credibility determinations as "as having been found in accordance with the result reached." Rule 73.01(c). The trial court is "presumed to have believed the testimony and evidence consistent with its decree." *Mills v.*

Mills, 939 S.W.2d 72, 75 (Mo. App. 1997). The only question now is whether the evidence viewed in the light most favorable to the trial court's judgment supports its conclusions. *Id.*

"A trial court is free to believe or disbelieve all, part, or none of the testimony of any witness," and this Court defers to that determination. *Short v. Short*, 356 S.W.3d 235, 240 (Mo. App. 2011). This includes as to whether property was marital or non-marital, and this Court defers to the trial court's determination of the facts that underlie the classification. *See Glenn v. Glenn*, 345 S.W.3d 320, 326 (Mo. App. 2011) (trial court has discretion to determine witness credibility for purposes of classifying property).

That Wife may be trying to make against-the weight challenges does not change this. This Court "defer[s] to the trial court's credibility determinations and assessments of the proper weight to be given to witness testimony and documentary evidence at trial." *Barbieri v. Barbieri*, 633 S.W.3d 419, 433 (Mo. App. 2021). "Matters such as the weight of evidence, the credibility of witnesses, and the resolution of conflicting evidence are for the trial court to resolve and will not be reviewed by this Court." *Id.*

This is true even when the appellant relies on documentary evidence. This Court "defers to the trial court as the finder of fact in determinations as to whether there is substantial evidence to support the judgment and whether that judgment is against the weight of the evidence, even where those facts are derived from pleadings, stipulations, exhibits and depositions." *Business Men's Assur. Co. of Am. v. Graham*, 984 S.W.2d 501, 506 (Mo. banc 1999). "In other words, even though this Court has the same

opportunity to review the evidence as does the circuit court, the law allocates the function of fact-finder to the circuit court." *MSEJ, LLC v. Transit Cas. Co.*, 280 S.W.3d 621, 623 (Mo. banc 2009).

Wife's brief is replete with statements that her testimony or other evidence was "unrefuted" or "undisputed" (Aplt.Br. 33, 36, 41-42, 45-46, 51, 63) and arguments that the trial court had to credit that testimony or other evidence as a result. For example, she acknowledges she had the burden to overcome the presumption that the sale proceeds she received during the marriage were marital property, but argues the standard of proof was preponderance of the evidence, rather than "clear and convincing," so she conclusively met that burden because of her "unrefuted" testimony or other evidence (Aplt.Br. 39-42). She argues that where "in the record of this appeal there was no conflicting testimony or disputed evidence presented contesting" a fact she alleged, "there was no credibility determination for the trial court to make to which this court should defer" (Aplt.Br. 34).

Wife's argument "misstates settled Missouri law." *England v. England*, 454 S.W.3d 912, 919 (Mo. App. 2015). The trial court could disbelieve all, part, or none of any of Wife's testimony or other evidence, even if not directly rebutted, and could find she failed to meet her burden as a result:

> When the burden of proof is placed on a party for a claim that is denied, the trier of fact has the right to believe or disbelieve that party's uncontradicted or uncontroverted evidence. If the trier of fact does not believe the evidence of the party bearing the burden, it properly can find for the other party. Generally, the party not having the burden of proof on an issue need not offer any evidence concerning it.

> It is only when the evidence is *uncontested* that no deference is given to the trial court's findings.
>
> Evidence is uncontested in a court-tried civil case when the issue before the trial court involves only stipulated facts and does not involve resolution by the trial court of contested testimony; in that circumstance, the only question before the appellate court is whether the trial court drew the proper legal conclusions from the facts stipulated.
>
> Contrary to [Wife]'s assertion, to contest evidence, a party need not present contradictory or contrary evidence. A party might contest evidence by presenting evidence to the contrary. But a party might also contest evidence by, for example, cross-examination, pointing out internal inconsistencies in the evidence, or arguing to the trial court that the witness is not credible as is apparent from the witness's demeanor, bias, or incentive to lie.
>
> When evidence is contested by disputing a fact in any manner, [an appellate c]ourt defers to the trial court's determination of credibility.

Id. (emphasis the Court's) (citations, quotation marks, and bracket omitted) (rejecting against-the-weight argument predicated on unrebutted evidence of party with burden of proof).

Wife's brief fails this required deference entirely. As Wife was the party with the burden to overcome the presumption of marital property, the trial court plainly disbelieved her testimony and evidence in reaching the conclusions contrary to her case so as to find she did not meet that burden:

> When the burden of proof is placed on a party for a claim that is *denied*, the trier of fact has the right to believe or disbelieve that party's uncontradicted or uncontroverted evidence. If the trier of fact does not believe the evidence of the party bearing the burden, it properly can find for the other party. Generally, the party not having the burden of proof on an issue need not offer any

> evidence concerning it. Consequently, substantial evidence supporting a judgment against the party with the burden of proof is not required or necessary.

Koeller, 602 S.W.3d at 287 (citation omitted) (emphasis in the original).

Therefore, here, as

> all the ultimate factual issues were contested, we must defer to the trial court's credibility determinations and its prerogative to believe all, part, or none of the evidence offered to prove those facts. In addition, because findings of fact were not requested in this case, we consider all fact issues upon which no specific findings were made as having been found in accordance with the result reached per Rule 73.01(c). Thus, under our mandated standard of review, we must presume the trial court implicitly decided not to credit the documentary evidence and testimony upon which [Wife] relies, and [Wife] presented no evidence immune from such a credibility determination. As a result, [Wife]'s argument fails because it rests only upon evidence that we must assume the trial court did not credit.

Hurricane Deck Holding Co. v. Spanburg Invs., LLC, 548 S.W.3d 390, 395 (Mo. App. 2018) (internal citations omitted).

Wife's arguments fail this entirely. Instead, they present only Wife's self-serving view of the testimony and evidence that the trial court plainly rejected, with no deference to its credibility determinations that must be presumed.

The Court should dismiss Wife's appeal.

II. The trial court properly found half the sale proceeds of TCG Futures, LLC was marital property.

(*Response to Appellant's Points I and II)*

Additional Standard of Review

The "trial court has broad discretion to identify marital property." *N.M.O. v. D.P.O.*, 115 S.W.3d 854, 859 (Mo. App. 2003). "If the evidence supports the trial court's classification, [this Court] will not find error in the trial court's decision." *Id.*

Abuse of discretion is "[t]he most deferential standard of review" and "severely limits the power of the appellate court to reverse or otherwise alter the rulings of the lower court." *In re Marriage of Stephens*, 954 S.W.2d 672, 678 (Mo. App. 1997). It "occurs when the trial court's 'ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration.'" *Dieser v. St. Anthony's Med. Ctr.*, 498 S.W.3d 419, 436 (Mo. banc 2016) (citation omitted).

"If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *Hancock v. Shook*, 100 S.W.3d 786, 794 (Mo. banc 2003).

* * *

A. Summary

In her first and second points, Wife appears to argue the trial court erred in finding half the sale proceeds of TCG, which she concedes she received during the marriage, was marital property (Aplt.Br. 30-47).

Wife's first point appears to argue this was because the trial court could not have found she personally acquired half of TCG during the marriage, and instead had to find SLC, a separate corporation in which she had an interest, acquired that interest (Aplt.Br. 36). Her second point appears to argue this was because the interest she acquired in TCG was in exchange for property she owned before marriage, rendering it non-marital (Aplt.Br. 38-46).

Wife's arguments are in error. Under § 452.330, R.S.Mo., the proceeds from the sale of TCG Wife received during the marriage are presumed marital property. She had the burden to overcome this presumption. The trial court found she had not met this burden for the 50% of TCG she acquired after the marriage. This was a proper conclusion from the evidence and in accord with well-established Missouri law.

While Wife testified SLC, and not her personally, owned all of TCG, the trial court could disbelieve her testimony. This was especially so in the face of her admission in her answer that she personally owned TCG, her pretrial omission of her business interest from her initial statement of assets and debts (which she also omits from the record), the obvious inference she filed for dissolution so as to be able to keep all the TCG sale proceeds, and documents all plainly showing Wife *personally*, and *not* SLC, became the 100% owner of TCG during the marriage. She does not address any of this.

And if Wife somehow is correct that the court had to find SLC acquired the half-interest in TCG at issue, then viewing the evidence most favorably to the judgment, it must be presumed the court found SLC or TCG were Wife's alter egos or instrumentalities, which the evidence also supported.

B. The asset at issue is the proceeds of the sale of TCG, which Wife received during the marriage in February 2020, not TCG itself, Wife's interest in TCG, or the increase in TCG's value.

At the outset, it bears clarification what the trial court was classifying as marital or non-marital. It was not TCG itself or even Wife's interest in TCG (which no longer existed at the time of trial), as Wife briefly suggests in her first point. It also was not the increase in value of TCG during the marriage, as Wife suggests in her third and fourth points, which Husband addresses below at pp. 53-58.

Rather, the trial court was classifying the "[p]roceeds from sale of court reporting business, TCG Futures (Value: $1.950,000.00)" (D30 p. 4), "the proceeds of the sale of TCG Futures/The Cooper Group" (D30 p. 6). It found these "proceeds from the sale of TCG Futures LLC/The Cooper Group are part marital and part non-marital," because Wife "owned one-half the company prior to the marriage and she acquired the other one-half the company during the marriage," so when "[t]he company sold for 1.95 million of which $975,000.00, one-half (50%), is [Wife]'s non-marital property," and "[t]he remaining $975,000.00, one-half (50%), is found to be marital property" (D30 p. 7). In its table of marital assets being divided, the court again labeled this asset with a value of $975,000 "Proceeds from sale of TCG (total proceeds 1,950,000 50% of which is marital" (D30 p. 10).

So, the issue is whether the trial court properly found one-half the sale proceeds of TCG, which Wife received during the marriage in February 2020, was marital property subject to division. The law of Missouri is it did.

C. Under § 452.330, R.S.Mo., when a spouse had an interest in a corporation before marriage but acquires an additional interest in the corporation during the marriage, that additional interest is marital property subject to division.

Section 452.330.3, R.S.Mo., lays out in relevant part how property is deemed marital or nonmarital in a dissolution of marriage proceeding:

> All property acquired by either spouse subsequent to the marriage and prior to a decree of legal separation or dissolution of marriage is presumed to be marital property …. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection 2 of this section.

(Emphasis added). This statute

> creates a presumption that all property acquired by either spouse subsequent to the marriage and prior to a decree of legal separation or dissolution is marital, regardless of whether title is held individually or jointly. This presumption can be overcome, however, by showing that the property was acquired by one of the exceptions listed in § 452.330.2.

In re Marriage of Looney, 286 S.W.3d 832, 837 (Mo. App. 2009).

One of the excepted methods of acquisition described in § 452.330.2 is "[p]roperty acquired in exchange for property acquired prior to the marriage …." *Id.*at .2(2). Section 452.330.2, read with its heading, states, "'marital property' means all property acquired by either spouse subsequent to the marriage *except*" these means. (Emphasis added).

"In classifying property as marital or non-marital, Missouri courts apply the 'source of funds' rule to determine when the property was 'acquired.'" *In re Marriage of Altergott*, 259 S.W.3d 608, 616 (Mo. App. 2008) (quoting *Hoffmann v. Hoffmann*, 676 S.W.2d 817, 824 (Mo. banc 1984)). Still, this is not an all-or-nothing proposition, and

> [w]hen the property is acquired through an on-going process of making payments both before and after the marriage, the property may not be wholly marital or non-marital. Using the source of funds rule, the court looks at the source of the funds used to finance the purchase. The property is considered to be 'acquired' as it is paid for, so that a portion of the property's ultimate value will be marital property.

Id.

Still, when a party argues property presumed marital because it was acquired during a marriage actually is non-marital because the source of funds for its acquisition was before the marriage, the burden is on that party to prove so. *Absher v. Absher*, 841 S.W.2d 293, 294-95 (Mo. App. 1992).

> Property acquired during the marriage is presumed to be marital property, but a party may overcome this presumption if he or she shows the property is separate. The spouse asserting property is separate has the burden to overcome the presumption of marital property and demonstrate by clear and convincing evidence that the property falls under one of the exceptions set out in section 452.330.2.

S.M.S. v. J.B.S., 588 S.W.3d 473, 486 (Mo. App. 2019) (internal citations and quotation marks omitted). (Whether the standard of proof is clear-and-convincing or preponderance, as Wife argues (Aplt.Br. 39-42), is a distinction without a difference on appeal, where the standard is abuse of discretion. *Ivie v. Smith*, 439 S.W.3d 189, 200 (Mo. banc 2014).)

So, when a spouse acquires a 100% ownership interest in a corporation after the parties' marriage, that interest is presumed marital. To overcome that presumption, the spouse has the burden to prove she acquired her interest in the corporation by one of the methods in § 452.330.2. In *In re Marriage of Dolence*, 231 S.W.3d 331, 337 (Mo. App. 2007), the husband

acquired his 100% ownership interest in a Subchapter-S corporation farm business after marriage, making it presumed marital. But believing the husband's testimony that the farm property he acquired before marriage was his non-marital property and the corporation was formed solely from those non-marital assets, the trial court held the corporation remained the husband's non-marital asset because its stock was in exchange for the non-marital property, and this Court affirmed. *Id.* at 337-38.

But if that spouse does not sustain her burden to overcome that presumption, the ownership interest in the corporation acquired during the marriage remains marital. In *Kauffman v. Kauffman*, 101 S.W.3d 42, 42 (Mo. App. 2003), the husband acquired an interest in a limited partnership with his father during the marriage, which he showed was a gift from his father. But he also acquired a half interest in a corporation with one of his brothers during the marriage, as well as a half interest in a partnership with another of his brothers. *Id.* at 42-43. The trial court found all three interests were the husband's separate, non-marital property. *Id.* at 42. This Court affirmed the finding about the limited partnership interest because the husband had shown the source of funds was non-marital, but it reversed the finding about the other two interests. *Id.* at 42-43. There was "no evidence that his interest in" those other entities was his separate property. *Id.* at 43.

As well, because the source-of-funds rule is not all-or-nothing, an interest in a corporation acquired in part before marriage and in part during marriage is both non-marital and marital in proportion to those portions. In *In re Marriage of Holden*, 81 S.W.3d 217, 221 (Mo. App. 2002), the husband

owned 50% of some stock in a corporation prior to marriage, so that half was non-marital. But he acquired the other half after the marriage. *Id.* "The 50% acquired during the marriage is presumed to be marital according to § 452.330.3, and Husband, as the party questioning the presumption, has the burden of proving otherwise." *Id.* He did not prove "that the stock was exchanged for nonmarital property under the exception to marital property found under § 452.330.2(2)," so the trial court had to find 50% of the husband's interest in the corporation marital and 50% was non-marital. *Id. Cf. In re Marriage of McMillin*, 929 S.W.2d 947, 950 (Mo. App. 1996) (wife's half of her interest in commercial building obtained before marriage was non-marital, but her other half obtained during the marriage was marital).

Finally, when a spouse receives funds from the sale of a business during a marriage, those funds are marital if their source – the interest in the business for which they were received – was marital. In *Sauer v. Newman*, 666 S.W.2d 811, 814-15 (Mo. App. 1984), the parties acquired a business during the marriage, which was not included in their dissolution, but the wife then sold it after the marriage for $55,000. In a separate action to divide the proceeds from that sale, the Court agreed they remained marital property and dividing the full $55,000 was correct:

> the facts in the case under review require a finding that the trial court was correct in valuing the … business at the $55,000.00 sale price because the business remained marital property until it was sold, not having been distributed in the earlier dissolution action. Because the business was marital property when sold, the sale proceeds were marital property ….

Id.

D. The trial court correctly found half the proceeds of TCG's sale Wife received during the marriage was marital property because Wife personally had acquired half her interest in TCG during the marriage, and the trial court must be presumed to have disbelieved Wife's testimony and other evidence to the contrary.

Wife argues that under § 452.330, the trial court was bound to hold all $1.95 million of the proceeds she received from the sale of TCG was her separate, non-marital property. First, she says this is because she introduced evidence that SLC, and not her personally, acquired the interest in TCG (Aplt.Br. 30). Second, she says this is because the interest she acquired in TCG was in exchange for property she owned before marriage, making it non-marital under § 452.330.2(2) (Aplt.Br. 38).

Both of Wife's arguments are in error. Wife fails in any way to view the evidence most favorably to the trial court, list all the evidence supporting its decision, or allow in any way for its obvious credibility determinations. As the sole judge of credibility and the weight to give evidence, the trial court's finding that half the proceeds of the sale of TCG was marital property was entirely proper. It was a reasonable theory supported by the evidence.

Wife received the proceeds from the sale of TCG in February 2020 (Tr. 12, 34). While this was after the parties "physically separated," they "were not *legally* separated at the time, however, so under § 452.330.3" those proceeds are presumed marital property. *Kauffman*, 101 S.W.3d at 43 (emphasis in the original). Therefore, to overcome that presumption by showing the source of those funds was non-marital, Wife had the burden to prove so. *S.M.S.*, 588 S.W.3d at 486.

The trial court found Wife "acquired one-half of her interest in TCG Futures/The Cooper Group after the date of the marriage" (D30 p. 6). Therefore, it found the proceeds from the sale of TCG "are part marital and part non-marital," because Wife "owned one-half the company prior to the marriage and she acquired the other one-half the company during the marriage. The company sold for 1.95 million of which $975,000.00, one-half (50%), is [Wife]'s non-marital property. The remaining $975,000.00, one-half (50%), is found to be marital property" (D30 p. 7)

Wife now argues this was error, because it was not *she* who acquired the interest in TCG *personally*, but rather SLC, so there was no change to her ownership of the business during the marriage (Point I) and the interest she acquired in TCG was in exchange for SLC, which was property she owned before marriage (Point II). Wife's argument fails the standard of review.

At trial, Wife maintained "TCG Futures" was the same entity as Cooper Moeller, only with a different name, and SLC owned 100% of it (Tr. 34-35, 92). She specifically said "SLC became the owner of TCG Futures" (Tr. 34). But at another point, she agreed with her counsel's statement, "SLC II ultimately became TCG Futures, doing business as The Cooper Group" (Tr. 57-58). And at another still, she countered Husband's counsel's statement that she owned 100% of the business by stating "SLC owned 100 percent" (Tr. 90). So, at one point, she said TCG was the same entity as Cooper Moeller, but at another she said SLC became TCG.

The trial court was entitled to disbelieve all of this and therefore find Wife did not meet her burden. Rule 73.01 requires this Court to presume it

did exactly that. *See* above at pp. 30-34. Essentially, Wife was attempting to suggest she had no personal ownership interest in TCG so as to keep 100% of the sale proceeds, when the evidence plainly showed otherwise.

Wife's statement about what evidence supported the trial court's finding that she personally acquired half of TCG during the marriage (Aplt.Br. 32) is lacking. First, in her answer to Husband's first amended counter-petition, Wife admitted she personally was the owner of TCG: "Petitioner, Sandra Kaderly, admits that she was the owner of TCG Futures, LLC d/b/a The Cooper Group and that the entity conducted business during the marriage" (D16 p. 2). The trial court was entitled to take this as an admission that Wife personally, and not SLC as she testified, owned TCG. "Allegations in a petition which are admitted in an answer do, in fact, constitute judicial admissions, for which production of evidence on the issue is not required and the fact is conceded for the purpose of the litigation that the certain proposition is true." *Creech v. MBNA Am. Bank, N.A.*, 250 S.W.3d 715, 717 (Mo. App. 2008).

Second, while Wife claimed SLC owned TCG, purported tax returns Wife introduced for herself and for TCG show she personally owned 100% of TCG beginning in April 2017. Wife never acknowledged this in her testimony, instead insisting SLC, and not her, owned TCG. But on all the purported TCG tax returns Wife introduced, from 2017, 2018, and 2019, Wife was listed personally as the "100%" owner of TCG by name and Social Security number (Ex. 27, pp. 11, 25; Ex. 47, pp. 11, 28; Ex. 48, pp. 11, 31). And on her only purported personal tax return in the record, from 2019, Wife

listed income directly from TCG – not from SLC – in her Schedule E (Ex. 54, p. 9), the numbers on which corresponded to the purported K-1 TCG issued directly to her that year (Ex. 48, p. 11). Similarly, the copy of the buy-sell agreement with Veritext Wife introduced listed her personally as TCG's only member (Ex. 50).

Wife introduced materials purporting to be from the transfer between SLC and GRM (Ex. 20) and tax returns for Cooper Moeller LLC from 2015-2017 listing "SLC" and "GRM" as its owners, with SLC eventually owning 100% and GRM owning 0% (Ex. 26, pp. 7-9; Ex. 45, pp. 8-13; Ex. 46, pp. 8-13).

But Wife's testimony was silent about how SLC's supposed interest in Cooper Moeller turned into her own personal 100% interest in TCG, also never mentioning her personal 100% interest in TCG at all. The only mention of this was from her expert, Mr. Barberich, who suggested that at some point, Wife "exchanged her 100% ownership interest in SLC II for SLC II's 100% ownership interest in TCG Futures, because TCG Futures was SLC II's sole income producing asset" (Ex. 31, p. 11). He described this as "the effect of it is she's swapping her ownership interest for SLC II for its ownership interest in TCG Futures" (Tr. 156). But "the trial court can choose to disbelieve even uncontradicted expert testimony." *Stine v. Stine*, 401 S.W.3d 567, 571 n.3 (Mo. App. 2013).

So, the trial court had Wife's admission in her answer that she personally was the owner of TCG, her and TCG's tax returns beginning in year 2017 showing that from its inception, she was its 100% owner, and Wife's testimony that before April 2017, she only owned 50% of the business.

It was entitled to believe all of that and conclude, as in *Holden*, that 50% of Wife's interest in TCG on its sale to Veritext was marital property and 50% was non-marital, and so 50% of the sale proceeds were marital property and 50% were non-marital.

Simultaneously, the court was entitled to disbelieve Wife's contrary – and contradictory – testimony that SLC, and not her personally, owned TCG, that SLC, and not Cooper Moeller, became TCG, or that what she acquired during the marriage was the same as what she owned before the marriage, as well as Wife's expert's singular testimony about how Wife came to own 100% of TCG personally, when Wife herself did not acknowledge that.

The court especially was entitled to disbelieve Wife's self-serving testimony considering she already had attempted to hide details about the sale to Veritext and her ownership of these entities. In her initial statement of assets and debts Wife filed in April 2020, which she omits from the record, she did not list any interest in a business, the Commerce Bank account where the proceeds of the sale to Veritext went, or any values for any business assets or retirement assets (Tr. 120-23; Ex. 217). Then, when during discovery, Husband's counsel tried to get documents about the sale of TCG to Veritext, Wife did not provide them, and she then was unable to give a reason for that at trial (Tr. 95-96, 133-34). This forced Husband to add TCG as a party to the case, which Wife opposed, (D9; D10; D13; D14), only then enabling Husband's counsel to obtain documents about the sale (Tr. 96, 134).

The court also was entitled to infer from the timing of Wife filing for dissolution that it was in an attempt to keep all the proceeds from the sale.

Veritext first approached Wife in Spring 2019 (Tr. 61). Husband said Wife left the marital home abruptly in September 2019 and denied her stated reason for it (Tr. 137, 141). Wife admitted that if TCG had failed, she and Husband would have had to pay back the business's obligations (Tr. 93-94). But she admitted that if she had not filed for dissolution, "had we not been sitting here today, of course he would receive the benefits of the sale" (Tr. 94). Husband's attorney drew out the inference that she filed for dissolution "because you knew that Veritext was interested in your company and you wanted to make sure that you got it all?" (Tr. 94).

Wife's argument otherwise fails to pay the trial court's credibility determinations any heed. Indeed, she incorrectly argues "there was no credibility determination for the trial court to make to which this court should defer" (Aplt.Br. 34). This is untrue. Wife had the burden to prove that any portion of the sale proceeds of TCG was her separate property. The trial court assessed her and her expert's credibility, especially given her admissions, the contradictions in her testimony and evidence, what other documentary evidence showed, her attempts to hide evidence from Husband, and her motives, and found she had not met that burden with respect to 50% of those proceeds. That finding is supported by the evidence, which the trial court properly weighed within its discretion.

None of the decisions Wife cites change this.

In *Penn v. Penn*, 655 S.W.2d 631, 632 (Mo. App 1983), the Court held a trial court cannot directly award assets of a close corporation to a spouse. Plainly, the trial court did no such thing here.

In *Hoffman*, 676 S.W.2d at 822-23, the Court *affirmed* a finding that an increase in ownership of a business *was not* marital. But "[t]he fact that the appellate court [in one case] did not find that the trial court abused its discretion in" making a determination "is not authority for the proposition that a trial court abuses its discretion if it" makes a contrary determination "in another case." *Hill v. City of St. Louis*, 371 S.W.3d 66, 78 (Mo. App. 2012). "An argument to the contrary ignores the nature of judicial discretion." *Id.*

In *S.M.S.*, 588 S.W.3d at 492-93, the trial court misinterpreted the meaning of the word "dividend" in a corporate consent document, directly leading it to misclassify the issuance of some stock as marital, but requiring remand for further findings. Similarly, in *Comninellis v. Comninellis*, 99 S.W.3d 502, 506-07 (Mo. App. 2003), there was no evidence the parties actually owned a house, and instead the only evidence was it was titled in the name of the husband's corporation, making it a corporate asset. And in *Watkins v. Watkins*, 924 S.W.2d 542, 545-46 (Mo. App. 1996), the party with the burden to prove the increase in value of property the trial court *found* to be non-marital did not meet that burden. Unlike in *S.M.S.* or *Comninellis*, this case turns on credibility determinations. And unlike in *Watkins*, the trial court here found Wife *had not* met her burden as to 50% of the proceeds.

Viewing the evidence in the light most favorable to the trial court's judgment, the trial court was well within its discretion to hold Wife personally acquired 50% of TCG during the marriage, making 50% of the proceeds of its sale marital property.

E. Alternatively, the trial court must be presumed to have determined SLC or TCG were Wife's alter egos or mere instrumentalities and disregarded the corporate entities to find Wife personally acquired half of TCG during the marriage, which was also proper.

At the end of the argument over her first point, Wife also argues the trial court could not have disregarded SLC and determined she personally acquired the interest in TCG (Aplt.Br. 35-36). This is equally in error.

Wife argues this could not have been at issue because "no claim was made and no evidence was presented of facts that provided a basis for disregarding the SLC or TCG corporate entity" (Aplt.Br. 35). This is untrue. Husband's counsel argued several times that Wife was "trying to play shell games with corporations and companies" and asked to "stop with the shell games" (Tr. 91). Husband also introduced evidence to support this theory, as addressed below.

Moreover, because neither party asked the trial court to make findings on whether SLC was Wife's alter-ego, it did not have to. Rule 73.01(a). Therefore, under Rule 73.01(c), this Court must consider this issue "as having been found in accordance with the result reached." And the trial court's judgment "will be affirmed under any reasonable theory supported by the evidence …." *Trimble*, 167 S.W.3d at 716.

Wife characterizes disregarding an entity as "piercing the corporate veil" (Aplt.Br. 35-36). But veil-piercing is only one method for doing so, especially in dissolution cases. Another is the alter-ego or instrumentality rule. "[U]nder the alter ego or instrumentality rule, when a corporation comes under the domination of a person such as to have it become a mere

instrument of that person, and is really indistinct from the person controlling it, then the corporate form will be disregarded, if to retain it would result in injustice." *Morgan v. Ackerman*, 964 S.W.2d 865, 870 (Mo. App. 1998). This is true when one spouse owns 100% of a closely held corporation, makes all corporate decisions, and freely uses personal assets in the business. *Id.* (citing *Boudreau v. Benitz*, 827 S.W.2d 732, 734 (Mo. App. 1998)).

Here, even under her testimony, Wife was SLC's and TCG's sole member and controlled them and all of their corporate decisions.

More importantly, Wife freely used personal assets in the business, paying personal bills out of the corporation (Tr. 202-03). Husband testified:

> She's bought cars, she's bought -- and this is just in 2020, but even when we were together, the amount she paid herself isn't reflective of the amount of money that she used for us -- for her or us, whatever. That's just what she's putting on her taxes. There were numerous things that she charged off to the company that's personal. I would say it reflects half of what she truly paid herself, because she paid a lot of things out of the corporate accounts.

(Tr. 203).

Even Wife's own evidence shows this. Throughout the marriage, she ran TCG out of an office in the marital home (Tr. 97, 144, 203). But the 2019 personal tax return she introduced does not report any rental income received for that office (Ex. 54, p. 9). And Husband expended his own labor and funds to upgrade Wife's office and to move the business (Tr. 203-04).

So, Wife used SLC and TCG as her own piggy bank and gave TCG the home office marital asset. The trial court had discretion to determine allowing this but declaring the business 100% non-marital would be unjust.

In the sole decision Wife cites in this part of her argument, *Taylor v. Clark*, 140 S.W.3d 242, 254-55 (Mo. App 2004), this Court affirmed a finding *not* disregarding a corporate entity. That "is not authority for the proposition that [the] trial court abuse[d] its discretion" by making a contrary determination here. *Hill*, 371 S.W.3d at 78.

The trial court was entitled to believe that SLC and TCG were indistinct from Wife. As in *Morgan* and *Boudreau*, viewing the evidence in the light most favorable to the judgment, it properly could find Wife's corporations were her alter egos or instrumentalities. Therefore, disregarding the entities, the trial court could find Wife personally acquired half of TCG during the marriage regardless of SLC, making that half – and so half the funds received for its sale – marital property.

F. If the Court disagrees and finds all the TCG sale proceeds had to be considered Wife's non-marital property, remand would be required to re-divide the marital estate.

In the conclusion to her brief, citing no authority besides the bare Rule 84.14, Wife argues the Court should simply reverse the portions of the trial court's judgment distributing half the sale proceeds of TCG and ordering her to pay Husband $200,000 (Aplt.Br. 67-68). She says this is because while this "would result in a disproportionate division of marital property …, [she] does not request any payment for equitable division of property" (Aplt.Br. 68).

Wife's argument is in error. Whenever this Court holds there was an erroneous designation of significant property as marital, the case must be remanded to the trial court for a re-division of the marital estate. In *Coffman*

v. Coffman, in which an erroneous designation of a disability pension as marital was held to require remand, the Court observed this is

> [b]ecause the trial court's erroneous designation … may have affected its division of the marital property and debts and its decision regarding maintenance, on remand, the trial court may, in its discretion, reconsider its division of the marital property and debts and its maintenance award. *See Comninellis*, 99 S.W.3d at 515; *In re Marriage of Michel*, 142 S.W.3d 912, 923 (Mo. App. 2004); *see also Hill v. Hill*, 67 S.W.3d 659, 661 (Mo. App. 2002) ("When an appellate court changes one part of the decree, upon remand, the trial court may reconsider other portions of the decree in light of that change.").

215 S.W.3d 309, 312-13 (Mo. App. 2007) (joined by Breckenridge, J.) (format of internal citations modified). *See also Schutter v. Seibold*, 540 S.W.3d 494, 501 (Mo. App. 2018) (erroneous classification of 401(k) account as marital, remanding for redivision of marital estate); *Jenkins v. Jenkins*, 368 S.W.3d 363, 370 (Mo. App. 2012) (same re: erroneous classification of wedding rings as marital); *Goodwin v. Goodwin*, 263 S.W.3d 703, 707 (Mo. App. 2008) (same re: erroneous classification of real property as marital).

This makes sense. The reclassification of property as non-marital, especially $975,000 in an estate worth $993,000 as here, would bring up a host of other issues. *Id.* (noting one question on remand would be the extent of the respondent's contribution to that now non-marital property). Indeed, "[t]he value of the nonmarital property set apart to each spouse" itself is a factor the trial court must consider in dividing the marital estate. § 452.330.1(3), R.S.Mo. If $975,000 of the $993,000 marital estate is suddenly reclassified as non-marital, that dramatically would change the values in the factors used in dividing the marital estate itself.

III. Because the trial court found 50% of TCG's sale proceeds were a marital asset, it did not reach the increase in value of TCG during the marriage or whether any of it was marital; but if the Court agrees with either of Wife's first two points, remand also would be required to determine those issues, too.

(Response to Appellant's Points III and IV)

Additional Standard of Review

"The trial court has considerable discretion in determining whether, as a result of marital services or labor, non-marital property has increased in value and whether this increase should be determined to be marital property." *Klaus v. Klaus*, 918 S.W.2d 407, 409 (Mo. App. 1996). This Court "will not disturb the trial court's decision on such matters without a clear showing of abuse of discretion." *Id.*

The standard of review for abuse of discretion is above at p. 35.

* * *

Wife's third and fourth points concern the valuation and division of the "increase in value" of TCG during the marriage. In her third, she argues the trial court improperly valued that increase, because it had to begin with the date she acquired TCG, not the date of marriage (Aplt.Br. 48-52). In her fourth, she argues the trial court improperly found half the proceeds were marital due to contribution of marital efforts and assets (Aplt.Br. 53-67).

At the outset, and as mentioned above at p. 37, both these points fail because the trial court never actually reached any question about TCG's increase in value. Instead, the court found half the TCG sale proceeds itself was actual marital property and divided it.

Wife says "[t]he trial court's finding that the $1,950,000 TCG sale proceeds resulted from Wife building the value of TCG during the marriage and that Cooper-Moeller/TCG had a negative net worth at the time of the April 2017 Membership Transfer indicates that the Court found that the business value increased by 100% during the marriage" (Aplt.Br. 49). This is untrue. The court made no finding about the increase in the value of TCG or whether that was marital or not.

That the increase in value of the business was marital and should be divided was Husband's alternative argument in case the court found all the sale proceeds were non-marital. The trial court finding half the value of TCG was marital foreclosed such an argument.

When one spouse owns property before a marriage, but marital efforts contributed to that property increase its value, that increase is "marital equity" subject to division. In *McKown v. McKown*, 108 S.W.3d 180, 184-85 (Mo. App. 2003), for example, the husband bought what became the marital residence before the marriage, but income acquired during the marriage – a marital asset – was used to pay the mortgage. The trial court figured out what that proportion was and awarded it to the wife as her "marital real estate equity." *Id.*

Under this principle, it is well-established that if a spouse owns an interest in a business before the marriage but during the marriage marital assets, including the other spouse's labor, are contributed to the business, the otherwise nonmarital increase in the business's value transmutes to marital property. *See, e.g.*, *Torres v. Torres*, 606 S.W.3d 168, 177-78 (Mo. App. 2020);

In re Marriage of Hillis, 313 S.W.3d 643, 645 (Mo. banc 2010); *Rhodus v. McKinley*, 16 S.W.3d 615, 618-19 (Mo. App. 2000); *Klockow v. Klockow*, 979 S.W.2d 482, 488-89 (Mo. App. 1998); *Glenn v. Glenn*, 930 S.W.2d 519, 524-25 (Mo. App. 1996).

So, here, as an alternative in case the trial court held all of Wife's interest in TCG to be non-marital and therefore all the funds from its sale non-marital, Husband argued that if that were so, the increase in value in TCG during the marriage remained marital property for this reason. But the court ultimately did not need to reach that. As the proceeds of sale were available and held to be half marital property, this was no longer an issue.

Still, if the Court somehow agrees with Wife on either of her first two points and holds the sale proceeds were entirely non-marital property, this is another reason remand would be necessary. Husband's claim to a marital portion of the increase in value of that otherwise non-marital asset during the marriage would be reactivated and would have to be decided.

To that end, Wife is wrong in her third point that, from the evidence, the trial court could not hold the increase in value during the marriage was $1.95 million. While "[t]he object of any valuation of a business is, of course, to determine its" fair market value, just as with any piece of property "[n]o one formula or method of determining value is binding or conclusive." *Nelson v. Nelson*, 195 S.W.3d 502, 507 (Mo. App. 2006) (citing *Thill v. Thill*, 26 S.W.3d 199, 203 (Mo. App. 2000)). So, "the trial court can accept the opinion of one expert as to the value over another and can prefer one method of valuation over competing methods based on the particular facts of the case

and the circumstances of the corporate entity involved." *Id.*; *see also Tarneja v. Tarneja*, 164 S.W.3d 555, 559 (Mo. App. 2005).

Here, Wife testified that when she began TCG, which she said was in April 2017, it had over $200,000 in liabilities and was worth less than zero (Tr. 91-92). Wife's expert agreed this may well have been so (Tr. 163, 174). In Missouri, the owner or owners of property are presumptively competent to testify as to their opinion of the property's worth. *Nelson*, 195 S.W.3d at 508. So, the trial court could accept that in April 2017, TCG's value was zero.

Similarly, the "fair market value approach" of "the price [a business] would bring were it sold on the open, relevant market" is always a permissible method of valuing a business. *Hanson v. Hanson*, 738 S.W.2d 429, 435-36 (Mo. banc 1987); *see also Wood v. Wood*, 361 S.W.3d 36, 39 (Mo. App. 2011). So here, where there was an arm's-length transaction for the purchase of TCG for $1.95 million, the trial court could hold that was its value on its dissolution. Indeed, Wife's own expert testified that sale price was TCG's fair market value at the time it was sold (Tr. 161-62).

Accordingly, the trial court properly could hold on remand that the increase in the value of TCG during the marriage was $1.95 million.

The trial court also properly could hold on remand that half or more of the increase in TCG's value during the marriage was marital property subject to division. Wife argues it could not, because there was insufficient evidence of Husband expending any substantial services for the business during the marriage, relying primarily on *Meservey v. Meservey*, 841 S.W.2d 240, 245-46 (Mo. App. 1992). Wife's argument is in error.

Cardinally, Wife ignores that viewing the evidence most favorably to the trial court's decision, her business operated rent-free out of the marital home. *See* above at p. 50. She characterizes this as merely her "computer room," argues Husband had no idea what she did there, and discounts Husband's testimony that he expended marital funds and labor renovating it (Aplt.Br. 62-67). This again improperly fails to give deference to how the trial court could assess the evidence and credibility favorably to Husband. The trial court could disbelieve Wife, and must have done so as to her office.

Besides that, Wife only concentrates on Husband's lack of actual work for the business, citing *Meservey* for that proposition. But as this Court noted in *McKown*, even the Court in *Meservey* held that proving a contribution of substantial services "is not needed … when 'the marital partners sacrifice marital funds … in acquiring the increase." 180 S.W.3d at 184 (quoting *Meservey*, 841 S.W.2d at 246). Only if "the increase in value of the property was … due … only to 'general economic conditions'" unaffected by the other spouse or marital property is it not marital. *Id.* (quoting *Hoffman*, 646 S.W.2d at 824).

Here, as with the mortgage in *McKown*, the business's debt in *Rhodus*, and the business's operations in *Klockow* and *Glenn*, viewing the evidence most favorably to Husband's claim, the parties directly contributed marital assets to Wife's business: a rent-free office to base its operations out of and Husband's work renovating that office. *See Torres*, 606 S.W.3d at 176-77 (where marital building was used rent-free for husband's separate business,

among other reasons, trial court properly found increase in the value of his business during the marriage was marital property).

But the trial court did not reach these issues, because it found half the proceeds of the sale of TCG itself was marital property. If the Court somehow agrees with Wife that was error, it should remand this case to the trial court not only to re-divide the marital estate, as Husband explains above at pp. 51-52, but also to decide what the increase in the value of TCG was during the marriage and what portion of it, if any, was marital.

Conclusion

The Court should dismiss Wife's appeal. Alternatively, it should affirm the trial court's judgment.

Respectfully submitted,

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Certificate of Compliance

I certify that I prepared this brief using Microsoft Word for Office 365 in 13-point, Century Schoolbook font, which is not smaller than 13-point, Times New Roman font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and this Court's Rule 41, as this brief contains 13,933 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that I signed the original of this brief of the respondent, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on August 24, 2022, I filed a true and accurate Adobe PDF copy of this brief of the respondent via the Court's electronic filing system, which notified the following of that filing:

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