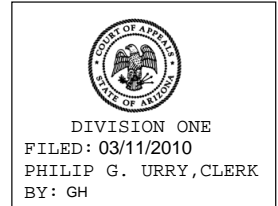


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



In re the Marriage of:) 1 CA-CV 09-0337
)
DIMITRI ROZENMAN,) DEPARTMENT B
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication
v.) - Rule 28, Arizona
) Rules of Civil
JANA ROZENMAN,) Appellate Procedure)
)
Respondent/Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC 2008-001839

The Honorable Randall H. Warner, Judge
The Honorable Peter C. Reinsteint, Judge

AFFIRMED

Murray Law Offices PC
By Stanley D. Murray
Attorneys for Petitioner/Appellant

Phoenix

J. Douglas McVay, Attorney at Law
Attorney for Respondent/Appellee

Phoenix

N O R R I S, Judge

¶1 Dimitri Rozenman ("Husband") appeals from a decree dissolving his marriage to Jana Rozenman ("Wife"). Husband argues the family court (1) improperly valued his business at

the time of termination of the community, (2) applied an unsubstantiated rate of return to determine the inherent nature of his business, (3) erroneously determined his business properties were community property, (4) improperly valued his business properties and vehicle, and (5) should not have awarded attorneys' fees to Wife. For the reasons below, we disagree with each of Husband's arguments and affirm the dissolution decree.

FACTS AND PROCEDURAL BACKGROUND

¶2 Husband and Wife married in 2003. In March 2008, Husband served Wife with a petition to dissolve their marriage. Before marriage, Husband had a cigar business, and during marriage he opened, incorporated, and operated retail locations and one internet site as part of his business. On January 22, 2009, the family court entered a decree dissolving the marriage, dividing the community's property and the community's interest in Husband's separate property, and awarding Wife her attorneys' fees. Husband timely appealed. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) and -2101(B) (2003).

DISCUSSION

I. Valuation and Characterization of Property

A. Valuation of Business and Applicable Rate of Return

¶3 In Arizona, "when the value of separate property is increased the burden is upon the spouse who contends that the increase is also separate property to prove that the increase is the result of the inherent value of the property itself and is not the product of the work effort of the community." *Cockrill v. Cockrill*, 124 Ariz. 50, 52, 601 P.2d 1334, 1336 (1979). The court must first determine the value of the separate property at the time of marriage and when the community ended; these numbers enable the court to calculate the increase of the asset's value. An increase which results "from a combination of separate property and community labor, must be apportioned accordingly." *Id.* at 54, 601 P.2d at 1338. In apportioning the increase between separate and community property, the family court "is not bound by any one method, but may select whichever will achieve substantial justice between the parties." *Id.*; *Kelsey v. Kelsey*, 186 Ariz. 49, 51, 918 P.2d 1067, 1069 (App. 1996).

¶4 Because the valuation of assets is determined "based on the facts and circumstances of each case," *Kelsey*, 186 Ariz. at 51, 918 P.2d at 1069, we will not set aside a court's valuation unless clearly erroneous. See *Castro v. Ballesteros-*

Suarez, 222 Ariz. 48, ___, ¶ 11, 213 P.3d 197, 200-01 (App. 2009).

1. *Business Value Methodology*

¶15 In adopting the market value approach to determine the value of the business as of the date the marital community terminated, the court reasoned:

The court finds that the value of Husband's business as of the date of marriage was \$177,023. This was its asset value as of December 31, 2003 as testified to by Husband's expert. By choosing asset value, the court is not making a finding that asset value is a superior measure than income value or market value. Rather, this was the only reasonable approximation of the company's value as of the date of marriage.

The court further finds that the value of Husband's business as of the termination of the marital community was \$517,884. This was Husband's expert's determination of the business's market value, which the court finds in this case to be a more credible and more reasonable measure of the company's true value.

Thus, the growth in the business's value during marriage was \$340,861. Although this is to some extent comparing apples to oranges, since the court is comparing a market value in 2008 to an asset value in 2003, the determination is reasonable for several reasons. First, there is no basis in the record for determining the business's market value in 2003, so the court could not have compared that figure. Second, because the business was relatively new in 2003 (especially the retail component), the difference between

market value and asset value would not be as great in 2003 as in 2008.

¶16 Husband contends the family court's use of the market value approach to value the business as of termination of the community was clearly erroneous because his expert testified the asset approach was the most appropriate valuation method.¹ Wife's expert, however, testified the market approach was "reliable" in this case because "the comps were good." Wife's expert also testified the asset value is "[u]sually a minimum value. It assumes that there's not any intangible value, there's not any goodwill value, there's not any value in the work force or the professional reputation . . . [of] the company." Husband's expert reported, however, that although "growth had started to slow down," the business had experienced substantial growth in sales (\$2,269,848 to \$3,753,330) as well as operating income (\$62,238 to \$119,845) from 2005 to 2007

¹After applying the income, asset, and market value approaches to value Husband's business at the termination of the community, Husband's expert recommended the asset value of \$274,000 because it "was higher than our value was under the income approach." Husband's expert applied the asset approach by calculating "the value of the assets less the value . . . of the company's liabilities," and explained the market value approach as "compar[ing] sales of similar businesses [using] various transactional databases that track sales of small private business[es]." Husband's expert testified the market value of Husband's business at the end of the community was \$517,884, but disfavored this approach because Husband's cigar business was unique and because he did not find the \$517,884 amount to be "financially feasible."

which translated to a compound annual operating income growth rate of 35%.

¶17 Given this evidence, the court's valuation of the business using the market approach was not clearly erroneous.

2. *Annual Rate of Return*²

¶18 Husband also contends the court's application of annual growth rates for cigar sales to determine the inherent value of his separate property interest in the business was clearly erroneous because his expert testified the business's actual growth rate during marriage was less than the reasonable rate of return -- which the expert asserted was 27% -- for an investor in the cigar business.³ Although not cited, Husband appears to be relying on one approach to apportionment

²In his opening brief Husband argues the evidence failed to show, contrary to what the family court found, that his labor contributed in part to the increase in the value of the business during marriage. Not only does Husband fail to adequately develop this argument for our review, but the record amply supports the family court's finding.

³Husband's expert settled on 27% after averaging the required rates of three different applicable methods. Husband's expert found the "implied rate of return [between the asset values of \$177,000 in 2003 and \$274,000 when the community ended] is 10.8 percent which is significantly below the required rate of return of 27 percent." Thus, Husband argues "all of the increase in value . . . was attributable only to the inherent nature of the business." The family court, however, did not use the asset approach to value the business as of the date the community terminated. See *supra* ¶¶ 5-6. Thus, it would have been incongruous for the court to accept Husband's implied rate of return calculated using the asset value.

identified by our supreme court in *Cockrill*: "the trial court may simply allocate to the separate property a reasonable rate of return on the original capital investment. Any increase above this amount is community property." 124 Ariz. at 54, 601 P.2d at 1338 (citing *Pereira v. Pereira*, 156 Cal. 1, 103 P. 488 (1909)).

¶19 The family court adopted this apportionment method but rejected Husband's 27% rate of return and found annual growth rates for cigar sales (as determined by Husband's expert) a more reasonable measure of the business's inherent growth. The court explained:

What portion of that \$340,861 was attributable to community labor? Husband's position is that the entire amount of the growth is attributable to the inherent nature of the assets, but the court does not find that view persuasive. Wife's position is that Husband has not established a reasonable basis for allocating the cause of the growth between Husband's labor and the inherent nature of the assets as of the date of the marriage. The court does not find that view to be persuasive because it ignores the value of what Husband brought to the business at the time of marriage.

The most reasonable basis in the record for determining the separate and community interests in the growth is to use the annual growth rates for cigar sales generally between 2003 and 2007, which are contained at page 11 of Trial Exhibit 50. In other words, absent Husband's labor, it is reasonable to infer that the business existing as of the date of marriage would

have grown at the same rate as cigar sales generally during that period.

That is, admittedly, a rough approximation. But in the absence of any better measure, it is a reasonable estimate of what the business assets would have earned without Husband's labor. The alternatives proposed by the parties are 0% (which Mother proposes) and 27% (which Father proposes). Neither position achieves substantial justice. The former does not adequately compensate Husband for his pre-marital contribution to the business; the latter over-compensates him.

¶10 We see no error in the family court's reliance on annual growth rates for cigar sales to determine what portion of the increase in the value of the business during marriage was attributable to its inherent nature and not Husband's labor. The court correctly recognized the 27% rate of return excluded any allocation of the increase to Father's labor during the marriage -- even though the evidence reflected the business had grown and increased in value during marriage through Father's labor. As Wife notes in her answering brief, the 27% rate of return "may be a relevant consideration for a buyer or investor but it is not a reliable tool to apportion total actual growth of a separate business during the marriage" because it failed to account for Husband's "labor during the time of the marriage."

B. *Characterization of Real Property*

¶11 Husband next argues the family court should have found real property in Mesa and Phoenix acquired by his business during marriage was his separate property.⁴ "Property acquired by either spouse during marriage is presumed to be community property, and the spouse seeking to overcome the presumption has the burden of establishing a separate character of the property by clear and convincing evidence." *Brebaugh v. Deane*, 211 Ariz. 95, 97-98, ¶ 6, 118 P.3d 43, 45-46 (App. 2005) (quoting *Thomas v. Thomas*, 142 Ariz. 386, 392, 690 P.2d 105, 111 (App. 1984)).

¶12 Here, the family court found as follows:

Husband has not met that burden. He did not present documentation at trial or credible testimony that exclusively sole and separate funds were used to purchase those properties, nor sufficient evidence to permit the court to trace sole and separate funds that were used to purchase those properties. The two parcels of real property are therefore community property.

¶13 The only evidence Husband presented to rebut the presumption the property was community property was his own testimony as to the origin of the funds used to acquire the property, a commitment letter from an alleged investor in the

⁴Husband also asserts he met his burden to show personal property acquired during the marriage was his separate property, but he fails to develop this argument, and thus we will not address it. See *Lohmeier v. Hammer*, 214 Ariz. 57, 64 n.5, ¶ 26, 148 P.3d 101, 108 n.5 (App. 2006).

Mesa property addressed "To Whom it May Concern," and confusing testimony from his expert about his efforts to "trace" proceeds from the refinance of property in Florida. As the trier of fact, the court was entitled to reject this evidence, *Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, 287, ¶ 12, 9 P.3d 314, 318 (2000) ("[t]he court or jury is not compelled to believe the uncontradicted evidence of an interested party"), and we defer to the family court's determination of a witness's credibility. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347-48, ¶ 13, 972 P.2d 676, 680-81 (App. 1998). The record supports the family court's factual findings and thus we agree with Wife Husband's "claim that the real property was his sole and separate property failed for lack of proof."

C. Valuation of Real and Personal Property

¶14 Husband also argues the court should have valued his real property and a vehicle according to what he testified they were worth. Again, we will not set aside a court's findings of fact unless clearly erroneous. *See supra* ¶ 4.

¶15 In the decree, the family court explained it "valued [the real property] as of current market conditions rather than as of the date the martial community dissolved, and . . . accepted [Husband's] appraiser's testimony regarding declines in

value since March 2008.”⁵ The court’s valuation of the real property is supported by substantial evidence and is not clearly erroneous.

¶16 Evidently relying on the parties’ pretrial statements, the family court awarded Husband the vehicle at “a value of \$16,322.” Citing Rule of Family Law Procedure 34(B), Husband argues that because Wife did not object to or contest his trial testimony the vehicle was worth \$5,600, “the pretrial statements were deemed amended” to conform to his valuation.⁶ Pursuant to Arizona Rule of Family Law Procedure 76(C)(1)(h) and (2)(c), however, Husband and Wife had listed as an uncontested fact the vehicle should be awarded to Husband at a value of \$16,322. The family court was not obliged to accept Husband’s trial testimony and could rely on the uncontested factual positions taken by the parties in their pretrial statements regarding the value of the vehicle. See generally *Carlton v. Emhardt*, 138 Ariz. 353, 355, 674 P.2d 907, 909 (App. 1983) (the joint pretrial statement “controls the subsequent course of the litigation”); *Harsh Bldg.*

⁵The court valued the property using current market values because “[s]ince the parties both had interests in those properties between March 2008 and the time of trial, the court finds it equitable that they share equally in the declines in value during that time.”

⁶Husband came to this valuation the day before trial: “I looked at [Blue Book] yesterday because I was trying to get more thorough information.”

Co. v. Bialac, 22 Ariz. App. 591, 593, 529 P.2d 1185, 1187 (1975) (parties are bound by their stipulations unless relieved by the court).

II. Attorneys' Fees

¶17 Husband argues the family court should not have awarded attorneys' fees to Wife. We review an award of attorneys' fees for an abuse of discretion. *Gutierrez*, 193 Ariz. at 351, ¶ 32, 972 P.2d at 684.

¶18 After considering the factors in A.R.S. § 25-324(A) (Supp. 2009),⁷ the court found "Husband [had] substantially greater financial resources than Wife." Contrary to Husband's argument, the court did not abuse its discretion in making this finding. The family court awarded Husband significant assets and Husband retained an income generating business which was projected to produce significant revenue.

III. Attorneys' Fees and Costs on Appeal

¶19 Both parties request an award of attorneys' fees and costs on appeal pursuant to A.R.S. § 25-324. After considering the statutory factors and in the exercise of our discretion, we

⁷Under A.R.S. § 25-324(A), the family court may order one party to pay the other party's reasonable attorneys' fees "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings."

award Wife her reasonable attorneys' fees and costs on appeal subject to her compliance with ARCAP 21.

CONCLUSION

¶20 For the foregoing reasons, we affirm the dissolution decree.

/s/

PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/

DANIEL A. BARKER, Judge

/s/

PETER B. SWANN, Judge