IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

In re the Marriage of:

JESSICA E. BOWSER, *Petitioner/Appellee*,

v.

SANG N. NGUYEN, *Respondent/Appellant*.

No. 1 CA-CV 19-0217 FC

FILED 7-16-2020

Appeal from the Superior Court in Maricopa County
No. FC2017-005446
No. FC2017-093323
(Consolidated)
The Honorable Rodrick J. Coffey, Judge

AFFIRMED

COUNSEL

Lewis Labadie, Tempe
By Brittany M. Labadie, Daniel A. Lewis
Counsel for Petitioner/Appellee

The Sampair Group PLLC, Glendale
By Patrick S. Sampair
Counsel for Respondent/Appellant

OPINION

Judge Randall M. Howe delivered the Opinion of the Court, in which Presiding Judge Samuel A. Thumma and Chief Judge Peter B. Swann joined.

H O W E, Judge:

¶1 Sang N. Nguyen ("Husband") appeals the family court's award of $38,750 of his negotiated employment severance package to Jessica E. Bowser ("Wife"). Husband argues, among other things, that his severance package was not community property because he signed his employment contract before he married Wife and because his severance package was negotiated and paid after he and Wife petitioned for dissolution of their marriage.

¶2 We hold that when community labor is expended in the acquisition of a future severance package, the community is entitled to a share of the severance, even if the severance was negotiated and paid after a petition for dissolution is filed. Because Husband's employment began and ended during the marriage, community labor was expended in the acquisition of his severance package. Therefore, the trial court correctly characterized his severance package as community property. And because we also reject Husband's other arguments, we affirm the family court's award of $38,750 to Wife.

FACTS AND PROCEDURAL HISTORY

¶3 Husband and Wife had a long-standing relationship, including having two minor children together. Husband signed an employment contract with Antronix ("Employer") on December 7, 2016. The contract included a term guaranteeing him a severance package equal to one year's salary if his employment was terminated during that first year, effective 2017.

¶4 Husband and Wife married on January 7, 2017, and petitioned for dissolution of their marriage on May 23, 2017. In the meantime, on January 16, 2017, Husband began working for Employer. On May 23, 2017, the same day that the petitions for dissolution were filed, Husband received an official letter of termination. Following confidential negotiations, Employer paid Husband $77,500 in severance—minus applicable taxes and

other withholding—and provided health insurance benefits for the family through the end of 2017.

¶5 Just before the dissolution trial, Husband and Wife resolved most issues by agreement. One of the issues that remained for trial was the character and division of the $77,500 negotiated severance. Husband and Wife both testified at the one-day trial. The family court entered a judgment, which included an award of half the gross severance pay to Wife as her community share. The court also awarded Wife $10,000 in attorneys' fees.

¶6 In January 2019, approximately two weeks after the judgment, Husband moved to alter or amend the judgment under Arizona Rule of Family Law Procedure 83, stating that the family court's award of $38,750 to Wife was an error of law. He attached a July 2017 paystub showing that, after taxes and withholding, he actually received only $41,040.61. Wife responded that Husband's motion was untimely and that the July 2017 paystub was not disclosed and included information not in the trial record. Because Husband's appeal of the severance pay issue was timely, his pending motion to amend was denied as moot.

DISCUSSION

¶7 Husband asserts that the family court erred by characterizing his severance as community property. He further argues that Wife received a windfall when she received $38,750 rather than half the net amount of the severance. We find the court correctly characterized the property and the record supports its award.

¶8 In a dissolution, the family court must divide community property equitably and assign each spouse his or her sole and separate property. A.R.S. § 25–213. The property's characterization is a question of law reviewed de novo. *Helland v. Helland*, 236 Ariz. 197, 199 ¶ 8 (App. 2014). We view the facts in the light most favorable to upholding the family court's decree. *See Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, 522 ¶ 2 n.1 (App. 2007).

¶9 Generally, community property includes "[a]ll property acquired by either husband or wife during the marriage." A.R.S. § 25–211(A)(1). Husband's performance under the employment contract occurred during the marriage and only during the marriage. No pre- or post-marital agreement changed the character of either partner's earnings. Nothing in the record showed that the couple treated Husband's earnings as separate property during the marriage. Husband even testified that had

the severance been paid out during the marriage it would have been community property.

¶10 Nevertheless, Husband asserts that (1) the severance was his separate property because he signed the employment contract before he was married pursuant to A.R.S. § 25–213(A); (2) the settlement was presumptively his separate property under A.R.S. § 25–213(B) because the severance was negotiated and paid out after the petitions for dissolution were served; and (3) her award, if any, should be half the net payout to have a fair and equitable division of property as required by A.R.S. § 25–318(A). To overcome the presumption of community property, Husband bore the burden to establish the separate property by clear and convincing evidence. *See Brebaugh v. Deane,* 211 Ariz. 95, 98 ¶ 6 (App. 2005). The family court was unpersuaded, as are we.

¶11 Any property earned through community effort is divisible in a dissolution of marriage. *Van Loan v. Van Loan*, 116 Ariz. 272, 274 (1977). "[P]erformance under the contract" occurred "during the marriage." *See, e.g.*, *Garrett v. Garrett*, 140 Ariz. 564, 567–68 (App. 1983). The fact that the contract was entered before the marriage does not control its character. *See id.* at 568 (App. 1983) ("it is theoretically immaterial if the contingency fee contract was entered into [before] marriage, if after marriage community labor was expended to bring it to fruition"). Nor does the character of the property change if the payout occurred after the petitions were filed. *See Van Loan*, 116 Ariz. at 273–74 ("The touchstone . . . revolves not around whether the employee's interest was 'vested' at the time of the divorce but whether his rights in the pension constitute a property interest or right purchased with community funds or labor."). Further, property acquired after service of a petition is generally the separate property of the acquiring spouse, except "[t]he service of a petition for dissolution does not alter the status of preexisting community property." A.R.S. § 25–211(B)(1).

¶12 Although we have never directly addressed the division of severance pay at dissolution, we have routinely found that where community labor is expended in the acquisition of future benefits (such as pensions or stocks), the community is entitled to share in those benefits to the extent community labor contributed to their acquisition. *See Van Loan*, 116 Ariz. at 274 (allocating military retirement benefits in dissolution action); *Johnson v. Johnson*, 131 Ariz. 38 (1981) (calculation of pension benefits in dissolution action). At that point, generally all that remains for the court is an assessment of the value of those rights. We need not undertake a valuation because Husband and Wife were married for longer than the course of the employment.

¶13 Husband next argues that Wife received a windfall when the family court ordered him to pay her $38,750 rather than half the net amount of the severance. Wife correctly asserts that Husband failed to introduce evidence about the net amount of the severance, even though Husband had already received the after-tax severance funds at the time of the trial. Husband also objected to a question asked about whether Wife was entitled to half the gross or half the net amount of the severance.

¶14 Husband's attempt to introduce net-pay evidence in the motion to amend was untimely. The evidence was not "newly discovered" because Husband had already been paid. *See* Ariz. R. Fam. Law P. 83(A)(4) (new evidence is "material evidence, newly discovered, which with reasonable diligence could not have been discovered and produced at the trial"). And our review is limited to the record before the court at the time of trial. *West v. Baker*, 109 Ariz. 415, 418–19 (1973). For that reason, we need not address whether the family court should have considered the net-pay issue.

ATTORNEYS' FEES

¶15 Wife requests her attorneys' fees pursuant to A.R.S. § 25–324. We are unpersuaded by Husband's assertions that Wife is not entitled to attorneys' fees on appeal. The evidence in the record is that, in November 2018, he earned approximately $155,000 annually where Wife earned $60,000. Further, Husband's asking this Court to divide the net severance was unreasonable given the factual background was neither disclosed nor included in the trial record. For these reasons, Wife is awarded her reasonable attorneys' fees and costs incurred on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶16 For the forgoing reasons, we affirm.

AMY M. WOOD • Clerk of the Court
FILED: AA