DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:	1 CA-CV 11-0714
CHARLES GERSTEN,	DEPARTMENT E
Petitioner/Appellant/ Cross-Appellee,	**MEMORANDUM DECISION**
ADAM GERSTEN,	(Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)
Intervenor/Appellant/ Cross-Appellee,	
v.	
ETHEL JOYCE GERSTEN,	
Respondent/Appellee/ Cross-Appellant.	

Appeal from the Superior Court in Maricopa County

Cause No. FN2005-051436

The Honorable Douglas Gerlach, Judge

AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS

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J O N E S, Judge[1]

¶1 Charles Gersten ("Father") appeals and Ethel Gersten ("Mother") cross-appeals various family court holdings made after we remanded this case following the prior appeal. We affirm in part, and vacate and remand in part with instructions.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The family court entered a decree of dissolution ("decree") on January 10, 2008. Father appealed several issues and we issued an opinion and a memorandum decision. *See Gersten v. Gersten*, 223 Ariz. 99, 219 P.3d 309 (App. 2009); *Gersten v. Gersten*, 1 CA-CV 08-0392, 2009 WL 3854335 (Ariz. App. Nov. 17, 2009) (mem. decision).

¶3 We instructed the family court on remand to decide first, whether and to what extent to allocate Mother's Employee Severance Plan annuity ("annuity") and Father's life insurance policies, *Gersten*, 1 CA-CV 08-0392, at *3, ¶¶ 11-12; second, whether Adam, the parties' adult son ("Son"), was disabled under

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[1]Pursuant to Article VI, Section 3 of the Arizona Constitution, the Arizona Supreme Court designated the Honorable Kenton D. Jones, Judge of the Arizona Superior Court, to sit in this matter.

Arizona Revised Statutes ("A.R.S.") section 25-320(E) (2012)[2] such that he was entitled to child support, *Gersten,* 223 Ariz. at 108, ¶ 27, 219 P.3d at 318; and third, whether Father was entitled to an award of attorneys' fees for the first trial, *id.* at 104, ¶ 13, 219 P.3d at 314.

¶4 On remand, the family court held Mother's annuity and Father's life insurance policies were each party's sole and separate property; Son was not entitled to child support from Mother, nor was Father; and neither Father nor Mother were entitled to an award of attorneys' fees.

DISCUSSION

I. Mother's Annuity

¶5 Mother's employer offered and she accepted an annuity of $60,236.65 -- essentially one year's salary -- payable in monthly installments, if she would agree to resign. As discussed, the family court held Mother's annuity was her sole and separate property, reasoning the annuity was a "severance package" to compensate her for future earnings, not a retirement benefit. We disagree and vacate this holding.

¶6 We review de novo the characterization of property as community or separate. *In re Marriage of Pownall*, 197 Ariz.

[2]Although the Arizona Legislature amended statutes cited in this decision, the revisions are immaterial. Thus, we cite to the current version of these statutes.

577, 581, ¶ 15, 5 P.3d 911, 915 (App. 2000). If retirement benefits are earned from employment during a marriage, then they are community property -- even if not distributed until after dissolution of marriage. *Van Loan v. Van Loan*, 116 Ariz. 272, 274, 569 P.2d 214, 216 (1977).

¶7 Mother argues the annuity represents future wages she would have earned post-dissolution "as a result of her decision to retire rather than continue working for that same employer." Father argues the annuity is like an early retirement benefit. He also argues the annuity must be community property because first, Mother received the annuity only because she had worked for her employer the required number of years all while married to Father; and second, she signed the agreement to receive the annuity and began receiving monthly payments before service of the petition for dissolution of marriage. We agree with Father.

¶8 In *Brebaugh v. Deane*, we held to classify husband's unvested stock options as community or separate property, a court must consider the "employer's intent in awarding the options." 211 Ariz. 95, 101, ¶ 25, 118 P.3d at 43, 49 (App. 2005) (citing *Ruberg v. Ruberg*, 858 So. 2d 1147, 1154 (Fla. Dist. Ct. App. 2003) (employer's expressed purpose is important factor in determining whether benefit is for past, present, or future services)). To determine the employer's intent, we

consider whether the employer "expressly stated" its purpose for giving the benefit. *Brebaugh*, 211 Ariz. at 101, ¶ 25, 118 P.3d at 49. If the employer intended to compensate the employee for past or current service, then the benefit is community property. *Id.*

¶9 Here, the language of the "Indication of Interest" form and "Release and Waiver of Claims Agreement" ("Agreement") Mother signed to receive the annuity shed light on the employer's purpose. The Indication of Interest form explained that in exchange for the annuity benefits, Mother agreed to resign from her employment and execute the Agreement. The Agreement explained the annuity was a severance incentive payment "not a fringe benefit" or "condition and terms" of employment. Mother signed the Agreement on October 4, 2004, her last day of work was in May 2005, and Father served the petition for dissolution of marriage in January 2006. Under the Agreement's express terms, Mother resigned effective at the end of her 2005 contract. Therefore, the severance incentive was payment to induce Mother to retire early.

¶10 On direct examination, the benefit coordinator for Mother's annuity testified the annuity was not a retirement benefit, but payment for future lost wages. However, on cross-examination, the benefit coordinator testified the annuity was

an "incentive plan" to save the employer money by encouraging higher paid employees to retire early. Thus, the annuity was more like an early retirement benefit based on years of past service than compensation for future lost wages.

¶11 Further, Father argues Mother's annuity is similar to the benefits in *Simon v. Simon*, 770 N.W.2d 683 (Neb. Ct. App. 2009). We agree. In *Simon,* the court held the husband's ("Richard's") benefit under the Early Leaving Incentive Program ("ELIP") was marital property subject to equitable division. *Id.* at 688. Richard was entitled to receive the benefit only because he was employed for the requisite number of years and agreed to resign. *Id.* In analyzing the benefit, the court noted the ELIP benefit was:

> completely earned and granted for past performance -- in this case, Richard's 30 years of work for [his employer], all of which time he was married to [his wife]. Moreover, Richard's choosing to terminate his employment with [his employer] is the precondition to his obtaining such benefits. Thus, in no sense can the ELIP payments be deemed a reward for future services, because his [] employment has ended.

Id. at 687.

¶12 Similarly, here, Mother was only offered the annuity because she worked for more than ten years for her employer. She was married for the duration of this employment. She

accepted the annuity, resigned, and began receiving the annuity payments all before service of the petition for dissolution of marriage. Thus, the annuity is community property.

¶13 Because we hold the annuity is community property, we next address the family court's alternative holding -- that it would be inequitable to award Father an interest in Mother's annuity ("alternative holding").

II. Equitable Division of Mother's Annuity

¶14 Father argues the court's alternative holding was improper because the court did not provide findings of fact and conclusions of law as he requested. We disagree.

¶15 "When a **timely** request for findings is submitted, the trial court must make findings concerning *all* of the ultimate facts." *Elliott v. Elliott*, 165 Ariz. 128, 134, 796 P.2d 930, 936 (App. 1990) (boldface added, italics in original). Although Father requested findings almost a year before the second trial, he did not mention his request in his pre-trial memorandum, nor did he renew his request in his "Summary of Requested Orders," which he attached to his post-trial memorandum. Thus, Father did not timely request findings of fact and conclusions of law. Moreover, Father's failure to object in the family court constitutes waiver. *Id.* at 134, 796 P.2d at 936.

¶16 Nevertheless, the family court failed to sufficiently articulate the rationale supporting its alternative holding that it would be inequitable to award Father any part of Mother's annuity. *See Ellingson v. Fuller*, 20 Ariz. App. 456, 460, 513 P.2d 1339, 1343 (1973) (purpose behind requiring family court, upon request, to make findings of fact, is to enable appellate court to examine the basis upon which the family court relied in reaching its ultimate judgment). Although normally we would presume the factual findings necessary to affirm the family court's ruling where evidence in the record supports it, we cannot do so here. *See Neal v. Neal*, 116 Ariz. 590, 592, 570 P.2d 758, 760 (1977) (Appellate court presumes family court "found every fact necessary to support the judgment, and such presumptive findings must be sustained if the evidence on any reasonable construction justified it.") (citation omitted). While the family court previously found Mother's annuity was separate property and its division of property was equitable, the record on appeal is insufficient for this court to determine that the division of property continues to be equitable in light of our determination that Mother's annuity is community property.

¶17 We therefore vacate the portion of the family court's order concerning the annuity and remand for reconsideration and

findings in light of our characterization of Mother's annuity as community property. Because we vacate the court's characterization of Mother's annuity and remand, we decline to address Father's other arguments on this issue.

III. Due Process

¶18 Father argues the family court violated his due process rights by reviewing the entire record before issuing its alternative holding. We disagree. Although Father alleges a due process violation, he fails to articulate how he was prejudiced by the court's review of the entire record, or how he was denied notice and an opportunity to be heard when the evidentiary hearing focused on the characterization and division of property.

IV. Child Support

¶19 As discussed, we previously instructed the family court to decide whether Son is disabled under A.R.S. § 25-320(E) such that Son is entitled to child support. On remand, the family court held Mother did not owe child support under A.R.S. § 25-320(E)(1),[3] which refers to A.R.S. § 25-320(D) -- the Child

[3]A.R.S. § 25-320(E) provides:

> Even if a child is over the age of majority when a petition is filed or at the time of the final decree, the court may order support to continue

Support Guidelines ("Guidelines") -- and Father and Son failed to meet their burden of proof with "persuasive, competent evidence" that Son was disabled before reaching the age of 18.

¶20 Father argues, first, the court had already found Son was disabled and thus, the evidentiary hearing on remand should only have been to determine the amount of support owed to Son. We disagree. Although the decree concluded Son was "in fact disabled," the court did not find Son was "severely" disabled as required by A.R.S. § 25-320(E)(2). Thus, the family court properly considered the issue of whether Son was severely disabled at the evidentiary hearing.

¶21 Second, Father argues the family court abused its discretion by holding Father and Son failed to meet their burden

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> past the age of majority if all of the following are true:
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> 1. The court has considered the factors prescribed in subsection D of this section.
>
> 2. The child is severely mentally or physically disabled as demonstrated by the fact that the child is unable to live independently and be self-supporting.
>
> 3. The child's disability began before the child reached the age of majority.

of proof with "persuasive, competent evidence" that Son was disabled before reaching the age of 18. We disagree.

¶22 We review child support awards for an abuse of discretion. *Fuentes v. Fuentes*, 209 Ariz. 51, 54, ¶ 10, 97 P.3d 876, 879 (App. 2004). A court abuses its discretion if there is no competent evidence to support its decision or if the court commits an error of law. *Id.* at 56, ¶ 23, 97 P.3d at 881.

¶23 At trial, the only evidence Father and Son presented that Son was severely disabled before he turned 18 was a letter dated September 21, 1998, from Dr. Kevin W. Olden -- a doctor who first saw Son when he was 21 -- that stated Son's disability began in 1992, when Son would have been 16. The letter, however, did not state Son was severely disabled before reaching age 18, such that he was unable to live independently and be self-supporting, as required by A.R.S. § 25-320(E)(2). Beyond failing to establish Son was severely disabled before reaching age 18, a letter from Dr. Arthur D. Shiff, dated January 14, 1994, when Son was 17, stated Son's condition was -- by that time -- actually in remission. In apparent contradiction to the requirement of A.R.S. § 25-320(E)(2) that Son establish an inability to live independently, Son attended college and lived away from home. Further, Son did not apply for Social Security Income, Medicare, or undergo surgical treatment until after he

turned 18. This court also notes Son has become caregiver for his ailing Father, obtained his license to drive and thereby provided transportation for Father, and assisted Father in the course of these proceedings by drafting his pleadings. Thus, on this record we cannot say the court abused its discretion in holding Son was not severely disabled before reaching the age of majority as required by A.R.S. § 25-320(E).

¶24 Because Son did not meet the statutory requirements of A.R.S. § 25-320(E) for an award of child support, we need not address Father's argument that the family court improperly calculated child support.

V. Father's Insurance Policies

¶25 We review de novo the family court's characterization of Father's insurance policies as his sole and separate property. *In re Pownall,* 197 Ariz. at 581, ¶ 15, 5 P.3d at 915. In the first trial, Father argued his insurance policies were separate property because he purchased them with his Federal Employees' Compensation Act ("FECA") funds, which he argued were separate monies. In our previous decisions, we explained Father's FECA benefits were community property during the marriage and directed the family court to determine whether these policies were Father's separate property or a community

asset. *Gersten,* 223 Ariz. at 315-16, ¶¶ 17-21, 219 P.3d at 105-06; *Gersten,* 1 CA-CV 08-0392, at *3, ¶ 11.

¶26 On remand, Father testified in his deposition, which was admitted at trial, he purchased two whole-life insurance policies in 2003 from a cash inheritance, dividends from stock, and proceeds from stock sales he received from his mother when she passed away. He further testified he put his inheritance into a separate bank account and never disclosed it to Mother. For both policies, Father testified he paid approximately $40,000 as an initial "down" payment. He admitted, however, he paid the monthly combined premiums for both policies of $225 from his FECA benefits since 2005. Mother testified she believed other life insurance policies previously existed, which Father cashed out to buy the new policies, but admitted this was speculation. Father testified the two previous policies were term life insurance policies, which would not have any cash value. Although the evidence was mixed, the family court found Father's testimony rebutted the presumption the policies were community property because they were purchased during the marriage, and thus, held Father's insurance policies were his sole and separate property. *See Hatcher v. Hatcher*, 188 Ariz. 154, 157, 933 P.2d 1222, 1225 (App. 1996); A.R.S. § 25-211 (2012) (presumption all property acquired during marriage is

community property, except property acquired by gift, devise, or descent).

¶27 Mother argues Father failed to rebut the presumption these policies were community property. Although Father testified he paid $40,000 from his separate money for the two policies, in the prior proceeding he admitted to using funds obtained from FECA payments -- community funds -- to pay the premiums since their purchase in 2003 until 2005. The family court failed to address the fact that community property -- FECA benefits -- sustained the insurance policies' payments during that period. *See Cockrill v. Cockrill,* 124 Ariz. 50, 54-55, 601 P.2d 1334, 1338-39 (1979) (when separate property and community property are combined, court must apportion the appropriate values selecting method that will "achieve substantial justice between the parties.") Thus, we remand to the family court to apply the most equitable method to achieve substantial justice between Father and Mother in valuing Father's insurance policies and to determine the separate and community property contributions made to them. *Id.*

VI. Attorneys' Fees

¶28 We review a family court's decision denying an award of attorneys' fees for an abuse of discretion. *Alley v. Stevens*, 209 Ariz. 426, 104 P.3d 157 (App. 2004).

A. Father's Request for Fees for the First Trial

¶29 Father claims the family court abused its discretion in denying his request for attorneys' fees because it failed to issue findings of fact to explain the reasoning behind its denial. This argument fails because Father's request for findings of fact and conclusions of law was untimely, as discussed above. *See supra* ¶¶ 15-16.

B. Mother's Request for Attorneys' Fees for the Second Trial

¶30 Mother argues the family court abused its discretion because it did not consider the financial disparity between the parties in denying her request for attorneys' fees on remand. We disagree.

¶31 Mother argues Father's income will increase to $4,854.00 per month and hers will decrease to $3,098.00 once the Qualified Domestic Relations Order ("QDRO") takes effect. However, Mother's income exceeded Father's from 2009 through 2011 when the family court denied her request for attorneys'

fees.[4] Therefore, assuming this factor mitigated in either party's favor, it would mitigate in Father's. Further, our review of the record indicates both Mother and Father advanced unreasonable positions in the family court on a number of occasions. The family court did not abuse its discretion in denying Mother's request for attorneys' fees in connection with the second trial.

C. Requests for Attorneys' Fees on Appeal

¶32 Both parties request an award of attorneys' fees on appeal under A.R.S. § 25-324(A) (2012). Each asserts a lack of financial resources as compared to the other and both accuse the other of asserting unreasonable positions on appeal. Father and Mother have similar financial resources, and neither party asserts unreasonable positions on appeal. In our discretion, therefore, we decline to award either party attorneys' fees on appeal. We also decline to award costs on appeal as neither party ultimately prevails on any of the issues appealed.

CONCLUSION

¶33 For the foregoing reasons, we vacate the family court's holding that Mother's annuity is her sole and separate

[4]In 2009, Mother's gross monthly income was $7,028.17 and Father's was $3,354.00. In 2010, Mother's gross monthly income was $6,266.08 and Father's was $3,354.00. In 2011, Mother's gross monthly income was $5,338.00 and Father's was $3,354.00.

property and remand for reconsideration and findings regarding the court's alternative holding that it would be inequitable to distribute some portion of Mother's annuity to Father. We also remand for the family court to determine and apportion the community interest in Father's life insurance policies. Further, we affirm the family court's order holding neither Father nor Son were entitled to receive child support from Mother and denying both parties' requests for attorneys' fees.

/S/_____
KENTON D. JONES, Judge

CONCURRING:

/S/_____
DIANE M. JOHNSEN, Acting Presiding Judge

/S/_____
JON W. THOMPSON, Judge