IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

NEIL OWEN GLASSMOYER, *Petitioner/Appellant*,

v.

DENISE MICHELLE GLASSMOYER, *Respondent/Appellee*.

No. 1 CA-CV 17-0333 FC
FILED 4-19-2018

Appeal from the Superior Court in Maricopa County
No. FN 2016-051437
The Honorable Jennifer C. Ryan-Touhill, Judge

AFFIRMED IN PART, VACATED IN PART AND REMANDED

COUNSEL

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By Judith A. Morse
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Judge Maurice Portley[1] delivered the decision of the Court, in which Presiding Judge Michael J. Brown and Judge Maria Elena Cruz joined.

P O R T L E Y, Judge:

¶1 Neil O. Glassmoyer ("Husband") appeals from the decree of dissolution awarding Denise M. Glassmoyer ("Wife") half of the value to certain property as community property. For the reasons stated below, we vacate the division of one of the two accounts at issue, and remand for further proceedings consistent with this decision.

FACTS AND PROCEDURAL POSTURE

¶2 The parties married in 2009. Seven years later, Husband filed a petition to dissolve the marriage. After discovery, the parties filed a successful joint motion for a telephonic Resolution Management Conference, which requested a referral for a settlement conference. The order also set a trial date and directed the parties to file a joint or separate pretrial statement, with exhibits, pursuant to Arizona Rule of Family Law Procedure ("ARFLP") 76. The parties ultimately filed a joint pretrial statement, and went to trial.

¶3 At the start of trial, the court found that Husband[2] had timely submitted his exhibits but they were disorganized. As a result, the documents were "not marked as exhibits." Instead, the court gave Husband the opportunity to offer the documents he wanted the court to consider, and seven were admitted into evidence.

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[1] The Honorable Maurice Portley, Retired Judge of the Arizona Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

[2] Husband represented himself at trial. He was, by law, held to the same standards as attorneys in complying with procedural rules. *See Flynn v. Campbell*, 243 Ariz. 76, 83-84, ¶ 24 (2017).

¶4 After trial, the court issued the decree dissolving the marriage and dividing the marital property and debts. In a subsequent judgment, the court awarded Wife $18,500 in attorneys' fees. Husband filed a timely notice of appeal from the decree of dissolution, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1).[3]

DISCUSSION

¶5 Husband contends his due process rights were violated at trial because he was denied the opportunity to fairly and adequately present his case. He also challenges the allocation, valuation and characterization of various assets and obligations.[4]

I. Due Process

¶6 Due process requires a trial court to give a party notice and a meaningful opportunity to be heard. *Wallace v. Shields*, 175 Ariz. 166, 174 (App. 1992). Whether due process was afforded to a party is a question of law we review *de novo*. *Jeff D. v. Dep't of Child Safety*, 239 Ariz. 205, 207, ¶ 6 (App. 2016).

A. Husband's Exhibits

¶7 Husband first argues his due process rights were violated because his documents, which were timely delivered to the court clerk, were not marked as trial exhibits. We will not disturb the court's decision on the handling and the admissibility of evidence absent a clear abuse of discretion and resulting prejudice. *See Elia v. Pifer*, 194 Ariz. 74, 79, ¶ 22 (App. 1998).

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[3] We cite to the current version of the statute unless otherwise noted.

[4] On appeal, Wife filed a motion to strike various portions of the opening brief, arguing that certain references were not part of the record. This court initially deferred ruling on the motion. We will only consider the record on appeal and nothing more. *Davies v. Beres*, 224 Ariz. 560, 561 n.1, ¶ 2 (App. 2010). Thus, although well taken, we now deny Wife's motion to strike as moot.

¶8 Husband, as the court recognized, timely delivered the documents he wanted to use as trial exhibits, but found that the documents were disorganized and, as a result, "were not marked as exhibits." The court, however, gave him the opportunity to have documents he wanted to admit marked during trial.[5] Husband used the opportunity to mark seven exhibits, which were admitted.

¶9 Although Husband complains about the process, he had notice of the process the court was going to employ for the pretrial marking of exhibits. In addition to having access to the family court rules, he knew some four months before trial of the court's requirements for presenting exhibits with the joint pretrial statement. *See* ARFLP 76(A)(3)(m) ("[T]he court may . . . issue orders regarding management of documents, exhibits, and testimony . . . ."). He did not comply with the court's directions; he did not provide a copy to Wife nor organize the documents, and they were not marked before trial. Moreover, he has not demonstrated any prejudice because there is no record that any document that was not admitted was crucial to any claim or defense, beyond the seven documents that he selected to be marked and were admitted into evidence. Accordingly, the court did not abuse its discretion in handling the documents before trial.

B. Time Limits at Trial

¶10 A trial court has broad discretion to impose reasonable time limits, but this "discretion is not limitless and cannot be exercised unreasonably." *Volk v. Brame*, 235 Ariz. 462, 468, ¶ 20 (App. 2014); *see also* ARFLP 22(1) (giving the court discretion to "limit the time to the scheduled time" once reasonable time limits are imposed); *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, 91, ¶ 29 (App. 1998) ("[Time] limits must be reasonable under the circumstances."). A party must be allowed "to offer evidence" and "to be heard at a meaningful time and in a meaningful manner." *Curtis v. Richardson*, 212 Ariz. 308, 312, ¶ 16 (App. 2006). "On appeal, we review the imposition of time limits for abuse of discretion." *Brown*, 194 Ariz. at 91, ¶ 30. We will not reverse the ruling, however, without a demonstration that some harm occurred "as a result of the court's time limitations." *Id.*

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[5] ARFLP 76(C)(1) outlines what a party needs to do before trial, including listing the exhibits in the joint pretrial statement, exchanging exhibits, and stipulating or making specific objections to any exhibit. If a party does not comply, ARFLP 76(C)(3) provides that the court can preclude the admission of an exhibit unless good cause is shown and the interest of justice requires it.

¶11 Here, the family court gave each party eighty minutes of trial time. *See Hales v. Pittman*, 118 Ariz. 305, 313 (1978) ("[T]he trial court has great discretion in controlling the conduct of the trial."). Husband did not object to the time limits, and told the court, "I probably won't even take that long, your Honor."

¶12 When the court told Husband he was out of time near the end of his testimony, Husband did not request more time to finish his testimony or present his case. Nor did he complain then, as he does now, that he had additional evidence he was unable to present within the time limits.[6]

¶13 Moreover, Husband fails to show he was harmed because of the enforcement of the time limits. He did not "make 'an offer of proof stating with reasonable specificity what the evidence would have shown.'" *Gamboa v. Metzler*, 223 Ariz. 399, 402–03, ¶¶ 17–18 (App. 2010) (quoting *State v. Towery*, 186 Ariz. 168, 179 (1996)). The court, as a result, did not abuse its discretion by setting time limits, did not preclude Husband from having a meaningful opportunity to be heard by enforcing the time limits, and, thus, we find no reversible error. *See Volk,* 235 Ariz. at 468, ¶ 21 (explaining that a court violates a party's due process rights when it "allows no time to hear testimony" or does not allow meaningful testimony).

II. Characterization of Property

¶14 We review the family court's division of property for abuse of discretion, but review the characterization of property *de novo*. *Helland v. Helland*, 236 Ariz. 197, 199, ¶ 8 (App. 2014). Under a *de novo* standard of review, we may independently analyze the record if the facts are undisputed. *See Tovrea Land & Cattle Co. v. Linsenmeyer*, 100 Ariz. 107, 114 (1966).

¶15 Separate property is property owned by a "spouse before marriage" or "is acquired by [a] spouse during the marriage by gift, devise or descent," including "the increase, rents, issues and profits of that property." A.R.S. § 25-213(A). All other property acquired by either spouse during a marriage is presumed to be community property, A.R.S. § 25-211, unless clear and convincing evidence establishes that the property is inherently separate, *Nace v. Nace*, 104 Ariz. 20, 22-23 (1968).

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[6] We will not consider arguments on appeal that were not first raised in the trial court. *See Fendler v. Phoenix Newspapers Inc.*, 130 Ariz. 475, 478 n.2 (App. 1981).

¶16 The legal nature of the property is established "at the time of the marriage." *Id.* at 22. Once established, the property retains its status "until changed by agreement of the parties or by operation of law." *Sommerfield v. Sommerfield*, 121 Ariz. 575, 578 (1979). For example, "[s]eparate property can be transmuted into community property by agreement, gift or commingling." *In re Marriage of Cupp*, 152 Ariz. 161, 164 (App. 1986). And whether property given to one spouse during the marriage by a third party is separate or community property is a question of fact which we review under a clearly erroneous standard. *See Chirekos v. Chirekos*, 24 Ariz. App. 223, 227 (1975).

¶17 Where separate property was commingled with community property, "the entire fund is presumed to be community property unless the separate property can be explicitly traced." *Cooper v. Cooper*, 130 Ariz. 257, 259 (1981) (quoting *Porter v. Porter*, 67 Ariz. 273, 281 (1948)). The burden to prove by clear and satisfactory evidence that any commingled property is separate property rests with the party making the assertion. *Cooper*, 130 Ariz. at 259-60. Once any property is determined to be community property, the court must then equitably divide the community property pursuant to A.R.S. § 25-318(A), *Kelly v. Kelly*, 198 Ariz. 307, 309, ¶ 7 (2000), and is given broad discretion in doing so, *Flower v. Flower*, 223 Ariz. 531, 535, ¶ 14 (App. 2010).

¶18 Moreover, the court may consider all related debts and obligations in dividing the property. A.R.S. § 25-318(B). We view the evidence in the light most favorable to upholding the ruling, and we will affirm the ruling if the evidence reasonably supports it. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 346, ¶ 5 (App. 1998). However, we will set aside the trier of fact's decision "if there is not substantial evidence in the record to justify it." *Mealey v. Arndt*, 206 Ariz. 218, 221, ¶ 12 (App. 2003). "Substantial evidence is evidence which would permit a reasonable person to reach the trial court's result." *In re Estate of Pouser*, 193 Ariz. 574, 579, ¶ 13 (1999).

A. Retirement Accounts

¶19 Husband challenges the rulings on his two retirement accounts. First, he contends the court abused its discretion by finding his Scudder Annuity to be community property. Second, he argues that his Scottrade SEP IRA contributions were a gift from his father and not from the community. He contends both accounts were his sole and separate property.

¶20 Generally, pension or retirement benefits earned during the marriage are community property subject to equitable division. *See Johnson v. Johnson*, 131 Ariz. 38, 41 (1981). "The accuracy of any attempt to value a retirement plan is heavily dependent upon the type of plan which confronts the court." *Id.* at 42.

1. Scudder Annuity

¶21 Husband provided evidence that he purchased the Scudder Annuity in 2001, before the parties' marriage. He submitted Exhibit 37, which indicated that the account was opened with $1000, and, by 2016, had grown by $171. Moreover, he testified he had not made any contributions to the account during the marriage**.** Although he did not prove the value of the annuity when the parties got married, there was no other evidence to undermine his testimony or the information in Exhibit 37. Accordingly, there is nothing in the record to support the court's determination that community funds were commingled into the account to make it community property. As a result, the Scudder Annuity was never a community asset, and we vacate the portion of the decree finding it was a community asset and dividing it. *See Nace*, 104 Ariz. at 22-23 ("[A]ll property acquired during marriage takes on a community nature unless clear and convincing proof is made that the property is inherently separate.").

2. Scottrade SEP IRA Account

¶22 The court found that the Scottrade SEP IRA Account was a sole and separate asset that became a community asset when Husband added $32,000 into the account during the marriage. Husband contends the finding is erroneous because the value of the community portion of the deposit was only $12,000, while the other $20,000 of the deposit was a gift to him from his father.

¶23 The nature of the IRA account was an issue raised in the joint pretrial statement. Wife claimed that Husband deposited $32,000 into the account during the marriage and had not disclosed any evidence that any portion of the funds were sole and separate. Husband, however, noted he would prove that the "amount going into the SEP IRA were sole and separate assets."

¶24 At trial, Husband submitted Exhibit 36, a bank statement, without objection. He testified that $20,000 of the deposit "was from [his] father." In fact, Exhibit 36 showed a $20,000 transfer into Husband's Wells Fargo checking account from "Glassmoyer J."

¶25 Wife challenged his testimony about the source of the $20,000. She objected to Husband's testimony arguing he had not disclosed the source of the funds, or that the funds were from his father and, as a result, she testified she did not have the opportunity to investigate his claim that the funds were a sole gift from his father.[7] The court did not explicitly sustain or overrule the objection.

¶26 In ruling that the $32,000 deposited into the SEP IRA account were community funds, the court had to determine that all funds acquired during a marriage are community funds, A.R.S. § 25-211, and that Husband did not prove by clear and convincing evidence that those funds were not given to the community. Although Husband contends that the only evidence before the court was his testimony and Exhibit 36, showing the transfer of $20,000 from "J. Glassmoyer" into the Wells Fargo account and then a transfer of $32,000 into the SEP IRA, the court had to determine whether the funds were a separate or community gift. Because the court had to determine the facts, after determining witness credibility, as it did in issuing the decree, we cannot say as a matter of law the court abused its discretion. Consequently, the court did not clearly abuse its discretion in determining the $32,000 deposited into the SEP IRA were community funds, or its division of those funds.

[7] Husband did not challenge Wife's contention that he had not disclosed any information to allow her to investigate his claim.

B. Parties' Debt Allocation

¶27 Husband next argues the court abused its discretion by inequitably dividing the parties' debt. He contends the "[c]ourt allocated far more community debt to Husband than it did to Wife."

¶28 Wife proposed that each party be responsible for debts in their own names. She also proposed that Husband be responsible for his American Express credit card because most of the charges were for supplies and services to his alleged sole and separate property, totaling $14,144.91. Husband, however, claimed that the "debts [were] community debts" and that the "$63,000 in community debt" be equally divided.

¶29 At trial, Husband testified the balance on the American Express was $49,472, which was for living expenses and "lost money in the cars." He did not provide evidence that he used that card for community purposes. And he was asked by the court how it could "figure out . . . which . . . amount due [on the] American Express [account] was for community debt versus [his] own separate debt? How do[es] [the court] know how much is which?" Husband could not answer the question except to say he would "have to go through it." The question and answer were important to the resolution of the issue because "where community property and separate property are commingled, the entire fund is presumed to be community property unless the separate property can be explicitly traced." *Cooper*, 130 Ariz. at 259 (quoting *Porter*, 67 Ariz. at 281).

¶30 Although the American Express debt was presumed to be community, Wife provided testimony and an exhibit summarizing charges to support that the vast majority of charges were attributable to expenses for Husband's sole and separate house, cars, or his business. Additionally, Wife testified that she agreed to forfeit any portion of the community funds used to improve Husband's sole and separate property in exchange for not being assessed for any debt on that property. And she testified that she offered to give up any community claim to the improvements on one of Husband's various cars (i.e., $195,000) in exchange for him taking sole responsibility for the American Express debt**.**

¶31 The court had to weigh the evidence, resolve the conflict, and decide the facts. *See Gutierrez*, 193 Ariz. at 347, ¶ 13. The court did not abuse its discretion by resolving the nature and allocation of the American Express debt.

C. Firearms and Ammunition

¶32 Husband argues the court abused its discretion by awarding Wife half the value of firearms and ammunition purchased during the marriage. We disagree.

¶33 Husband argues that Wife had no idea how much ammunition remained nor the value of the ammunition and firearms. He, however, failed to present any evidence of the actual valuation of the firearms and any remaining ammunition. Although he alleged in the joint pretrial statement that "[a]ll guns, except for one shotgun, were purchased prior to marriage," he only provided an estimated cost of one of the guns despite Wife's testimony that he purchased three handguns during their marriage. Moreover, when asked by the court if he had any proof of the dates in which he purchased the ammunition, his response was "No. I never keep the receipts." And he told that court that "if [Wife] wanted a couple boxes of .22s [ammunition] she's certainly welcome to, but she doesn't."

¶34 Husband contends the firearms and ammunition should have been valued at their fair market value to achieve substantial equality in the division of property. We agree that marital community property should be equitably divided under A.R.S. § 25-318(A) and that, "[i]n most cases," "an equal distribution of joint property will be the most equitable." *Toth v. Toth*, 190 Ariz. 218, 221 (1997). However, in determining what is an equitable division, a "court should not be bound by any per se rule of equality," but should use "discretion to decide what is equitable in each case." *Id.* The division is not merely mathematical, but one based in fairness and on the facts of the case; that is, equitably. *See id.*

¶35 Here, Husband did not provide any evidence about the value of the firearms and ammunition. The court took the evidence presented and awarded Husband all his guns and ammunition, and awarded Wife $2,350 as her share of the community value of those items. Husband has not shown that there is evidence in the record that the court did not consider in reaching its conclusion. Given our deference to the court's credibility determinations and factual findings, *see Gutierrez*, 193 Ariz. at 347, ¶ 13, the court did not abuse its discretion in the resolution of the firearms and ammunition.

D. Offset Value of 2010 Volkswagen Jetta

¶36 Husband argues the court abused its discretion by not giving him an offset for half the value of the 2010 Volkswagen Jetta; a car Wife traded in for a 2016 Volkswagen Passat. We disagree.

¶37 During trial, the court asked Husband whether the 2016 Volkswagen Passat could be awarded to Wife without an offset, and he responded "Correct." He did not claim an offset at trial, nor did he seek to correct any misperception of his answer. Because the issue was not raised to the trial court, we will not address it for the first time on appeal. *Airfreight Express Ltd. v. Evergreen Air Ctr., Inc*., 215 Ariz. 103, 109, ¶ 17 (App. 2007).

ATTORNEYS' FEES ON APPEAL

¶38 Both parties request an award of attorneys' fees on appeal and each contend the other's actions on appeal are unreasonable citing to A.R.S. § 25-324(A), (B) and ARCAP 25. Given our resolution of the issues, we, in our discretion, deny both requests for fees or costs.

CONCLUSION

¶39 Based on the foregoing, we affirm the decree, but vacate the finding and division of the Scudder Account and remand to allow the family court to award the Scudder account to Husband.

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