IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

NINA LOUISE DEL BECARRO LINDZON,
Petitioner/Appellee/Cross-Appellant,

v.

IRVING S. LINDZON,
Respondent/Appellant/Cross-Appellee.

No. 1 CA-CV 20-0276 FC
FILED 12-23-2021

Appeal from the Superior Court in Maricopa County
No. FN2011-002169
The Honorable Mark H. Brain, Judge

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

COUNSEL

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By Carrie M. Wilcox
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MEMORANDUM DECISION

Judge David D. Weinzweig delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Paul J. McMurdie joined.

W E I N Z W E I G, Judge:

¶1 Irving Lindzon ("Husband") appeals from a decree of dissolution ending his marriage to Nina Lindzon ("Wife"). Husband challenges the superior court's characterization and division of property, allocation of expenses and denial of his requests for attorney fees. He also challenges the denial of his motion to reconvene Wife's deposition. Wife cross-appeals, challenging the court's characterization of jewelry. We affirm in part, reverse in part and remand.

FACTS AND PROCEDURAL BACKGROUND

¶2 Husband and Wife married in March 1991. Wife petitioned for dissolution in May 2011. During the marriage, the couple acquired large collections of wine, art and jewelry. Wife took the jewels when she vacated the family home, along with several items of jewelry that Husband acquired before the marriage. Nine months earlier, Husband had signed an impromptu agreement ("2009 Agreement"), which provided: "In consideration of love and affection, . . . [Wife] is entitled to 50% of the combined worldwide assets of [Wife] and [Husband] plus all of her jewelry in the event of a separation."

¶3 The court conducted a one-day trial on the dissolution petition in May 2013. The parties quarreled over the jewelry, including how to characterize and divide the collections. All the jewelry was photographed, itemized and grouped into five trial exhibits, including exhibits 24, 53, 85, 86 and 87. According to Husband, however, it was "impossible" at trial to identify any of the jewelry because the photos were unclear.

¶4 Both Husband and Wife testified. Wife asserted that she owned the marital jewels as her sole and separate property under the 2009 Agreement, and that Husband had gifted her all the jewels in exhibit 85. Husband countered that the 2009 Agreement was unenforceable because he signed it under duress. Husband told the court he never gifted Wife the

premarital jewels in exhibit 85, but did gift her the items in exhibit 87. He also said the couple had acquired the items in exhibit 86 during the marriage for investment purposes. Lastly, Husband argued he should receive a larger share of the wine because Wife consumed over 200 bottles after she petitioned for divorce.

¶5 A month later, the superior court issued the dissolution decree. It first rejected Wife's interpretation of the 2009 Agreement. The court confirmed the agreement does not say Wife will "receive all of the jewelry in the event of a divorce," only that she gets "all of *her* jewelry in the event of a separation." And then, although confessing "it was hard to discern which jewelry belonged where," the court (1) awarded Wife all the jewelry pictured in exhibits 24, 87 and 53 as her sole and separate property, (2) awarded Husband all the jewelry in exhibit 85 as his sole and separate property, and (3) found the rest to be community property. The court declined to award attorney fees to either party, finding that both parties had similar financial footing and both acted unreasonably at times.

¶6 Wife later moved to amend the decree, asking the court to recharacterize all or most of the jewelry in exhibit 85 as either her sole and separate property or community property**.** Husband disagreed. The superior court held oral argument and issued a minute entry modifying the decree "to reflect that if a piece of jewelry is listed on two exhibits, then that piece shall be deemed community property." The court also amended the decree to award Wife the "original engagement ring" as her sole and separate property. The court did not consider Wife's untimely raised evidence and declined to reclassify exhibit 85.

¶7 The superior court retained jurisdiction and nearly ten years of litigation followed. By stipulation of the parties, the court appointed a special master to oversee the division of property and rule on all remaining contested issues, including costs, inventories and the sale of assets. The special master worked with the parties to distribute the property and mediate disputes, which led to dozens of special master reports with recommendations. The court considered each report and any objections before adopting the recommendations. The superior court entered a final judgment in 2020. Husband appealed and Wife cross-appealed. We have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶8 We review de novo the legal question of whether assets are community or separate property, embracing the evidence in the light most

favorable to upholding the court's decree. *Femiano v. Maust*, 248 Ariz. 613, 615, ¶ 9 (App. 2020). The nature of property as separate or community is established at the time of its acquisition and can only be changed by agreement or operation of law. *Bender v. Bender*, 123 Ariz. 90, 92 (App. 1979). Property acquired during the marriage is presumed to be community property unless a spouse proves the property is separate property by clear and convincing evidence. A.R.S. § 25-211(A); *Femiano*, 248 Ariz. at 615, ¶ 10. By contrast, a spouse is presumed to own property acquired before the marriage as his or her sole and separate property. A.R.S. § 25-213(A).

I. The Jewelry in Exhibit 85

¶9 The superior court determined that all jewelry in exhibit 85 belonged to Husband as his sole and separate property, except for a wedding ring, which the court awarded to Wife. Both parties challenge this decision on appeal. For our purposes, we separate the jewelry into three categories:

Jewelry Acquired by Husband Before the Marriage

¶10 Husband acquired 12 pieces of jewelry in exhibit 85 before the marriage.[1] Wife concedes this, but she argues that she owns these items either under the 2009 Agreement or because Husband gifted them to her during the marriage. The superior court rejected both arguments. We affirm. First, the 2009 Agreement only promised Wife would receive "her jewelry" as sole and separate property.

¶11 Second, Arizona law presumes that Husband owned these 12 pieces as his sole and separate property unless Wife offered clear and convincing evidence to rebut the presumption. *See* A.R.S. § 25-213(A); *In re Marriage of Pownall*, 197 Ariz. 577, 582, ¶ 17 (App. 2000); *Hefner v. Hefner,* 248 Ariz. 54, 58, ¶ 9 (App. 2019) ("The spouse seeking to overcome a presumption of asset characterization has the burden of establishing the character of the property by clear and convincing evidence.").

¶12 Spouses in Arizona may gift their separate property to one another. *See Bender*, 123 Ariz. at 93. A gift requires (1) donative intent to give a gift, (2) delivery of the gift, and (3) the vesting of irrevocable title upon delivery. *See Armer v. Armer*, 105 Ariz. 284, 289 (1970). Whether a gift has been made presents a question of fact "ascertained in light of all surrounding circumstances," *see In re Marriage of Berger*, 140 Ariz. 156, 162

[1] Items 000, 003, 004, 005, 031, 038, 039, 043, 044, 097, 098 and 114.

(App. 1983), and we do not disturb that finding absent clear error, *In re Marriage of Thorn*, 235 Ariz. 216, 219, ¶ 13 (App. 2014).

¶13 Wife shows no clear error. To support her gift claim, Wife testified that Husband gifted these items to her. Husband disagreed. The court heard this testimony and accepted Husband's version of the facts. The court was in the best position to assess and resolve conflicting evidence, and we accept its factual findings absent clear error. *Kelsey v. Kelsey*, 186 Ariz. 49, 51 (App. 1996); *Hrudka v. Hrudka,* 186 Ariz. 84, 92–93 (App. 1995) (wife's bare testimony that husband gave her all the jewelry could not rebut community property presumption). We therefore affirm the superior court's order awarding these 12 pieces to Husband as his sole and separate property.

A Wedding Ring

¶14 Exhibit 85 also contained a ring described at trial as the "original wedding ring." Husband argues the court erroneously awarded the ring to Wife as her sole and separate property.

¶15 Husband shows no clear error. Wife testified this was her original wedding ring from the couple's 1991 wedding, and she offered details about when she wore it. Husband did not rebut this testimony. The court adopted Wife's testimony. *See Valento v. Valento*, 225 Ariz. 477, 480, ¶ 7 (App. 2010) (deferring to superior court's credibility determination in adopting wife's view of property as sole and separate when neither party provided documentary evidence).

The Rest

¶16 All the remaining pieces of jewelry in exhibit 85 were awarded to Husband as his sole and separate property. Wife contends this was error because either she owned the jewels under the 2009 Agreement or Husband never proved he purchased the items before marriage. We again reject her first argument because the 2009 Agreement only promised she would receive "her jewelry" upon dissolution. Even so, the court should not have awarded this jewelry to Husband as his sole and separate property.

¶17 We presume this jewelry to be community property because neither traced its source. *See Cooper v. Cooper*, 130 Ariz. 257, 259 (1981) (comingled property is presumed to be community property unless separate property can be "explicitly traced"). To overcome this presumption, Husband needed to prove the jewelry was his separate

property by clear and convincing evidence. *Hefner*, 248 Ariz. at 58, ¶ 9 (separate property remains separate only if it can be identified).

¶18 Exhibit 85 contained photographs of jewels that had been bundled together for trial. According to the court and Husband, these photographs were unclear at best, indecipherable at worst. Husband could not answer whether he owned the items pictured in exhibit 85 before marriage, conceding "it is almost impossible for me to be able to clearly identify the pieces of jewelry." And the court agreed, confessing "it was hard to discern which jewelry belonged where."

¶19 Any confusion or uncertainty in tracing the source of an asset is resolved in favor of the community. *See Porter v. Porter*, 67 Ariz. 273, 282 (1948) ("Where separate and community property are confused or blended so that the separate property cannot be identified, the presumption in favor of the community casts the whole into the community."). The court should have defaulted to the presumption of community property on this record. "[W]here there is any doubt in the court's mind, the property will be treated as community property." *In re Marriage of Foster*, 240 Ariz. 99, 101, ¶ 9 (App. 2016) (citing *Ariz. Cent. Credit Union v. Holden*, 6 Ariz. App. 310, 313 (1967)).

¶20 We therefore reverse the dissolution decree in part and remand to the superior court to reclassify the remaining jewelry in exhibit 85 as community property.

II. Motion to Reconvene Deposition

¶21 Husband deposed Wife for three hours in July 2012. The deposition focused on the character of the jewelry, the 2009 Agreement and the amount of wine consumed by Wife. Three months later, Husband's counsel asked for permission to depose Wife a second time to discuss the jewelry collection and other items. Wife refused. Husband filed a motion to reconvene Wife's deposition, which the court denied a month before trial.

¶22 Husband argues the superior court abused its discretion by denying his motion to reconvene Wife's deposition. Wife claims Husband waived this argument, but Husband raised the argument in the superior court, *see Golonka v. Gen. Motors Corp.*, 204 Ariz. 575, 580, ¶ 12, n.1 (App. 2003) (issue raised and ruled upon is preserved on review), and we exercise our discretion to reach the merits despite Husband's failure to provide the legal standard under ARCAP 13(a)(7).

¶23 We review the trial court's decisions on discovery issues for abuse of discretion. *State Farm Mut. Auto. Ins. Co. v. Superior Ct.*, 167 Ariz.

135, 137-38, (App. 1991). To prove reversible error, Husband needed to show the court abused its discretion and he suffered prejudice. *See John C. Lincoln Hosp. & Health Corp. v. Maricopa Cnty.*, 208 Ariz. 532, 543, ¶ 33 (App. 2004).

¶24 Husband has not shown error or prejudice. Arizona law permits a single deposition of up to four hours "[u]nless all parties agree or the court orders otherwise for good cause." Ariz. R. Fam. L. P. ("ARFLP") 57. Husband waited months to request the second deposition. He still had the chance to cross-examine Wife at trial. And he was able to serve interrogatories on the issues he wanted to discuss. The superior court did not abuse its discretion.

III. Special Master Reports

¶25 Husband also contends the superior court erroneously adopted the special master's recommendations in seven reports. Absent clear error, we affirm a superior court's adoption of a special master's report. *See* ARFLP 72(h). The superior court reviewed Husband's objections and held its own evidentiary hearing before adopting the reports. We discern no error. The record shows that Husband harassed the special master and Wife. It also shows he refused to make timely payments or honor deadlines.

¶26 Husband contends the special master was biased and unfair and treated him in a discriminatory manner. "All decision makers, judges and administrative tribunals alike, are entitled to a presumption of honesty and integrity." *Emmett McLoughlin Realty, Inc. v. Pima Cnty.*, 212 Ariz. 351, 357, ¶ 24 (App. 2006) (internal quotation marks omitted). To prove bias, Husband needed to "set forth a specific basis for the claim of partiality and prove [it] by a preponderance of the evidence." *State v. Medina*, 193 Ariz. 504, 510, ¶ 11 (1999); *State v. Macias*, 249 Ariz. 335, 342, ¶ 22 (App. 2020) (showing of bias must arise from an extra-judicial source). The record shows no bias. *See In re Guardianship of Steyer*, 24 Ariz. App. 148, 151 (1975) ("The fact that a judge may have an opinion as to the merits of the cause or a strong feeling . . . does not make the judge biased or prejudiced.").

¶27 At one point, the special master recommended that Husband had forfeited his share of the wine collection as a sanction for Husband's refusal to meet the special master's instructions and deadlines to retrieve his share of the wine. The record contains reasonable evidence in support. Given this valid sanction, we do not address Husband's argument that the court erroneously apportioned the community's wine collection. *See Double*

AA Builders, Ltd. v. Grand State Const. LLC, 210 Ariz. 503, 510, ¶ 37, n.1 (App. 2005).

IV. Attorney Fees

¶28 Husband contends the court erroneously denied his motion for attorney fees under A.R.S. § 25-324. We review fee awards for an abuse of discretion. *Myrick v. Maloney*, 235 Ariz. 491, 494, ¶ 6 (App. 2014). A court may award attorney fees "after considering the financial resources of both parties and the reasonableness of the positions each party has taken." A.R.S. § 25-324(A). The court examined these factors here, finding that Husband and Wife had similar financial footing, and both acted unreasonably at different phases during the proceedings. The record supports these findings. We find no abuse of discretion. *See Engel v. Landman*, 221 Ariz. 504, 514, ¶ 46 (App. 2009) (affirming denial of attorney fees where both parties took reasonable and unreasonable positions).

¶29 Husband and Wife request their attorney fees on appeal. In the exercise of our discretion, we deny the requests and order that each party pay his or her own attorney fees on appeal. We award Wife her taxable costs on appeal after compliance with ARCAP 21.

CONCLUSION

¶30 Aside from the distribution of certain jewelry discussed in ¶¶16-20, we affirm the dissolution decree.

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