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

DIVISION ONE
FILED: 02/24/2011
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	1 CA-CV 10-0362
SALLY ANN STULTZ,	DEPARTMENT C
Petitioner/Appellee,	**MEMORANDUM DECISION**
v.	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
JOSEPH KENT STULTZ,	
Respondent/Appellant.	

Appeal from the Superior Court in Maricopa County

Cause No. FN2008-090853

The Honorable James P. Beene, Judge

AFFIRMED IN PART AND REMANDED IN PART

Simmons & Gottfried, P.L.L.C. — Scottsdale
By Alona M. Gottfried
Attorney for Petitioner/Appellee

Todd A. Schultz, Esq. — Phoenix
Attorney for Respondent/Appellant

B A R K E R, Judge

¶1 Joseph Kent Stultz ("Husband") appeals from the decree of dissolution's characterization and valuation of the parties' shares in a corporation, the denial of Husband's request that Sally Ann Stultz ("Wife") pay the deposition-related fees of Husband's expert, and the denial of Husband's request for additional trial time. For the reasons stated below, we affirm in part and remand in part.

Facts and Procedural Background[1]

¶2 Wife's family has owned and operated Pioneer Distributing Company, Inc. ("Pioneer") since 1947. During the parties' marriage, Wife received 1600 shares, or two-thirds, of the stock in Pioneer as her separate property. In 1988, Wife placed her Pioneer stock into a trust in both parties' names. In 2002, the parties amended the trust and stock agreement to grant Wife a 51% interest in the stock and Husband a 15.66% interest. The amended agreement provided that each party's stock interest was his or her separate property. The parties disputed the reason for this amendment.

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[1] Wife asks this court to disregard the statement of facts in Husband's opening brief. Wife argues that the statement of the case and statement of facts lack citations to the record as required by Arizona Rule of Civil Appellate Procedure 13(a)(4). Although not every factual statement in Husband's opening brief contains a citation to the record, most of the facts are properly supported. Where a fact is not supported by the record, we will disregard that fact or rely on Wife's properly supported statements.

¶3 When the parties began contemplating divorce, they agreed to use business valuation expert Ben Ederer to determine the value of a one-third stock interest in Pioneer. Ederer amended his initial valuation five months later, after Wife requested an update. The amended valuation was lower than the initial report. Husband retained his own expert to challenge Ederer's amended valuation.

¶4 The trial was initially set for one afternoon. The court specified that each side would be allotted one-half of the trial time and that the time would not be extended absent a motion filed at least thirty days prior to the hearing. At the beginning of the first trial day, the court said that it would grant additional trial time at a later date to "finish up" if the parties did not complete their testimony on the first day. When the court found a second trial date for one-and-a-half hours on December 10, 2009, Husband's counsel said "I'll make that work." At the end of the first trial session, the court again asked the parties if an hour-and-a-half to finish would be sufficient. The court issued a minute entry stating that the remaining time was one-and-a-half hours.

¶5 At the second trial session, when Husband had one minute left in his allotted time, he told the court he would need more time. Husband argued that he did not understand that

the case was to be completed by the end of the second trial day. At that point, he had not presented his case-in-chief. He moved to continue the trial so that he could have additional time.

¶6 The court denied Husband's request. In so doing, the court emphasized that the parties had bargained for the shorter time limits in order to receive an earlier trial date and complete the case sooner[2]:

> THE COURT: Well, I know I was clear when I stated the last time we met on November 9th that we could go out to a later date in February or March and give more time to complete the case or we could do something sooner.
>
> Both parties wanted to complete this case sooner so it could be briefed. You both said you wanted to submit closing briefs.
>
> And the hour and a half was -- from my recollection the hour and a half, both sides agreed that they could present their cases in the remaining hour and a half.
>
> MR. SCHULTZ: Okay.

¶7 After denying the motion to continue, the court ultimately found that Wife owned 51% of Pioneer and Husband owned 15.66%. The court also found that Husband's share of the stock was worth $172,345 and ordered Pioneer to pay Husband that

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[2] The discussion of continuing the trial into February or March is not included in the trial record, however, Husband acknowledges that this issue was discussed in chambers prior to trial on November 9, 2009.

amount in equal installments over a three-year period. The court did not make a finding as to whether the stock was held as community property or separate property. The court denied Husband's request for Wife to pay his expert's fees.

¶8 Husband filed a motion for new trial and a motion to alter or amend the judgment. The motion for new trial argued that Husband was substantially prejudiced and denied a fair trial because the trial court did not allow him to present his case-in-chief. The motion to alter or amend the judgment argued that the court erred by (1) ordering Pioneer, a non-party, to purchase Husband's separate property stock, and (2) denying his request that Wife pay Husband's expert witness fees. The court denied these motions without comment. Husband filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-2101(B) and (F) (2003).

Discussion

1. Trial Time Limits

¶9 Husband argues that the trial time limits deprived him of a fair trial and denied him due process. He contends the limitations were unclear and that the court's enforcement of the time limits over Husband's objections deprived him of an opportunity to present his case-in-chief.

¶10 Under the Arizona Rules of Family Law Procedure, the trial court may "impose reasonable time limits on all proceedings or portions thereof and limit the time to the scheduled time." Ariz. R. Fam. L.P. 22(1); *see also* Ariz. R. Fam. L.P. 77(B)(1) (granting same authority specifically for trials). "[A] trial court has broad discretion over the management of a trial," *Gamboa v. Metzler*, 223 Ariz. 399, 402, ¶ 13, 224 P.3d 215, 218 (App. 2010), and we review the court's enforcement of trial time limits for an abuse of discretion. *Brown v. U.S. Fid. & Gaur. Co.*, 194 Ariz. 85, 91, ¶ 30, 977 P.2d 807, 813 (App. 1998). "An abuse of discretion exists when the record, viewed in the light most favorable to upholding the trial court's decision, is 'devoid of competent evidence to support' the decision." *Little v. Little*, 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999) (quoting *Fought v. Fought*, 94 Ariz. 187, 188, 382 P.2d 667, 668 (1963)).

¶11 Here, we cannot say that the court abused its discretion by denying husband additional time at trial. The trial court offered Husband the option of continuing the trial at a later date so the parties could have additional time to question witnesses. The parties agreed to a trial of shorter duration so they would have an earlier trial date. The shorter trial time was part of a bargained exchange, and Husband cannot

now persuasively argue that it violated his due process rights. *See Gamboa*, 223 Ariz. at 402, ¶ 14, 224 P.3d at 218 (affirming trial court's time limits when the party appealing the limits agreed to them). It would be unfair to the party who had abided by the time limits, and sought the earlier trial date, to change the bargain based on Husband's unilateral desire.

¶12 Importantly, Husband did not request more time until the trial had essentially been completed stating that he did not understand that the case was to be completed by the end of the second trial day. We see no reason why Husband could not have (1) monitored his time to limit his cross examination and save time for his case-in-chief or (2) timely asked the court for more time rather than waiting for all but one minute to expire before making the request. *See Gamboa*, 223 Ariz. at 402, ¶ 15, 224 P.3d at 218 ("[T]he time constraints encountered by Plaintiff were 'solely attributable to [him].'"). We recognize the trial court stated at the close of the first day that there was a possibility of more time. However, Husband did nothing to notify the trial court of that need until only one minute of allotted time remained. Under such circumstances, similar to *Gamboa*, we hold "the court did not abuse its broad discretion in holding [Husband] to the agreed-upon schedule." *Id.* at ¶ 16.

2. Husband's Pioneer Stock

¶13 Husband argues that the trial court erred as a matter of law in ordering him to sell his Pioneer stock to a non-party because the stock was his separate property. The trial court found that Husband owned 15.66% of the stock in Pioneer when the parties divorced, but the court did not expressly characterize the stock as separate or community property. The court then ordered Pioneer to pay Husband $172,345 for his interest in equal installments over a three-year period.

¶14 Husband contends the court cannot order him to sell his separate property. Wife argues that the court had authority to divide the stock pursuant to A.R.S. § 25-318(A) because the parties held the stock in common. Thus, whether the court had the authority to order the sale of the stock depends on whether it was separate or community property.

¶15 Courts must "assign each spouse's sole and separate property to such spouse." A.R.S. § 25-318(A) (Supp. 2010). "[I]t has long been held that a divorce court is without jurisdiction to award either party the separate property of the other." *Becchelli v. Becchelli*, 109 Ariz. 229, 233, 508 P.2d 59, 63 (1973), *superseded by statute on other grounds as stated in Jordan v. Jordan*, 132 Ariz. 38, 39, 643 P.2d 1008, 1009

(1982). Wife acknowledged this rule of law in the joint pretrial statement.

¶16 If the stock was community property, however, the order of the sale generally (without regard to Pioneer) could have been proper. *See* A.R.S. § 25-318(A) (authorizing court to divide community property equitably). Husband argues that the court lacked authority to order a non-party, Pioneer, to buy property. On the present record, we agree. Under A.R.S. § 25-314(D) (Supp. 2010), "[t]he court may join additional parties necessary for the exercise of its authority." Thus, if the stock were found to be community property, the court may have been able to order the sale if Pioneer had been joined as a party to this action. *See Sample v. Sample*, 152 Ariz. 239, 243, 731 P.2d 604, 608 (App. 1986). However, that did not take place.

¶17 Because the trial court made no finding as to whether the stock was separate or community property, we remand on this issue to enable the court to make that determination. If the stock is characterized as separate property, then the court may not order sale of the stock. If the stock is community

property, then the court may order the sale to Pioneer only upon joinder of Pioneer as a party.[3]

3. Payment of Husband's Expert Witness Fees

¶18 Husband argues that the trial court erred in denying his request that Wife pay the fees his expert, Frank Pankow, incurred in responding to Wife's subpoena and in preparing for his deposition. Husband argued that Wife should pay for the time it took his expert to attend the deposition and to comply with Wife's request for all business valuations Pankow prepared during the past five years. Wife contends that Husband's request, first made in his closing argument, was untimely. We agree.

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[3] Wife contends that if the trial court lacked authority to order Pioneer to buy Husband's separate property stock, Husband invited this error by asking the court to equitably divide the stock. Wife also makes a similar argument that Husband did not raise these issues timely. Although Husband did ask the court to divide the stock, this request was based on his assertion that the stock was community property and, therefore, the court had authority to divide the stock. *See* A.R.S. § 25-318(A) (authorizing court to divide community property equitably). As Wife acknowledged in the trial court, the court lacks authority to divide the parties' separate property. This issue involves the court's subject matter jurisdiction, *Thomas v. Thomas*, 220 Ariz. 290, 292-93, ¶¶ 7, 10, 205 P.3d 1137, 1139-40 (App. 2009), and therefore the issue cannot be waived. *See State v. Silva*, 222 Ariz. 457, 459, ¶ 9, 216 P.3d 1203, 1205 (App. 2009) ("[S]ubject matter jurisdiction is never waived and can be raised for the first time on appeal.").

¶19 Husband did not request that Wife pay Pankow's expert fees in the joint pretrial statement.[4] This precludes Husband from raising this issue for the first time in his closing argument. *See Leathers v. Leathers*, 216 Ariz. 374, 378, ¶ 19, 166 P.3d 929, 933 (App. 2007) (holding that issues not included in the joint pretrial statement are not properly before the court at trial); *see also* Ariz. R. Fam. L.P. 76(C)(1)(i) (providing that pretrial statements shall contain "detailed and concise statements of contested issues."). Therefore the trial court did not err in denying Husband's request.

4. Attorneys' Fees on Appeal

¶20 Both parties request an award of attorneys' fees and costs on appeal pursuant to A.R.S. § 25-324 (Supp. 2010). Wife also cites A.R.S. § 12-349 (2003) in support of her request. It appears that the parties have comparable financial resources, and neither party took unreasonable positions on appeal. Accordingly, we order that each party shall pay his or her own attorneys' fees on appeal. As the successful party on appeal, Wife is entitled to an award of her reasonable costs upon

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[4] Husband argues that the joint pretrial statement was filed before the deposition took place so he could not have made his request in the joint pretrial statement. Wife did attempt to depose Pankow, albeit unsuccessfully, prior to the date the joint pretrial statement was filed. Thus, this issue could have been addressed in the joint pretrial statement.

compliance with Arizona Rule of Civil Appellate Procedure 21. *See* A.R.S. § 12-341 (2003).

Conclusion

¶21 We affirm the decree of dissolution in its entirety except that we remand on the issue of whether Husband's Pioneer stock is separate or community property. If the trial court determines that the stock is separate property, the court may not order sale of the stock. Each party shall bear his or her own attorneys' fees on appeal. Wife is awarded her reasonable costs on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21.

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DANIEL A. BARKER, Presiding Judge

CONCURRING:

____
MARGARET H. DOWNIE, Judge

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MICHAEL J. BROWN, Judge