IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF

CRAIG GLENN GROSS,
Petitioner/Appellant,

and

LORI JILL GROSS,
Respondent/Appellee.

No. 2 CA-CV 2019-0081-FC
Filed January 24, 2020

Appeal from the Superior Court in Pima County
No. D20151636
The Honorable Laurie B. San Angelo, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART AND REMANDED

COUNSEL

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and

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By Russell Piccoli
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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Eppich and Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 Craig Gross appeals the trial court's decree of dissolution of marriage, claiming the court erroneously chose the valuation date of a business, wrongly ordered a distribution award to his former spouse, Lori Gross, and failed to apportion tax liabilities and property in four bank accounts. For the following reasons, we affirm the decree in part, vacate the decree in part, and remand to the trial court for the limited purpose of distributing the bank accounts.

Factual and Procedural Background

¶2 The parties were married for twenty-one years and have two children. Craig was a physician, and during the marriage, the marital community held interests in multiple businesses related to his medical practice, including Desert Sun Surgery Center LLC ("Surgery"), Desert Sun Gastroenterology PLLC ("Gastro"), and Desert Sun Management LLC. Craig is the sole member of Gastro, which pays all of the common expenses of the medical practices and is reimbursed from other doctors in the group. Craig managed both Gastro and Surgery, working as one of four doctors, while Lori was the financial manager.

¶3 Shortly after Craig filed the petition for dissolution in 2015, he removed Lori from all her duties at the medical businesses. At that time, the businesses had been doing well financially, and the value of the Grosses' share of Surgery was approximately $6 million.[1] In March 2016, Craig told the other doctors that Lori had committed financial malfeasance

[1]Craig and Lori owned eighty-five percent of Surgery.

within Gastro and Surgery. Each of the doctors working with Craig subsequently left the group.

¶4 The dissolution case ultimately proceeded to a ten-day trial at the end of 2017. The central issues involved the medical entities—and particularly Craig's allegations that Lori had committed misconduct in her handling of the finances of Surgery and Gastro—because the value of Surgery had plummeted by the time of trial. Lori and Craig both testified and offered competing reports relating to the financial allegations against Lori. Craig's report, created by accountant Jack Roberts, concluded Surgery and Gastro had paid rent in excess of market value, Gastro had paid payroll and other costs that should have been charged to Surgery, two doctors had paid more than their share of the cost of an electronic medical records (EMR) system, and Gastro had paid funds to the nanny of the Grosses' children.

¶5 Lori's expert, Carla Keegan, prepared a report analyzing the Roberts report. Keegan's report identified shortfalls in the Roberts report, namely that its findings were "based on insufficient procedures" and that Roberts had "failed to consider sufficient evidence, alternative scenarios, explanations and facts." Keegan concluded that the rental rates charged to Gastro and Surgery were reasonable and appropriate, as were the allocation of costs between Surgery and Gastro, there was no evidence Lori had been involved or responsible for the expense reimbursements for the EMR system, and the nanny, who was also employed by Gastro, had not been compensated by the business for her time watching the Gross children.

¶6 After taking the matter under advisement, the trial court found that except for one unintentional accounting error Lori had acknowledged, "[a]ll other financial management decisions that [Lori] made were reasonable and appropriate." Surgery was awarded to Craig, valued on the date of service. After dividing the remainder of the parties' property, Craig was ordered to pay Lori $204,784.88 to equalize the division.[2] The court subsequently entered a final dissolution decree and

[2]Craig repeatedly asserts he was only "awarded 5% of the estate, while [Lori] was awarded 95%." But his claim is premised on valuing Surgery at $0, rather than over $6 million, as the trial court found was equitable and as we affirm for the reasons stated herein.

denied Craig's post-judgment motions. We have jurisdiction over Craig's appeal pursuant to A.R.S. § 12-120.21(A)(1) and A.R.S. § 12-2101(A)(1).

Valuation Date of Surgery

¶7 Craig first argues the trial court erred by using the date of service, rather than the trial date, to value Surgery. Arizona has not adopted a general valuation rule, instead allowing trial courts to use alternative valuation dates so that they may "make truly equitable awards." *Sample v. Sample*, 152 Ariz. 239, 242 (App. 1986). We review the trial court's selection of a valuation date for abuse of discretion, testing the choice "by the fairness of the result." *Id.* at 243.

¶8 Craig contends the trial court's factual findings were insufficient to support the date of service as the valuation date of Surgery because the court made no findings that Craig "mismanaged the business" or "made any decision that harmed the business."[3] Specifically, Craig argues Lori "put in motion a series of events that ultimately led [to] the complete and utter destruction of the business." And he points out that the other doctors left the practice because of Lori's conduct.

¶9 But evidence presented at trial, which we view in the light most favorable to upholding the trial court's rulings, *see Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 5 (App. 1998), undercuts Craig's claims of insufficient findings and his characterization of Lori's performance. After hearing the testimony of both parties and considering the conflicting financial reports, the court determined that Lori's financial management of Surgery and Gastro had been reasonable and appropriate, and "any patient refunds that accumulated," a major allegation regarding Lori's mismanagement, "were the responsibility of Dr. Gross, as the medical director and sole member of the medical entities." Moreover, the court found, and Craig does not dispute, that Craig "took over full management of the medical entities" around the date of service, and that Surgery's

[3]Craig's arguments on this point appear somewhat inconsistent, and Lori contends the issue has been waived for failure to raise it below. Craig, however, points to his pretrial statement and proposed findings as preserving the issue, while asserting "even if [he] did not raise the issue directly, which he did, the trial court has an independent duty to correctly apply the law." In view of the entire record, and preferring to address issues on their merits unless clearly waived, we find the issue sufficiently preserved.

performance "prior to that time reflects the efforts of the community; after that time, it reflects the efforts of [Craig]." Thus, contrary to Craig's argument, the court made sufficient factual findings to support its valuation date, concluding that Surgery's post-service performance and decline was due to Craig's decision-making.

¶10 Craig also claims the chosen valuation date was inequitable because it awarded him "an undisputedly worthless asset at a value of six million dollars." But in light of Craig's sole management of Surgery and shutting Lori out of her financial management role after service of the petition for dissolution, it would have been inequitable for Lori to bear the financial results of business decisions attributable to Craig during the pendency of the dissolution. *See, e.g.*, *McSparron v. McSparron*, 662 N.E.2d 745, 752 (1995) (valuing active asset at date of commencement to prevent one spouse from unilaterally manipulating asset's value); 2 Brett R. Turner, *Equitable Distribution of Property*, § 7:4 (4th ed. 2019) ("To prevent the dissipating spouse from receiving an unfair windfall, the court will value the dissipated assets as of some date before the dissipation occurred."); *cf. Sample*, 152 Ariz. at 242 (where stock appreciated solely from market forces, not through effort of parties, later valuation date equitable); A.R.S. §§ 25-211(A)(2) (community stops acquiring assets upon petition for dissolution of marriage if petition results in decree of dissolution), 25-318(C) (permitting unequal distribution of assets when party commits waste). Accordingly, Craig has not demonstrated the trial court's use of the date of service to value Surgery was an abuse of discretion.

Distributions to Lori

¶11 Craig next argues the trial court erred by ordering him to pay $74,123.73 to Lori, inclusive of the "monthly distributions as support" still owing to her and the mortgage and property taxes Craig had failed to pay as previously ordered. The parties had agreed by stipulation that each would receive $20,000 monthly distributions from Surgery or another community source in lieu of Lori receiving spousal maintenance *pendente lite*.

¶12 Craig contends the trial court "lacked jurisdiction" to award Lori distributions from Surgery because Surgery was awarded to him as his separate property. And because the court awarded Lori assets in equalization to the value of Surgery, he maintains the judgment allows Lori to "double dip" from his property award. These claims, however, lack merit. First, there is no colorable question about the court's jurisdiction

here. *See In re Marriage of Thorn*, 235 Ariz. 216, ¶¶ 16-17 (App. 2014) (whether court can order one spouse to return other spouse's separate property issue of statutory authority, not jurisdiction). Second, Craig's argument ignores the basic fact that the distributions were ordered to Lori upon stipulation of both parties, in lieu of support during the period that the dissolution was pending, before Surgery was awarded to Craig. Moreover, the parties agreed that such payments were "non-modifiable." Accordingly, Craig has not demonstrated the court erred in awarding Lori the pre-dissolution amount the parties agreed she would be paid. *See Pulliam v. Pulliam*, 139 Ariz. 343, 345 (App. 1984) ("The parties are bound by their stipulation unless relieved therefrom by the court.").

Division of the Children's 529 Accounts

¶13 Craig also challenges the trial court's failure to characterize four 529 educational savings accounts titled in the children's and Lori's names as community property subject to division. Lori argues Craig waived the issue by failing to argue it below. *See Pflum v. Pflum*, 135 Ariz. 304, 307 (App. 1982) ("Matters not raised below will not be considered on appeal."). Although Craig did not directly argue the 529 accounts were community property to the trial court, he requested joint control over the accounts and "the right to direct disposition of 50 percent of the remainder of the account when each son's education concludes" in his pretrial statement, while Lori asked for the accounts to be awarded to the children. Both parties listed the accounts in their property inventories, and the trial court's ruling characterized them as non-community property. Because the parties and the trial court had the opportunity to address the issue, we conclude it was not waived. *See In re Marriage of Johnson & Gravino*, 231 Ariz. 228, ¶ 25 (App. 2012) (issue not raised below waived when court and opposing party did not have opportunity to correct error).

¶14 We review de novo whether property is separate or community property. *In re Marriage of Pownall*, 197 Ariz. 577, ¶ 15 (App. 2000). It is undisputed that the four 529 accounts were funded wholly with community funds. That the accounts were created for the benefit of the children and the children's names are on the accounts does not alter their nature as assets of the community, especially when Lori retains the right to withdraw funds from the accounts at will, as a titled owner. *See Frequently Asked Questions*, az529.gov, https://az529.gov/faq (last visited Jan. 6, 2020) (Under Arizona's 529 plan, the account owner maintains control of the account, may withdraw funds, and change the named beneficiary.). Although this issue has not yet been addressed in Arizona appellate cases,

other jurisdictions have done so. *See Ahrendt v. Chamberlain*, 910 N.W.2d 913, ¶ 15 (S.D. 2018) (where account in wife's name and she could withdraw funds for other purposes, 529 plan correctly treated as marital property); *Greenan v. Greenan*, 91 A.3d 909, 924 (Conn. App. Ct. 2014) (529 accounts marital property). Accordingly, we conclude the four 529 accounts should have been characterized as community property.[4] We therefore vacate the portion of the decree treating the accounts as non-community property and remand to the trial court to equitably divide the accounts. *See* A.R.S. § 25-318(A).

Allocation of Tax Liability

¶15 Craig next argues the trial court erred by unfairly allocating tax liabilities between the parties. We review the division of community property, including related tax consequences, for an abuse of discretion. *Boncoskey v. Boncoskey*, 216 Ariz. 448, ¶ 13 (App. 2007); *see* A.R.S. § 25-318(B) (property subject to division includes taxes). Craig contends the court's division of community property was unequal because it ordered the parties to split capital gains taxes related to assets awarded to Lori, but made "no equivalent allocation [of tax liabilities] for the medical entities awarded" to him. He reasons this was error because if he sells the medical entities in the future, he would owe capital gains taxes, thus unfairly decreasing the value of his property award. Arizona precedent, however, holds that community property should be divided "without considering the future speculative tax consequences of converting assets to cash." *Biddulph v. Biddulph*, 147 Ariz. 571, 573 (App. 1985). Specifically, the only tax consequences "which ought to be accounted for by the trial court in the decree" are those "occurring in connection with the division of community property." *Id.* Accordingly, the court did not abuse its discretion by not allocating the tax liabilities that

[4]*See also D.G. v. S.G.*, 82 N.E.3d 342, 352-53 (Ind. Ct. App. 2017) (In 529 account, "[t]he named custodian owns the property, but it is intended for the benefit of the child."); *Berens v. Berens*, 818 S.E.2d 155, 158 (N.C. Ct. App. 2018) ("Parents are under no obligation to spend the money in a 529 savings plan on the educational expenses of the children listed as the plan beneficiaries," and "those funds are solely the property of the parents."); 1 Brett R. Turner, *Equitable Distribution of Property* § 5:15 (4th ed. 2019) ("A majority of courts are holding that funds in a 529 account can be withdrawn at will by the parents, and are therefore marital property.").

would arise upon Craig's potential decision to sell the medical entities in the future.[5]

Attorney Fees on Appeal

¶16 Both parties have requested attorney fees on appeal pursuant to A.R.S. § 25-324. In our discretion, we decline to award fees as neither party's position was unreasonable and there being no significant financial disparity between them. *See Coburn v. Rhodig*, 243 Ariz. 24, ¶ 16 (App. 2017). Craig, however, being partially successful on appeal, is awarded his appellate costs pursuant to A.R.S. § 12-342(A) upon compliance with Rule 21, Ariz. R. Civ. App. P.

Disposition

¶17 The trial court's dissolution decree is affirmed, except as to that portion regarding the four 529 accounts, which we vacate. We remand for the court to treat those accounts as community property.

[5]Craig also appears to challenge the trial court's denial of his motion to amend the decree to allocate between the parties $467,560 in tax liability incurred from the sale of a building owned by Desert Sun Management LLC. Lori opposed the motion, arguing the tax liability was already divided equally between them as a matter of law because they each held fifty percent membership interests in the LLC, a pass-through entity. Craig refers to this issue, but beyond merely asserting error, he does not develop this argument in any meaningful way or demonstrate the court abused its discretion. We therefore do not further address the issue. *See Stafford v. Burns*, 241 Ariz. 474, ¶ 34 (App. 2017) (failure to develop argument results in waiver); *Modular Sys., Inc. v. Naisbitt*, 114 Ariz. 582, 587 (App. 1977) (merely asserting error was committed insufficient; appellant must state with particularity why or how court erred).