IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE THE MARRIAGE OF

APRIL DAWN WHITESIDE, FKA APRIL DAWN AUTRAND,
Petitioner/Appellee,

and

SCOTT JOSEPH AUTRAND,
Respondent/Appellant.

No. 2 CA-CV 2019-0191-FC
Filed December 16, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pinal County
No. S1100DO2018001325
The Honorable Joseph R. Georgini, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

COUNSEL

April D. Whiteside, Modesto, California
In Propria Persona

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By Dianne Sullivan
Counsel for Respondent/Appellant

MEMORANDUM DECISION

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

E C K E R S T R O M, Judge:

¶1 Scott Autrand appeals from the trial court's "division of community assets, division of community debts, and attorney's fees" in its order dissolving his marriage to April Whiteside. Autrand argues the court erred by: (1) not equally dividing certain community property; (2) not equally dividing certain community debts and obligations; (3) not reimbursing him for community expenses paid after the date of service; and (4) denying his request for attorney fees. For the reasons that follow, we affirm the court's rulings on attorney fees, we vacate and remand the portion of the ruling pertaining to the parties' retirement accounts, and we leave undisturbed the remainder of the court's findings.

Factual and Procedural Background

¶2 "In reviewing the apportionment of community property, we consider the evidence in a light most favorable to upholding the trial court's ruling and will sustain that ruling if the evidence reasonably supports it." *Kohler v. Kohler*, 211 Ariz. 106, ¶ 2 (App. 2005). Whiteside served the petition for dissolution on July 23, 2018. After an evidentiary hearing, the court entered the ruling giving rise to this appeal. The court found that no unique facts or circumstances necessitated an unequal division of community property.

¶3 As relevant to Autrand's appeal, the trial court ruled on the following disputed issues: (1) the parties' joint bank account; (2) each party's retirement account or accounts; (3) the division of community debt, specifically a number of past-due credit accounts and an outstanding income tax liability; (4) payments Autrand had made after the date of service toward the former marital residence; and (5) the parties' requests for attorney fees.

¶4 In addition to the findings Autrand challenges, the trial court also ordered each party to pay their own student loans and any debt associated with property they retained. It ruled that Whiteside did not owe Autrand for an alleged deficit related to a vehicle trade-in but that she had

not proven her claim of infidelity-related waste by a totality of the evidence. It also found Autrand had proven that certain real property purchased during the marriage and sold after the date of service was his sole property, rather than community property as typically presumed under Arizona law. *See Neely v. Neely*, 115 Ariz. 47, 51 (App. 1977). However, the court found Whiteside was entitled to half of the community lien on the property, which amounted to $9,317.24 for each party. Autrand retained the remainder of the proceeds from that sale.

Discussion

Division of Community Property

¶5 A trial court's discretion "in apportioning community property" is broad and we will not disturb its ruling absent an abuse of that discretion, such as an error of law. *Boncoskey v. Boncoskey*, 216 Ariz. 448, ¶ 13 (App. 2007). Section 25-318(A), A.R.S., requires that all community property should be divided equitably. Equitable division does "not necessarily" mean division "in kind." § 25-318(A); *see also McClennen v. McClennen*, 11 Ariz. App. 395, 398 (1970) (trial court "not required to divide the property evenly, only equitably"). Rather, the court's division "must result in a substantially equal distribution which neither rewards nor punishes either party." *Lee v. Lee*, 133 Ariz. 118, 121 (App. 1982). "[N]othing shall prevent the court from considering 'excessive or abnormal expenditures, destruction, concealment or fraudulent disposition' of the property in making that equitable division." *Toth v. Toth*, 190 Ariz. 218, 221 (1997) (quoting § 25-318). And, "any other factors that bear on the equities of a case may properly be considered." *In re Marriage of Inboden*, 223 Ariz. 542, ¶ 14 (App. 2010).

Joint Wells Fargo Account

¶6 Autrand argues the trial court erred "when it failed to reimburse [him] for one-half of the community funds in the parties' joint account." About two weeks before the date of service, Whiteside transferred the entire balance from the joint checking account, which was $5,891.49, into an account in her name. Autrand requested the court order an equalization payment of one-half of this pre-service balance. The court ruled that because there were no funds remaining in the joint account on the date of service, the "[e]vidence showed that there were no joint accounts" to equalize. It also declined to equalize the funds in Autrand's

individually held bank account, which carried a balance of "over $5,400,"[1] even though Autrand "provided no proof" that the funds in that account were not community funds.

¶7 As Autrand argues, the "marital community is deemed to have terminated upon the service of a petition that results in a decree of dissolution." *Bobrow v. Bobrow*, 241 Ariz. 592, ¶¶ 14-15 (App. 2017) (holding pre-dissolution contractual obligation of one spouse to pay community bills terminated upon date of service). And, "the selection of a valuation date rests within the wide discretion of the trial court and will be tested on review by the fairness of the result." *Sample v. Sample*, 152 Ariz. 239, 242-43 (App. 1986).[2]

¶8 The evidence here supports the trial court's finding that the joint account had a balance of zero on the date of service, and thus there were no funds to equalize. Autrand raised no claim of waste or other misconduct with regard to Whiteside's pre-service withdrawal from the joint account, and the court made no such finding. *See Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 7 (App. 1998). Thus, the court acted within its discretion in determining the account would be equalized as of the date of service, at which time the joint account had a zero balance.

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[1]The balance of Autrand's account as of the date of service is unclear from the record before us. Whiteside agreed both that the funds were placed in Autrand's account "after the date of service" and, contrarily, "as of" the date of service. The trial court relied on Exhibit 55 to find that the funds were in the account on the date of service. However, that exhibit reflects only the account balance as of July 25, 2018, two days after the date of service. In any event, because Autrand does not challenge the court's ruling that his separate account was not subject to equalization, and because Whiteside did not cross-appeal this ruling, the amount in that account on the date of service is immaterial to our decision.

[2]We have upheld trial courts' use of the date of service as the appropriate date of valuation when dividing bank account balances. *See, e.g.*, *Moyer v. Moyer*, No. 1 CA-CV 18-0703 FC, ¶¶ 34-40 (Ariz. App. Aug. 11, 2020) (mem. decision) (affirming division of bank account as of date of service, but equalizing other accounts subject to waste claim); *Clark v. Clark*, No. 1 CA-CV 13–0252 FC, ¶¶ 25-26 (Ariz. App. Apr. 30, 2015) (mem. decision) (using account balances as of date of petition in calculation).

Retirement Plans

¶9 Autrand next argues the trial court "erred when it failed to award [him] one-half of [Whiteside]'s retirement plans." At trial, Whiteside testified that she had held one of these two accounts since 2012, before the marriage, and that a portion of it "was separate property." She also affirmed she had withdrawn funds from both accounts as "a loan" to pay for her school supplies and attorney fees after serving the petition for dissolution. Testimony from both parties also established that Autrand's former retirement account had been cashed out in 2017, during the marriage, and the funds had been placed in the parties' joint bank account. Both parties also testified that these funds were used to satisfy community liabilities, including various bills the parties paid after Autrand quit his job to attend flight school.

¶10 The trial court found that Whiteside had "presented evidence of a separate property component" to her retirement accounts. Additionally, it found that a portion of Autrand's former retirement account constituted a community asset, but "no evidence established that the monies withdrawn by [Autrand] were used for the benefit of the community." It thus ordered no equalization to either party "for any community interest in his/her retirement assets, which no longer exist."

¶11 Autrand maintains the evidence did not support the trial court's finding that the retirement plans were Whiteside's separate property rather than community property subject to division. We agree. It is settled law in Arizona that retirement benefits "are community property insofar as the rights were acquired during marriage, and are subject to equitable division upon divorce." *Johnson v. Johnson*, 131 Ariz. 38, 41 (1981). Courts calculate a non-employee spouse's "community interest in the employee spouse's pension benefits under either of two methods," the "present cash value method" or the "reserved jurisdiction method." *Id*.

¶12 Here, however, the trial court made no such calculation regarding the extent of Autrand's community interest in Whiteside's retirement accounts. Nor did the evidence provide for such a calculation, as the relevant exhibit reflected only the account balance as of 2018, and did not reflect the amount that had accrued during the marriage. The evidence also did not establish the value of Autrand's former retirement account, which had been cashed out in 2017. Finally, both parties agreed that the funds from Autrand's account had been used to the benefit of the community, and we find nothing in the record that supports the court's finding to the contrary.

¶13 Thus, we cannot conclude that the trial court acted within its discretion when it declined to equalize Whiteside's retirement accounts. *See Tester v. Tester*, 123 Ariz. 41, 45 (App. 1979) ("Although it is the role of the trial court to sift the evidence and determine the facts, an appellate court must reverse the lower court's decision when it finds no evidence to support it."). We therefore remand this issue to allow the court to determine the extent of Autrand's interest, if any, in Whiteside's retirement funds and whether the community property must be reapportioned to achieve an equivalent division. In doing so, the court may receive additional evidence to evaluate the equitable factors, including evidence relating to the historic balances of both parties' retirement accounts, including Whiteside's pre-marital balance and Autrand's pre-cash-out balance.

Division of Outstanding Community Liabilities

¶14 Autrand also argues the trial court abused its discretion in not equally dividing various community liabilities pending after the date of service. Specifically, he contends the court erred in holding him solely liable for the parties' outstanding federal income tax liability; balances on two credit cards and a furniture store account; and a damage fee on the parties' former rental property. Autrand argues the court erroneously apportioned these debts.

Income Tax Liability

¶15 The parties disagreed as to the apportionment of $6,053.48 in federal income taxes, interest, and penalties owed on the parties' 2015 joint taxes. Trial testimony established that Autrand, who filed their joint tax returns, had failed to file certain documents supporting Whiteside's receipt of educational grant money, resulting in the outstanding tax obligation. For his part, Autrand testified that once he was aware of the tax audit, he had provided Whiteside with the necessary documentation and envelopes before he left the state for flight school. He argued her failure to send the documents led to the liability. Whiteside disputes this claim in her answering brief. The trial court found "[t]he evidence clearly showed" Autrand had "prepared the tax return" and had "failed to file the paperwork necessary to claim the credits to which the parties were entitled."

¶16 To the extent Autrand complains the trial court erred in concluding he was at fault for the error leading to the tax liability, we see no abuse of discretion. Viewed in the light most favorable to upholding the

ruling, *Kohler*, 211 Ariz. 106, ¶ 2, and giving due regard to the court's assessment of witness demeanor and credibility, *see In re Estate of Zaritsky*, 198 Ariz. 599, ¶ 5 (App. 2000), the court maintained discretion to conclude Whiteside's testimony regarding the tax liability was more credible. The court thus acted within its discretion in concluding Autrand was solely responsible for incurring the unnecessary tax liability.

¶17 Autrand also complains the trial court's allocation of the entire tax liability to him was "not supported by the law" because "no case or statute . . . permits an unequal distribution of a joint debt due to one spouse's alleged error when filing an income tax return." But Autrand cites no authority, and we have located none, providing the reverse—that a trial court may *not* apportion an unnecessarily incurred income tax liability to the party responsible for accruing that debt. Moreover, the court may consider factors including "abnormal expenditures" and destruction of community property, as provided by § 25-318(C). *See Marriage of Inboden*, 223 Ariz. 542, ¶ 14 (in addition to considering statutory factors listed under § 25-318(C), court may consider "any other factors that bear on the equities of a case"). In so doing, the court "may compensate one spouse for the misuse of the common property by the other spouse by awarding the innocent spouse a greater share of the community property to offset the value of the lost property." *Martin v. Martin*, 156 Ariz. 452, 456 (1988). As long as the court does not "reward one spouse and punish the other," the division of community debt remains within the court's broad discretion. *Calderon v. Calderon*, 9 Ariz. App. 538, 541 (1969). We find no abuse of that discretion here.

Other Outstanding Debt

¶18 Autrand also challenges the trial court's ruling that he solely pay an outstanding balance at a furniture store and two credit card balances.[3] He argues these constituted community debts because they were incurred during marriage, and Whiteside did not need to know the accounts existed in order to be liable for them.

¶19 The trial court heard conflicting testimony with regard to these debts. According to Autrand, the cards were used to purchase "community things." But Whiteside stated she had been unaware the

[3]The trial court misstated that Autrand held "three Amazon credit cards and three Capital One credit cards." The trial testimony and admitted exhibits show only two active cards in Autrand's name; he carried duplicate cards with different account numbers for a time.

accounts had been opened, she did not have access to them, and to her knowledge they had not been used to purchase anything for the benefit of the community. With regard to the furniture store account, he testified he had left the furniture purchased on that account at the former marital residence, and he requested Whiteside reimburse him for half the funds he had spent to purchase it. But Whiteside testified she had left the furniture with Autrand when she left the residence and, to her knowledge, it remained in his possession. And, both parties testified that Autrand had changed the locks, such that Whiteside did not have access to the residence, or the furniture, after her early July departure.

¶20 The trial court found that "[n]o evidence established that anything charged on these [credit card] accounts was used for the benefit of the community," and that because Whiteside had not known about them and did not have access to them, Autrand should be solely responsible for their payment. Autrand does not cite, and we have not found, anything in the record to contradict the court's determination.

¶21 Likewise, uncontroverted testimony established that Autrand maintained possession of the furniture and that Whiteside was unable to access it after he changed the locks. Viewed in the light most favorable to upholding the trial court's ruling, *Kohler*, 211 Ariz. 106, ¶ 2, and deferring to its assessment of witness credibility, we will not disturb the court's findings of fact unless they are clearly unsupported by the record. *Estate of Zaritsky*, 198 Ariz. 599, ¶ 5. It was within the court's discretion to determine that Autrand had prevented Whiteside from accessing or possessing the furniture purchased on the furniture store account. Thus, we also find no abuse of discretion in the court's ruling that Autrand bear this debt.

¶22 Autrand also appears to challenge the trial court's equal division of additional account balances in Whiteside's name at Best Buy and Wells Fargo. He grounds this complaint in the court's admission of two exhibits, a Best Buy statement and a Wells Fargo account statement, both in Whiteside's name, despite her late disclosure of these exhibits. The court admitted the documents over Autrand's objection, reasoning that the statements contained "information the court should have" in its equitable division. It equally divided these account balances between the parties.

¶23 A trial court retains "broad discretion in admitting or excluding evidence, and we will not disturb its decision absent a clear abuse of its discretion and resulting prejudice." *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, ¶¶ 19-20 (App. 2005) (finding "no manifest abuse of the court's discretion in admitting" certain evidence, "despite the lack of timely

disclosure"); *see also Johnson v. Provoyeur*, 245 Ariz. 239, ¶ 8 (App. 2018). The court considered Autrand's objection to the admission of these exhibits, as well as Whiteside's contention that Autrand was not prejudiced by the late disclosure of the Best Buy account statement because he had actual knowledge of it. Under these circumstances, the court acted within its discretion in admitting these exhibits.

Expenses Related to Former Marital Residence

¶24 The trial court also ruled that Autrand was solely liable for "expenses related to the parties' former rental" because the parties had paid the rent before Whiteside had left the residence on July 6. These included payments Autrand made for rent, utilities, and a charge for apartment cleaning after the lease terminated. It also found that trial evidence showed Autrand had "changed the locks," denying Whiteside access to the rental, and thus he was responsible for the utilities for that month as well as an $850 charge related to "dog urine cleanup and paint touch up caused by [his] dogs."

¶25 Autrand contests these rulings. He has maintained through his pretrial filings, his trial testimony, and this appeal that he separately paid the July rent after the date of service, and thus its payment was also subject to equalization. He further argues that the dogs were community property and Whiteside "could not produce any evidence" to show the damage charges were incurred after she left the residence.

¶26 The trial court was presented with conflicting testimony regarding rent payments for the month of July. Whiteside testified she had left the residence in the first week of that month and did not have further access to it. She further agreed she did not "have the benefit of rent being paid for [her]" in July. Autrand testified on cross-examination both that "the rent for July would have already been paid before the service date" and that they had not yet paid it because they were behind. Thus, the parties' testimony regarding the payment for the rental apparently conflicts. And, we can find nothing in the record to resolve this conflict. As we discuss above, we defer to the trial court's assessment of witness credibility and will not disturb the court's findings of fact unless they are clearly unsupported by the record. *Estate of Zaritsky*, 198 Ariz. 599, ¶ 5. Thus, we find no abuse of discretion in the court's determination that Whiteside was locked out of the house in early July, that the month's rent was paid before the date of service, and that therefore no equalization was appropriate for the rent.

¶27 We similarly defer to the trial court's assessment of the parties' testimony regarding the utilities and the $850 cleanup charge for the parties' former rental residence. Whiteside maintained that the residence had been "in good shape" when she left, that the dog-related charges could have been avoided had Autrand properly cleaned the residence, and that she had been unable to clean the residence herself because he changed the locks. She further testified she had not benefited from the payment of July utilities, because she did not have access to the property. Autrand testified that he had changed the locks "towards the end" of July because Whiteside gave her keys to people he did not know. And, he claimed the paint damage constituted "normal wear and tear" that had accumulated over the course of the parties' tenure at the residence. Neither party offered further evidence to substantiate their testimony.

¶28 Viewed in the light most favorable to upholding the trial court's ruling and deferring to its assessment of witness credibility, we will not disturb its finding that the damages were attributable to Autrand rather than to the community. Because the court could properly take into account "other factors" in dividing the community property, *Marriage of Inboden*, 223 Ariz. 542, ¶ 14, such as its finding that Autrand had locked Whiteside out of the house, which prevented her from entering the apartment to help clean it or from benefitting from the utilities after she left, we find no abuse of discretion in its apportionment of these debts to Autrand.

Attorney Fees

¶29 Finally, Autrand argues the trial court erred in denying him attorney fees pursuant to A.R.S. § 25-324. He claims the court abused its discretion because Whiteside's "legal positions and arguments were unreasonable" and were unsupported by evidence and law. He further complains that he was entitled to fees because Whiteside "committed numerous discovery violations" and rejected "a reasonable settlement offer."

¶30 We review for abuse of discretion the trial court's denial of a party's request for attorney fees, *In re Marriage of Williams*, 219 Ariz. 546, ¶ 8 (App. 2008), and we find no such abuse here. Section 25-324(A) allows a court to award fees after considering the parties' financial resources and the reasonableness of their positions. However, it "is not required to do so," *Alley v. Stevens*, 209 Ariz. 426, ¶ 12 (App. 2004), unless the court finds the presence of certain circumstances outlined in § 25-324(B).

¶31 The trial court expressly considered the factors required by § 25-324(A) and found none of the factors listed in § 25-324(B) applied. It noted that although "both parties pled unreasonableness on the part of the other," neither filed motions "that appeared to be inappropriate or frivolous," to have been made in bad faith, or to be "so unreasonable as to warrant an award of fees." Although Autrand characterizes as unreasonable numerous positions Whiteside took during the proceedings, the court accepted some of these positions in its ruling, as we do on appeal. And although Whiteside testified that she initially had failed to disclose two retirement accounts in her uniform interrogatories, she disclosed both of these accounts before trial. As we have discussed above, the court did not find Whiteside had committed a discovery violation as a result of her initial failure to disclose these accounts. Thus, Whiteside's late disclosure did not require the court to deem her actions during litigation "unreasonable" and to accordingly award fees under § 25-324. Finally, it was well within the court's discretion to determine that Whiteside's rejection of Autrand's settlement offers did not constitute an unreasonable position. *See Gutierrez*, 193 Ariz. 343, ¶ 34 ("trial court may consider a party's settlement position in determining reasonableness under A.R.S. section 25-324"). We affirm the court's denial of attorney fees.

¶32 Autrand requests his fees and costs on appeal pursuant to § 25-324 and Rule 21(c), Ariz. R. Civ. App. P. But he has provided no reason for us to depart from the trial court's finding that neither party pled disparity of income, the primary purpose of § 25-324. *Edsall v. Superior Court*, 143 Ariz. 240, 248-49 (1984) ("The primary focus of this section is on the relative ability of the parties to pay costs incurred in the proceedings . . . . This statute was designed to assure the poorer party a remedy."). And Rule 21(c) does not provide a substantive basis for awarding attorney fees. *Bed Mart, Inc. v. Kelley*, 202 Ariz. 370, ¶ 24 (App. 2002). Lastly, Autrand is not the prevailing party such that he is entitled to costs under A.R.S. § 12-341. Thus, we deny Autrand's request for both fees and costs.

Disposition

¶33 For the foregoing reasons, we affirm the trial court's rulings on attorney fees. We vacate the portion of the trial court's ruling that relates to the parties' retirement accounts and remand for further proceedings. We do not disturb the court's other findings with regard to the allocation of property; however, we recognize that upon remand, the court's findings with regard to the parties' retirement accounts may compel it to reweigh the overall equitable distribution of property.