IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF

SHERRY MARIE ENGLAND,
Petitioner/Appellee,

and

DON A. ENGLAND,
Respondent/Appellant.

No. 2 CA-CV 2021-0054-FC
Filed October 14, 2021

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NOT FOR PUBLICATION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. S1100DO201800853
The Honorable Karen F. Palmer, Judge Pro Tempore

AFFIRMED

COUNSEL

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By Christina S. Hamilton
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Georgini Law Offices L.L.C., Casa Grande
By Tresa S. Georgini
Counsel for Respondent/Appellant

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Eppich and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 Don England appeals from the trial court's decree of dissolution of his marriage to Sherry England and its order denying his motion to alter or amend the decree. On appeal, he argues the court erred by denying his motions to continue the trial and by failing to fairly and equitably distribute the parties' "liquid assets." For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to affirming the decree. *In re Marriage of Foster*, 240 Ariz. 99, ¶ 2 (App. 2016). Don and Sherry were married in 2005 and have two minor children. During the course of the marriage, they were partners in several agricultural partnerships, including D&S Land and Cattle LLC, D&S Equipment Co. LLC, EB Livestock, Sierra Farms II, Sierra Farms III, and Thornton and Ash LLC.

¶3 In May 2018, Sherry petitioned for dissolution and after a two-day bench trial, the court entered its under-advisement ruling dissolving the marriage on August 24, 2020. As relevant here, the court's ruling divided the parties' community property and granted Sherry's request for attorney fees and costs in part.[1] The court also certified the decree as final and appealable under Rule 78(b), Ariz. R. Fam. Law P.

¶4 On September 4, 2020, Sherry filed a motion to alter or amend the trial court's judgment pursuant to Rule 83, Ariz. R. Fam. Law P. Ten days later, Don also filed a Rule 83 motion. On September 24, the court

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[1]Don does not challenge on appeal the other rulings in the trial court's decree: awarding Sherry sole legal decision-making authority over the parties' children, granting Don parenting time, ordering him to pay child support, and allocating medical expenses and tax deductions. As such, we will not address these issues.

issued a minute entry that, among other things, denied Don's request to generally set aside the judgment, but ordered the parties to submit additional briefing on a tax liability issue he had raised. Don filed a notice of appeal on October 9, 2020, challenging the court's August 24 decree and its order of September 24. On October 25, Sherry filed a motion for relief pursuant to A.R.S. § 25-318 and Rule 85, Ariz. R. Fam. Law P., requesting the court to amend the decree to include the legal descriptions of the land held by the various business entities owned by the parties. In a judgment entered November 6, the court awarded Sherry attorney fees and costs and granted her Rule 83 motion. And on December 21, the court entered an order denying Don's Rule 83 motion on the remaining tax issue,[2] and a separate order granting Sherry's Rule 85 motion, amending the decree to include the legal descriptions of the parties' land. Neither party filed a notice of appeal, amended or otherwise, following entry of the December 21 ruling.

Discussion

Jurisdiction

¶5 Preliminarily, we address Sherry's motion to dismiss the appeal on the basis that Don's notice of appeal was filed prematurely while post-judgment motions were pending in the trial court. We previously granted Sherry's motion to dismiss Don's appeal of the September 24 order as to his motion to alter or amend, but denied the motion as to the August 24 decree. After Don filed his opening brief, Sherry filed a motion to strike the brief and to dismiss the appeal.

¶6 Our jurisdiction is defined by statute, and we must dismiss an appeal over which we lack jurisdiction. *Robinson v. Kay*, 225 Ariz. 191, ¶ 4 (App. 2010). Generally, we have jurisdiction to hear appeals from a final judgment of the superior court. A.R.S. § 12-2101(A)(1). A notice of appeal must be filed within thirty days after entry of the judgment being appealed, Ariz. R. Civ. App. P. 9(a), and we lack jurisdiction when the notice of appeal is untimely. *Sycamore Hills Ests. Homeowners Ass'n, Inc. v. Zablotny*, 250 Ariz. 479, ¶ 25 (App. 2021). The filing of certain post-judgment motions, however, such as a motion to alter or amend a judgment under Rule 83(a), Ariz. R. Fam. Law P., or a motion to correct mistakes under Rule 85, Ariz.

[2]Although the trial court denied Don's Rule 83 motion on November 6, 2020, it later stayed that order, noting it had prematurely ruled before Don could file a reply. After reviewing Don's reply, the court affirmed its denial in its December 21, 2020 ruling.

R. Fam. Law P., extend the time for a notice of appeal to be filed, with the thirty days beginning to run after the trial court has disposed of the last remaining motion.[3] Ariz. R. Civ. App. P. 9(e)(1)(C), (E).

¶7 Sherry argues this court lacks jurisdiction over Don's appeal from the August 24 decree because his notice of appeal, filed October 9, 2020, was not filed within thirty days after the trial court entered the decree.[4] To support her argument, Sherry relies on *Craig v. Craig*, 227 Ariz. 105, ¶ 13 (2011), for the proposition that "a notice of appeal filed in the absence of a final judgment, or while any party's time-extending motion is pending before the trial court, is 'ineffective' and a nullity." However, Sherry's argument overlooks that in 2014, our supreme court amended Rule 9, Ariz. R. Civ. App. P., to include Rule 9(e)(2) which provides that a notice of appeal filed prematurely before or during the pendency of a post-judgment motion under Rule 9(e)(1), takes effect "as of the entry of the order disposing of the last remaining motion." Ariz. Sup. Ct. Order R-14-0017 (Sept. 2, 2014). Accordingly, even though Don's notice of appeal challenging the August 24 decree was filed while time-extending motions were pending, under Rule 9(e)(2), the notice became effective when the court entered its order disposing of the remaining issue in Don's motion under Rule 83, Ariz. R. Fam. Law P., and Sherry's Rule 83 and Rule 85 motions—the last of the pending time-extending motions—on December 21, 2020. We therefore have jurisdiction over Don's appeal from the court's decree.

¶8 As noted above, we previously entered an order granting Sherry's motion to dismiss Don's appeal of the September 24 order. We now explain our reasoning. Sherry argued that the notice of appeal was

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[3]Sherry does not dispute that the trial court's August 24 decree qualifies as a final judgment, or that Don's Rule 83 motion was timely filed.

[4]As noted above, on December 21, 2020, the trial court entered an order affirming its earlier order denying Don's motion under Rule 83, Ariz. R. Fam. Law P. Don argues his notice of appeal was timely under Rule 9, Ariz. R. Civ. App. P., because his Rule 83 motion extended the time for filing his notice of appeal, which he filed within thirty days of the September 24 order. Because Rule 9(e)(1) clearly states the time to file a notice of appeal only begins when the "signed written order disposing of the last such remaining motion" is entered, his notice of appeal was premature because the September 24 order did not completely dispose of his Rule 83 motion, leaving unanswered the questions about his tax liability.

premature and should have been filed within thirty days of the trial court's December 21, 2020 final ruling on Don's motion. When a party attempts to appeal an order disposing of motions like Don's under Rule 83, Ariz. R. Fam. Law P., the time to appeal begins at the "entry of the order disposing of the last such remaining motion." Ariz. R. Civ. App. P. 9(e)(3). To challenge the court's denial of his motion to alter or amend, Don therefore needed to file his notice of appeal within thirty days after the court entered a signed order disposing of the last remaining, time-extending motion. *See* Ariz. R. Civ. App. P. 9(a),(e)(3). Don's notice of appeal, filed October 9, 2020, was within thirty days of the September 24 order. But that order did not completely dispose of his Rule 83 motion, nor did it resolve Sherry's Rule 83 and Rule 85 motions. Because Don did not file an amended notice of appeal within thirty days after entry of the December 21 ruling, we lack jurisdiction over his appeal from the court's denial of his motion to alter or amend.

¶9 In her motion to strike and answering brief, Sherry also argues we must dismiss Don's appeal because he failed to timely file transcripts of trial court proceedings with this court. *See* Ariz. R. Civ. App. P. 11(c)(2)-(3) (requiring transcripts to be ordered within ten days and notice thereof to be filed with trial court within fifteen days of filing notice of appeal or entry of order disposing of last timely remaining motions under Rule 9(e), whichever is later). Nothing in the record on appeal indicates when Don ordered trial transcripts. He also did not file them with this court until July 7, 2021, which is almost nine months after he filed his notice of appeal and five months after the trial court ruled on the last time-extending motions.

¶10 We generally exclude untimely filed transcripts from the record on appeal, especially when the late filing has prejudiced one of the parties. *See Auman v. Auman*, 134 Ariz. 40, 42 (1982) ("[T]he trial transcript . . . was not timely filed and therefore was not available for appellee's use prior to the time her answering brief was due. Thus, the transcript is not part of the record for purposes of this appeal."). However, we prefer to decide cases on their merits, *DeLong v. Merrill*, 233 Ariz. 163, ¶ 9 (App. 2013), and because the transcripts were filed with this court nineteen days before Sherry's answering brief was due, she cannot show prejudice and we will consider them as part of the record, *see* Ariz. R. Civ. App. P. 15(a)(2) (answering brief due within forty days after service of opening brief).

Motion to Continue

¶11 Don argues the trial court erred by denying his motion to continue the trial.[5] We review a court's denial of a motion to continue for abuse of discretion. *Dykeman v. Ashton*, 8 Ariz. App. 327, 330 (1968). An abuse of discretion occurs when there is no evidence to support the court's conclusion or if the court's decision is "clearly untenable, legally incorrect, or amount[s] to a denial of justice." *Charles I. Friedman, P.C. v. Microsoft Corp.*, 213 Ariz. 344, ¶ 17 (App. 2006) (quoting *State v. Chapple*, 135 Ariz. 281, 297 n.18 (1983)). In requesting a continuance to obtain additional witness testimony, a party must show: "(1) why the testimony of the party or witness is material; (2) when the party learned of the party's or witness's unavailability; (3) the party's diligence and efforts in attempting to obtain the party's or witness's testimony; and (4) the postponement is for good cause and not for delay." Ariz. R. Fam. Law P. 34(a).

¶12 On April 23, 2020, Don filed a motion to continue the bench trial set to begin on June 19, 2020, arguing he needed time to hire his own expert to calculate the value of the businesses in dispute after the pandemic related "crash of the current economic market."[6] The trial court denied the request. Later in the August 24 decree, in awarding Sherry attorney fees, the court found Don had acted unreasonably in attempting to delay the trial by filing his motion to continue.

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[5]In his notice of appeal, Don did not identify the trial court's rulings denying his motions to continue as "judgment[s] . . . from which [he] is appealing," as required by Rule 8(c)(3), Ariz. R. Civ. App. P. However, because Sherry has not raised this as an issue, we deem the notice of appeal as sufficient because it does not appear to have "misled []or prejudiced an opposing party." *Hill v. City of Phoenix*, 193 Ariz. 570, ¶ 10 (1999).

[6]On June 12, 2020, Don filed a second motion to continue, arguing that the parties' bank had begun the process of assessing the assets of their farming businesses that were subject to a secured interest held by the bank and that the bank could liquidate the assets if it questioned the parties' financial stability. But Don's opening brief only argues that the trial court erred by denying his motion to continue because he needed time to hire an expert to determine whether the pandemic affected the value of the parties' business assets. We therefore do not address the court's denial of his second motion. *See City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶ 88 (App. 2008) (argument on appeal waived by party's failure to adequately develop it).

¶13 The record supports the trial court's decision. Don had almost two years to determine whether he needed an expert to appraise the property, as Sherry filed the petition for dissolution in May 2018, and later that year, he even agreed to pay a portion of the costs of Sherry's appraiser. On February 19, 2020, Sherry's appraiser issued his valuation report and on March 24, 2020, the court set the matter for trial in June. Most importantly, when Don filed his request for a continuance almost a month later, he did not offer any support for his contention that the conditions of the current economic market required new valuations of the parties' businesses due to the pandemic. Don has not shown that the court abused its discretion in denying his motion to continue the trial.

Community Property Division

¶14 Don argues the trial court abused its discretion by failing to make a "fair and equitable distribution of the community assets and debts." He maintains the court erred by requiring him to pay $2,869,954 in equalization payments instead of ordering the sale of the assets for the parties' businesses, paying their debts with the proceeds, dividing the remainder between the parties, and having the Sierra Farms partnerships, which had partners other than Don and Sherry, purchase Sherry's interest.

¶15 As an initial matter, relying on *Leathers v. Leathers*, 216 Ariz. 374, ¶ 19 (App. 2007), Sherry argues Don is precluded from raising this issue on appeal because he did not ask for all the business assets to be sold in his pretrial statement. However, we have since distinguished *Leathers* and held the "division of an asset is not automatically waived when one or both of the parties fails to list the asset in a pretrial statement, if exhibits are admitted and testimony regarding the asset is given at trial." *Nold v. Nold*, 232 Ariz. 270, ¶ 20 (App. 2013). In his pretrial statement, Don claimed the parties' business assets "are held as collateral to Wells Fargo Bank, the creditor, to secure the agriculture loans" made to their farming businesses. He disputed Sherry's expert's valuation of the assets, noting that the bank's assessment of "whether or not the value of the collateral is adequate to secure the loan" would have to be completed "before the parties can sell an asset of the businesses or personal assets." In his written closing argument, Don argued that the assets should be sold with the profits being divided among the parties. Don therefore did not waive his challenge to the trial court's division of community property.

¶16 The trial court has broad discretion in the distribution of community property, "and we will not disturb its allocation absent an abuse of discretion." *Boncoskey v. Boncoskey*, 216 Ariz. 448, ¶ 13 (App. 2007).

"[W]e consider the evidence in the light most favorable to upholding the superior court's ruling and will sustain the ruling if it is reasonably supported by the evidence." *Id.*

¶17 Don argues it is unfair to require him to pay $2,869,954 in equalization payments when he was only awarded $1,020,166 in liquid assets. Section 25-318(A), A.R.S. requires community property to be divided "equitably, though not necessarily in kind" between the parties. Community property "should be divided substantially equally unless sound reason exists to divide the property otherwise." *Toth v. Toth*, 190 Ariz. 218, 221 (1997). "In considering the equities, courts might reach different conclusions without abusing their discretion." *In re Marriage of Inboden*, 223 Ariz. 542, ¶ 7 (App. 2010).

¶18 In this case, the total value of the community businesses in dispute is $5,446,000. Because Sherry did not want to continue her business partnership with Don, the trial court awarded him Sherry's fifty percent ownership interest and required him to pay her $2,723,000, which amounts to one half of the community businesses' value. Although Don apparently prefers to sell the businesses' assets, split the proceeds, and have the Sierra Farms partnerships purchase Sherry's share rather than pay her an equalization payment, he does not specify how the court's approach is inequitable beyond claiming it "is not fair" and his approach is the "more appropriate remedy." To the extent Don is asking this court to reweigh the evidence, we will not do so. "We will defer to the trial court's determination of witnesses' credibility and the weight to give conflicting evidence." *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 13 (App. 1998). Don has not shown the court abused its broad discretion in apportioning the community property.

Attorney Fees

¶19 Sherry requests her attorney fees and costs on appeal pursuant to A.R.S. § 25-324 and Rule 21, Ariz. R. Civ. App. P. In requesting attorney fees on appeal, Sherry asserts that Don has greater financial resources and claims that his positions were unreasonable. In his reply, Don merely responded that Sherry's request should be denied without further elaboration. Notably, the trial court found a "substantial disparity of financial resources" between the parties and awarded Sherry attorney fees. Because nothing in the record on appeal suggests the parties' financial positions have changed, we grant Sherry's request for attorney fees, *see Keefer v. Keefer*, 225 Ariz. 437, ¶ 16 (App. 2010), and her costs on appeal upon

compliance with Rule 21(b). *See Doherty v. Leon*, 249 Ariz. 515, ¶ 24 (App. 2020).

Disposition

¶20 For the foregoing reasons, we deny Sherry's motion to dismiss and strike, and we affirm the trial court's decree.