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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of VICTOR C. and
BEVERLY J. CHING.

VICTOR C. CHING,

Respondent,

v.

BEVERLY J. CHING,

Appellant.

G049628

(Super. Ct. No. RFLRS052225)

O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County, Dennis G. Cole, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed in part, affirmed in part, and remanded.

Law Offices of Marjorie G. Fuller and Marjorie G. Fuller for Appellant.

Haslam Perri & Thorne, Donald G. Haslam; Arias & Lockwood, and Christopher D. Lockwood for Respondent.

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Appellant Beverly J. Ching appeals from a trial court judgment that (1) divided the substantial community and separate property assets Beverly and her husband, respondent Victor C. Ching, acquired during their 32-year marriage, and (2) denied Beverly's requests for spousal support and attorney fees.¹ Beverly challenges several different aspects of the trial court's judgment.

First, Beverly contends the trial court erred in awarding Victor reimbursements under Family Code section 2640 for the value several investments had when Victor executed the couple's agreement to transmute the investments and all of Victor's other separate property into community property.² As explained below, we reject Beverly's contention Victor waived his section 2640 reimbursement rights by signing the community property agreement. We also reject her contention section 2640 only applies to separate property used to purchase real estate for the community's benefit. We agree, however, the trial court erred in finding a TD Ameritrade account was Victor's separate property. With this exception, we conclude the trial court did not err in awarding reimbursements under section 2640.

Second, Beverly contends the trial court erred in failing to award her half of the community property funds deposited in a joint bank account after the couple separated, arguing Victor failed to account for a substantial portion of the money. We reject this challenge because Beverly forfeited it by failing to raise the issue in the trial court.

Third, Beverly contends the trial court erred in valuing the community's interest in Victor's medical practice because it erroneously found Victor had a partner

¹ For clarity, "we refer to the parties by their first names, as a convenience to the reader. We do not intend this informality to reflect a lack of respect. [Citation.]" (*In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1513, fn. 2.)

² All statutory references are to the Family Code unless otherwise stated.

that owned half of the practice. No substantial evidence shows Victor had a partner on the agreed-upon valuation date for the practice. To the contrary, the record establishes Victor's partner did not acquire an interest in the practice until approximately one year after the valuation date.

Finally, Beverly challenges the trial court's denial of her requests for spousal support and attorney fees. The trial court found Beverly did not need spousal support or an attorney fee award because the income she earned as a registered nurse, the assets she received through the property division, and the income she could earn by investing those assets allowed her to maintain the marital standard of living and pay her attorneys. We conclude the trial court erred because it relied on an outdated income and expense declaration and an updated declaration filed shortly before trial showed Beverly's income had decreased and her expenses had increased.

We remand for the trial court to reconsider Beverly's requests for spousal support and attorney fees based on current and accurate information. On remand, the trial court also must adjust the division of property to account for the full value of the TD Ameritrade account without any right of reimbursement and the full value of Victor's medical practice as a community asset.

I

FACTS AND PROCEDURAL HISTORY

Victor and Beverly wed in 1974. Victor is a urologist who has a private practice and also works at the Veterans Affairs Hospital. Beverly is a registered nurse with a master's degree in healthcare administration. During their marriage, the couple accumulated substantial financial assets, including the family home they owned outright, multiple vacation homes and other real estate holdings, and numerous stocks and other investments. Victor and Beverly also purchased homes and vehicles for their two adult children. At the time of trial, Victor earned on average about \$25,000 per month as a

urologist and over \$4,100 per month from his separate property. Beverly earned on average about \$7,600 per month as a nurse and \$2,700 in rental income.

In January 2005, Victor and Beverly established the “BVJC Family Revocable Living Trust.” At the same time, Victor and Beverly also executed the “Community Property Agreement of Victor C. Ching and Beverly J. Ching,” which stated they “hereby declare and agree that all property now owned or hereafter acquired by either or both of us . . . is and shall be our community property.” At trial, the couple stipulated this agreement transmuted their separate property into community property.

The couple separated on January 1, 2007, and Victor filed a petition to dissolve the marriage in February 2007. Six months later, the court entered an unopposed judgment dissolving the marriage, but reserving jurisdiction over all other issues. In August 2009, the couple reached an agreement to divide many of their assets and the court entered a partial judgment on reserved issues based on that agreement.

Between February 2010 and March 2011, the court conducted a nine-day bench trial on the remaining issues. In November 2011, the court entered a further judgment on reserved issues making a final division of the couple’s property and denying Beverly’s requests for spousal support and attorney fees. Beverly timely appealed from that judgment. We will provide additional facts below concerning each aspect of the judgment Beverly challenges.

II

DISCUSSION

A. *Section 2640 Separate Property Reimbursements*

The trial court awarded Victor reimbursements of more than \$1.5 million for the value of several separate property investments that became community property under the couple’s 2005 community property agreement. The specific investments were interests in three partnerships and brokerage accounts at TD Ameritrade, UBS Financial,

Stifel Nicholas, and Citibank. According to the trial court, Victor inherited these investments as his separate property when his father died in 2002, and therefore section 2640 obligated the community to reimburse Victor for the existing value of the investments when they were transmuted into community property.

Section 2640 provides, “In the division of the community estate under this division, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party’s contributions to the acquisition of property of the community property estate to the extent the party traces the contributions to a separate property source. The amount reimbursed shall be without interest or adjustment for change in monetary values and may not exceed the net value of the property at the time of the division.” (§ 2640, subd. (b).) Under section 2640, the contributing spouse is entitled to the existing value of the separate property when it was converted into community property. (*In re Marriage of Tallman* (1994) 22 Cal.App.4th 1697, 1700; *In re Marriage of Perkal* (1988) 203 Cal.App.3d 1198, 1202 (*Perkal*).)

Beverly contends the trial court erred in awarding Victor reimbursements for these investments because section 2640 does not apply as a matter of law when a spouse transmutes separate property investments into community property. Alternatively, Beverly contends the trial court erred in finding the TD Ameritrade account was Victor’s separate property and in valuing Victor’s separate property interests in the TD Ameritrade account, the UBS Financial account, the Stifel Nicholas account, and the three partnerships.

1. Section 2640 Reimbursement Rights Apply to Separate Property Investments a Spouse Transmutes into Community Property

Beverly contends section 2640 does not apply to the investments Victor transmuted into community property for three reasons. First, she argues Victor waived his reimbursement rights under section 2640 by executing the couple’s community

property agreement and transmuting all his separate property into community property. According to Beverly, these investments irrevocably became community property when Victor executed the community property agreement. We reject this contention because it erroneously equates transmuting property with a waiver of section 2640 reimbursement rights and ignores well-established waiver requirements.

Section 850 allows a spouse to transmute, or change the form of property, from separate property to community property. (§ 850, subd. (b).) An effective transmutation must be “made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected.” (§ 852, subd. (a).) Transmutation gives the noncontributing spouse an interest in the contributing spouse’s property that he or she otherwise would not have and allows the noncontributing spouse to share in any appreciation in the property’s value.

Section 2640, however, preserves the contributing spouse’s right to the value the property had at the time of transmutation. When the legislature enacted section 2640, it “overturn[ed] a long line of cases which had held that absent an agreement to the contrary, separate property contributions to the community were deemed to be gifts to the community. [Citations.] . . . [U]nder section [2640], ‘the tables are turned so that the separate property interest is now *preserved* unless the right to reimbursement is waived in writing.’ [Citation.]” (*Perkal, supra*, 203 Cal.App.3d at pp. 1201-1202, original italics.) The statute “encourages married persons to freely and without reservation contribute their separate property assets to benefit the community, and alleviates the need for spouses to negotiate with each other during marriage regarding continuing reimbursement rights. . . . [S]ection 2640 protects the general expectations of most people in marriage, i.e., that spouses will be reimbursed for significant monetary contributions to the community should the community dissolve.” (*In re Marriage of Walrath* (1998) 17 Cal.4th 907, 919; *In re Marriage of Carpenter* (2002) 100 Cal.App.4th 424, 429 (*Carpenter*).)

“Section 2640 creates a substantive right of reimbursement that can be relinquished only by an express written waiver by the contributing spouse. [Citation.] ‘In the absence of such a written waiver the donative intent of the contributing spouse does not bar reimbursement. . . .’ [Citation.]” (*Carpenter, supra*, 100 Cal.App.4th at p. 427; see *In re Marriage of Witt* (1987) 197 Cal.App.3d 103, 107 [section 2640 “creates a new property right in the contributing spouse”].) “‘Waiver [of section 2640 reimbursement rights] requires a voluntary act, knowingly done, with sufficient awareness of the relevant circumstances and likely consequences. [Citation.] There must be actual or constructive knowledge of the existence of the right to which the person is entitled. [Citation.]’ [Citation.] There must be ‘. . . an actual intention to relinquish it or conduct so inconsistent with the intent to enforce that right in question as to induce a reasonable belief that it has been relinquished.’ [Citation.]” (*Perkal, supra*, 203 Cal.App.3d at p. 1203; *Carpenter*, at pp. 428-429.)

A transmutation agreement between spouses therefore does not waive a contributing spouse’s section 2640 reimbursement rights *unless* the agreement acknowledges those rights and expressly waives them. (*In re Marriage of Holtemann* (2008) 166 Cal.App.4th 1166, 1175 (*Holtemann*); see *Carpenter, supra*, 100 Cal.App.4th at pp. 426-428 [premarital agreement deeming house husband purchased before marriage to be community property did not waive section 2640 reimbursement rights]; see also *Perkal, supra*, 203 Cal.App.3d at pp. 1203-1204 [deed transferring separate property to community as “a gift” did not waive section 2640 reimbursement rights].)

Here, Victor and Beverly’s community property agreement merely states the couple agrees “all property now owned or hereafter acquired by either or both of us . . . is and shall be our community property.” The agreement neither acknowledged nor expressly waived Victor’s section 2640 reimbursement rights. Accordingly, although the community property agreement transmuted these investments into community property and allowed Beverly to share in the appreciation of the investments from the date of the

agreement, it did not waive Victor's reimbursement right for the value the investments had on the date he signed the community property agreement.

Beverly next contends section 2640 only applies to separate property contributions used to purchase real property. According to Beverly, the Legislature enacted section 2640 to correct the perceived unfairness of the previous rule, which made separate property contributions used to purchase a single-family residence during marriage presumptively a gift to the community absent a written agreement to the contrary. Beverly relies on the statute's definition of the phrase "contributions to the acquisition of property," which she argues "limit[s]" reimbursable contributions to downpayments, payments for improvements, principal reduction payments, and other types of "cash contributions" that apply to real property acquisitions rather than stock acquisitions or contributions to bank accounts. We disagree.

On its face, section 2640 applies to "the division of the community estate *under this division.*" (Italics added.) Section 2640 is found in Division 7 of the Family Code, which governs the division of all property, not just real property. (Hogoboom & King, Cal. Prac. Guide: Family Law (The Rutter Group 2013) ¶ 8:451, p. 8-113.) Nothing on the statute's face limits it to separate property contributions used to acquire real property. Accordingly, courts have applied section 2640's reimbursement rights to separate property cash contributions deposited in bank accounts. (*In re Marriage of Braud* (1996) 45 Cal.App.4th 797, 825 (*Braud*).

Moreover, contrary to Beverly's contention, section 2640's definition of the phrase "contributions to the acquisition of property" does not limit the statute to separate property contributions relating to real property. Section 2640, subdivision (a), "specifies certain items that are reimbursable and nonreimbursable. Reimbursable "[c]ontributions to the acquisition of the property," . . . include downpayments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property" [Citation.] Nonreimbursable items,

which are not considered contributions to the acquisition of property under section 2640 include ‘payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property.’ [Citation.] These items enumerated in section 2640 are not all-inclusive.” (*In re Marriage of Cochran* (2001) 87 Cal.App.4th 1050, 1061 (*Cochran*).)

In *In re Marriage of Anderson* (1984) 154 Cal.App.3d 572, disapproved on other grounds in *In re Marriage of Fabian* (1986) 41 Cal.3d 440, the Court of Appeal explained, “The term ‘includes’ is ‘ordinarily a word of enlargement and not of limitation. [Citation.] The statutory definition of a thing as “including” certain things does not necessarily place thereon a meaning limited to the inclusions.’ [Citations.] We are therefore not limited to the forms of contributions enumerated in the [former] section [4800.2, which was reenacted as section 4620].” (*In re Marriage of Anderson*, at pp. 580-581; *Cochran, supra*, 87 Cal.App.4th at p. 1061.)

Finally, Beverly contends section 2640 does not apply to these investments because there was no “acquisition of property” within the meaning of the statute. According to Beverly, the couple did not acquire property as defined in section 2640 and therefore Victor could not claim reimbursement simply by signing the community property agreement and placing the investments in the family trust. Beverly cites no authority to support this contention. Indeed, case law establishes conveying separate property to the community by adding the noncontributing spouse to title is an acquisition of property under section 2640. (*Braud, supra*, 45 Cal.App.4th at p. 825 [section 2640 applied when husband changed bank account from his name only to a joint tenancy account with his wife]; *Carpenter, supra*, 100 Cal.App.4th at pp. 426-428 [section 2640 applied when husband changed title on his separate property residence to both his and his wife’s name as community property]; *Perkal, supra*, 203 Cal.App.3d at pp. 1200-1203 [section 2640 applied when husband changed titled on his separate property residence from his name only to both his and his wife’s name as joint tenants].)

Consequently, we reject Beverly's contentions that section 2640 may not apply to these investments as a matter of law. We next consider the separate challenges she raises to reimbursement for some of the specific investments.

2. The Trial Court Erred in Awarding Victor a Reimbursement for the TD Ameritrade Account

The trial court found Victor had a reimbursable separate property interest in a TD Ameritrade brokerage account worth approximately \$382,000 when he transmuted that account into community property in January 2005. Citing section 770, the court concluded the account previously was Victor's separate property because he inherited it from his father in 2002.³ Beverly contends the trial court erred in ordering reimbursement for this account because it was not Victor's separate property. We agree.

"Whether the spouse claiming a separate property interest has adequately met his or her burden of tracing to a separate property source is a question of fact and the trial court's holding on the matter must be upheld if supported by substantial evidence." (*Cochran, supra*, 87 Cal.App.4th at pp. 1057-1058.) Whether property is separate or community property, however, is reviewed under the de novo standard when the underlying facts are undisputed. (*In re Marriage of Rossin* (2009) 172 Cal.App.4th 725, 735.)

Here, the undisputed evidence showed Victor's father purchased all of the stocks and assets in the TD Ameritrade with his own funds. The account originally was in the name of Victor's father only, but he later added Victor to the account as a joint tenant with a right of survivorship. Shortly before Victor's father died, Victor and his father decided to add Beverly to the account as a joint tenant with a right of survivorship. Victor testified they added Beverly so she could do the paperwork and maintain the

³ Section 770 provides, "Separate property of a married person includes all of the following: [¶] . . . [¶] (2) All property acquired by the person after marriage by gift, bequest, devise, or descent." (§ 770, subd. (a).)

account, but they did not intend to convey an interest in the account to her. The trial court apparently credited Victor's testimony and concluded the TD Ameritrade account became Victor's separate property upon his father's death. The California Multiple-Party Accounts Law (Prob. Code, § 5100 et seq.) and Family Code joint title presumption (§ 2581), however, compel the opposite result.

Probate Code section 5301 states a joint account "belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each, unless there is clear and convincing evidence of a different intent." (Prob. Code, § 5301, subd. (a).) Probate Code section 5302 provides, "Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent. If there are two or more surviving parties, their respective ownerships during lifetime are in proportion to their previous ownership interests under Section 5301 augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before the decedent's death; and the right of survivorship continues between the surviving parties." (Prob. Code, § 5302, subd. (a).)

"Under [Family Code] section 2581, all property held in joint title by spouses during marriage is presumed to be community property upon dissolution, rebuttable only by written evidence to the contrary. [Citations.] Such evidence must consist of either '[a] clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property, [¶] . . . [or by p]roof that the parties have made a written agreement that the property is separate property.' [Citation.] Thus, under section 2581 spouses cannot hold property in joint title while preserving the property's separate property characterization through oral or implied agreements." (*In re Marriage of Weaver* (2005) 127 Cal.App.4th 858, 865 (*Weaver*).

In *Weaver*, a husband held title to his parent's home in joint tenancy with his mother and father. After his father died, he and his mother changed title to the home to reflect his father's death. In doing so, the husband's wife was added to the title as a joint tenant along with the husband and his mother. In later divorce proceedings between the husband and wife, both the husband and mother testified they did not intend to add wife to the title and adding her name on the title was a mistake. Despite this undisputed testimony, the court concluded the oral testimony of the husband and mother did not overcome section 2581's presumption the two-thirds interest the husband and wife held in the home was community property because there was no written evidence to rebut the presumption. (*Weaver, supra*, 127 Cal.App.4th at pp. 865-866.)

Here, Victor did not receive a reimbursable separate property interest in the TD Ameritrade account when his father first added him to the account because Victor did not contribute any funds to the account. (Prob. Code, § 5301.) When Victor and his father later added Beverly to the account any interest Victor and Beverly held was presumptively community property and the entire account became community property when Victor's father died. (Prob. Code, § 5302; § 2581; *Weaver, supra*, 127 Cal.App.4th at p. 865.) Victor's testimony that neither he nor his father intended to convey an interest in the account to Beverly when they added her is insufficient to overcome section 2581's presumption. (*Weaver*, at pp. 865-866.) The trial court therefore erred in concluding Victor had a separate property interest in the TD Ameritrade account and a right of reimbursement under section 2640. On remand, the trial court is directed to adjust the division of property to account for the full value of the TD Ameritrade account without any right of reimbursement.

Victor cites three cases for the proposition that oral testimony is sufficient to establish a spouse's separate property interest. (See *In re Marriage of Mix* (1975) 14 Cal.3d 604, 614; *In re Marriage of Steinberger* (2001) 91 Cal.App.4th 1449, 1457-1458; *In re Marriage of Milse* (1986) 182 Cal.App.3d 203, 206.) Of these three

cases, only *In re Marriage of Milse* addressed section 2581's presumption. That case refused to apply the presumption as established by former Civil Code section 4800.1, but it did so because the statute was enacted while the appeal was pending and applying it retroactively would be unconstitutional. (*In re Marriage of Milse*, at pp. 207-208.) Here, the statute was enacted nearly 25 years before Victor and Beverly separated. There is no issue of retroactivity and Victor cites no other authority addressing section 2581 or the California Multiple-Party Accounts Law.

3. Beverly Failed to Show the Trial Court Erred in Valuing UBS Financial Account Number 55498

The trial court found Victor had a reimbursable separate property interest in UBS Financial account number 55498 worth nearly \$818,000 when he transmuted the account into community property. Beverly argues the trial court erred in its valuation because the parties stipulated the account held only approximately \$742,000 when Victor transmuted it. We must reject this contention because Beverly failed to show the stipulation applied to this account.

We presume the trial court's judgment is correct and Beverly, as the appellant, bears the burden to affirmatively show the trial court erred. (*Natkin v. California Unemployment Ins. Appeals Bd.* (2013) 219 Cal.App.4th 997, 1013.) Beverly's opening brief must identify the evidence and authority necessary to support her claim of error; she may not wait until her reply brief to cite essential evidence or authority. (See *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852, fn. 10.)

The record shows the couple had multiple accounts with UBS Financial and the oral stipulation at trial that Beverly cites relates to "UBS Financial account 9866," not UBS Financial account number 55498. Beverly's opening brief does not acknowledge, let alone explain, the discrepancy between the account at issue and the account to which the stipulation applies. In her reply, Beverly contends account number 9866 became

account number 55498 after Victor transferred the Nucor Corporation stock that was the principal asset in this community property account to a new account in his name alone. To support this contention Beverly cites to Victor's trial brief, which acknowledges a transfer from a joint account to an account in Victor's name alone, but does not show account number 9866 became account number 55498. Moreover, the evidence Beverly cites — the oral stipulation at trial and Victor's trial brief — shows the Nucor Corporation stock was the primary asset in the account, but not the sole asset, and the stipulation on value relates only to the value of the Nucor Corporation stock, not the entire account. Accordingly, even if we assume Beverly's explanation is correct, her argument does not establish the trial court erred because the cash or other assets in the account could explain the difference between the stipulation and the trial court's valuation.

4. Substantial Evidence Supports the Trial Court's Valuation of the Boeing Stock Held at Stifel Nicholas

The trial court found Victor had a reimbursable separate property interest in shares of Boeing stock held at Stifel Nicholas worth nearly \$54,000 when Victor transmuted the stock into community property. Beverly contends Victor should not be reimbursed for any separate property interest in this stock because he failed to present admissible evidence showing the stock's value on the date he transmuted it. According to Beverly, the only "evidence" showing the Boeing stock's purported value in January 2005 was an exhibit Victor's accountant prepared but Victor never had it admitted into evidence. Beverly also contends the exhibit could not have been admitted into evidence because Victor failed to establish a foundation for how the accountant prepared the exhibit or determined the Boeing stock's value. We reject this challenge because it ignores the testimony of Beverly's own expert on the Boeing stock's value.

When dividing a marital estate, the trial court has broad discretion to determine the value of both separate and community property assets and the amount of

any section 2640 reimbursement. (*In re Marriage of Geraci* (2006) 144 Cal.App.4th 1278, 1285-1286 (*Geraci*); *In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 631-632 (*Duncan*)). “As long as the court exercised its discretion along legal lines, its decision will be affirmed on appeal if there is substantial evidence to support it.’ [Citation.]” (*Geraci*, at p. 1286; *Duncan*, at p. 632.) “The term “substantial evidence” means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion; it is evidence which is reasonable in nature, credible, and of solid value. [Citation.]’ [Citation.]” (*Los Angeles County Dept. of Children & Family Services v. Superior Court* (2013) 222 Cal.App.4th 149, 159.) A single witness’s testimony may constitute substantial evidence. (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767-768; *City and County of San Francisco v. Givens* (2000) 85 Cal.App.4th 51, 56.)

Beverly hired Michael J. Ross, a certified public accountant and valuation analyst, as an expert to value Victor’s medical practice and the couple’s other assets. Ross met with Victor’s accountant, Franklin Ewing-Chow, to review and discuss the exhibit Ewing-Chow prepared in analyzing and valuing the couple’s stock holdings. On cross-examination, Ross testified he agreed with the numbers contained in Ewing-Chow’s exhibit regarding the couple’s stock holdings and his only dispute concerned Victor’s entitlement to a reimbursement under section 2640. In particular, Ross acknowledged and agreed with the nearly \$52,000 valuation Ewing-Chow assigned to the Boeing stock that the trial court used to award Victor a reimbursement.

Ross’s testimony constitutes substantial evidence supporting the trial court’s decision. Whether Ewing-Chow’s exhibit was admitted into evidence, and whether he established an adequate foundation for how he prepared the exhibit, are irrelevant because Ross, as a valuation expert, testified he agreed with Ewing-Chow’s numbers. No one objected to Ross’s testimony, and therefore the trial court properly could rely on that testimony when exercising its discretion in valuing the stock.

5. The Trial Court Acted Within the Broad Scope of Its Discretion in Valuing the Partnership Interests

The trial court found Victor had reimbursable separate property interests in three partnerships in which his father had invested before his death in 2002: Columbia Pacific Growth Fund Y2K, Columbia Pacific Growth Fund '97, and Maui Investors, L.P. The court valued Victor's separate property interest in each of these partnerships at \$50,000 and therefore awarded Victor \$150,000 in reimbursements. Beverly contends the trial court erred because it used the amount of the original investments to determine the value of Victor's separate property interests rather than the value of Victor's interests in the partnerships when he transmuted them into community property in January 2005. According to Beverly, Victor was not entitled to reimbursement for these partnership interests because he conceded he failed to present evidence showing their value on the transmutation date. We disagree. The trial court's decision fell within the range of its broad discretion in valuing Victor's reimbursable separate property interest.

Under section 2640, "the measure of the separate property contribution subject to reimbursement is the equity value in the property at the time of its conversion to [community property]." (*Perkal, supra*, 203 Cal.App.3d at p. 1202.) It is often difficult to determine the value of infrequently sold, closely held stocks and partnership interests. No single formula exists for determining the value of such stocks and partnership interests because there generally is no easily identifiable market for them. It is therefore incumbent upon the court to consider all the factors potentially affecting the value of the stock or partnership interest, and determine a value that best achieves substantial justice between the spouses. (*Duncan, supra*, 90 Cal.App.4th at p. 632.)

As explained above, the trial court has broad discretion in determining the value of a spouse's reimbursable separate property interest, and we may not reverse for an abuse of discretion if substantial evidence supports the trial court's valuation. (*Geraci, supra*, 144 Cal.App.4th at p. 1286; *Duncan, supra*, 90 Cal.App.4th at

pp. 631-632.) “In the exercise of its broad discretion, the trial court ‘makes an independent determination of value based upon the evidence presented on the factors to be considered and the weight given to each. The trial court is not required to accept the opinion of any expert as to the value of an asset.’ [Citations.] Differences between the experts’ opinions go to the weight of the evidence. [Citations.] Rather, the court must determine which of the recognized valuation approaches will most effectively achieve substantial justice between the parties. [Citation.]” (*Duncan*, at p. 632.)

In *Geraci*, the husband owned a house before he married his wife, and when they later divorced he sought reimbursement under section 2640 for the value of the equity in the home when the couple married. (*Geraci*, *supra*, 144 Cal.App.4th at pp. 1282, 1284-1285.) The husband, however, failed to present evidence establishing the amount of equity. The trial court therefore found the husband failed to meet his burden of identifying his separate property contributions to the house. Nonetheless, the trial court found the husband was entitled to an approximately \$35,000 reimbursement under section 2640 based on the preliminary division of equity the couple made when they sold the house after separating. The Court of Appeal affirmed, finding the court acted within its broad discretionary powers. (*Geraci*, at pp. 1287-1288.)

Here, the evidence showed Victor’s father paid \$50,000 for an interest in each of these three partnerships between 1997 and 2000, Victor inherited these interests when his father died in 2002, and Victor sold these interests for approximately \$45,000, \$62,000, and \$85,000 in 2007. At trial, Victor’s accountant testified he was unable to determine a value for these partnership interests when Victor transmuted them into community property in 2005. Accordingly, the accountant used the amount of the original investments to calculate the amount of the sale proceeds that belonged to the community and the amount that represented Victor’s reimbursable separate property interests. Beverly objected on the ground the amounts Victor’s father originally invested were irrelevant to the value of the partnership interests when Victor transmuted them.

The trial court overruled Beverly's objection, finding the time that elapsed between the purchase and the transmutation went to the weight of the evidence, not its admissibility.

We conclude the trial court acted within its broad discretion in valuing Victor's reimbursable separate property interests in these three partnerships. No readily identifiable market existed for these partnership interests when Victor transmuted them and it appears they only could be valued when they were sold. Using the original purchase price as the value of Victor's reimbursable separate property interests best achieved substantial justice between Victor and Beverly because it secured for Victor the value of the original investments he contributed to the community, while also allowing the community to share in the appreciation without sharing in any loss in value.⁴ (*Duncan, supra*, 90 Cal.App.4th at p. 632.)

B. *Beverly Forfeited Any Argument Victor Failed to Properly Account for Community Property Funds in the Vineyard Bank Account*

Beverly contends a checking account the couple shared at Vineyard Bank received nearly \$500,000 in community property deposits after the couple separated, and Victor failed to account for more than \$155,000 of those funds. According to Beverly, the trial court therefore erred in failing to award her one-half of \$155,000. Beverly forfeited this claim because she never asked the trial court to award her these funds and failed to argue below that Victor did not account for the \$155,000.

“An appellate court generally will not consider a new theory of liability for the first time on appeal. [Citation.] We have the discretion to consider for the first time on appeal an issue of law based on undisputed facts, but we will not consider a new issue

⁴ The trial court may have erred in awarding Victor a \$50,000 reimbursement for the one partnership (Columbia Pacific Growth Fund Y2K) that declined in value to less than \$45,000 when Victor sold it. Section 2640 states, “The amount reimbursed . . . may not exceed the net value of the property at the time of division.” (§ 2640, subd. (b).) Beverly, however, did not raise this potential error and therefore waived it.

where the failure to raise the issue in the trial court deprived an opposing party of the opportunity to present relevant evidence. [Citations.]” (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1409.)

Whether Victor mishandled community property funds deposited into the Vineyard Bank account postseparation, and which funds were community property funds, are factual questions that cannot be raised for the first time on appeal. Beverly does not dispute, or offer any explanation for, her failure to raise these factual issues in the trial court and therefore she has forfeited the issue. (*Blankenship v. Allstate Ins. Co.* (2010) 186 Cal.App.4th 87, 105 [“We do not consider factual arguments raised for the first time on appeal, and this argument is forfeited”].)

C. *The Trial Court Erred in Valuing Victor’s Medical Practice*

The trial court valued Victor’s interest in his medical practice at \$140,000. According to the court, the practice’s overall value was \$280,000, but Victor only owned half of the practice because he had a partner, Christopher K. Tsai, M.D., who owned the other half. In its statement of decision the trial court found, “The partnership between [Victor] and Dr. Chris Tsai was formed in May of 2005. Testimony of Dr. Tsai RT page 372 testimony of [Victor] and testimony of Mr. Chow [Victor’s accountant].” Beverly contends the trial court erred because Tsai did not become a partner in the practice until after the agreed-upon valuation date for the medical practice, June 30, 2007. We agree because none of the evidence the trial court cited supports its finding. (See *Duncan, supra*, 90 Cal.App.4th at p. 632 [“The trial court’s determination of the value of a particular asset is a factual one and as long as that determination is within the range of the evidence presented, we will uphold it on appeal”].)

The testimony at page 372 of the reporter’s transcript is Beverly’s testimony, not Tsai’s, and it does not refer to the medical practice or when Tsai became a partner. Tsai testified he became Victor’s partner in June or July 2008 when he paid

\$25,000 to receive a 50 percent interest in the practice's fixed assets and goodwill. Elsewhere, Tsai testified he began working with Victor in May 2005 under a shared services agreement that paid Tsai for all accounts receivable he brought into the practice after deducting one-half of all fixed overhead and 100 percent of all expenses directly attributable to Tsai; Victor likewise received the accounts receivable he brought into the practice and paid his share of the overhead and expenses. Tsai continued to work under this same compensation model through the trial date.

Victor testified Tsai began working at the practice in 2005 as an independent contractor under the compensation model Tsai described, and became a partner in 2006. Corporate minutes from August 2006 show Tsai's offer to join the practice and purchase 50 percent of its assets for \$25,000 was accepted, but the minutes do not reflect Tsai actually joined the practice until July 2008 when he paid the \$25,000 necessary to acquire 50 percent of the practice's assets. Moreover, the June 30, 2007 corporate tax return for the practice identifies Victor as the practice's sole owner and officer, and the valuation expert who determined the practice's overall value testified the corporate records showed Victor was the only owner as of the valuation date.

Accordingly, neither Tsai's testimony nor any other evidence in the record supports the trial court's finding Tsai became a partner in May 2005. To the contrary, the record shows Victor and Tsai reached an agreement in 2006 for Tsai to become a partner, and Tsai became a partner and acquired his 50 percent interest in the practice in 2008 — one year after the agreed-upon valuation date. The compensation arrangement with Tsai paid him for his own accounts receivable, after deducting overhead and expenses, but did not make Tsai a partner because he had no ownership interest in any of the practice's equipment or other assets until he purchased that interest in 2008. The trial court therefore erred in finding Victor only owned half of the practice on the valuation date. On remand, the trial court is directed to credit the community with the full \$280,000 value the court assigned to the medical practice.

D. *No Substantial Evidence Supports the Trial Court's Denial of Beverly's Request for Spousal Support*

The trial court denied Beverly's spousal support request in its entirety. After making findings on each statutory spousal support factor identified in section 4320, the trial court concluded Beverly did not need spousal support because the income she earned as a nurse, the substantial assets she received through the division of community property, and the income she could earn by investing those assets allowed Beverly to maintain if not exceed the couple's marital standard of living. We conclude the court erred because the record lacks substantial evidence to support the trial court's finding Beverly could maintain or possibly exceed the marital standard of living.

“Spousal support is governed by statute. [Citations.] In ordering spousal support, the trial court *must* consider and weigh all of the circumstances enumerated in [section 4320], to the extent they are relevant to the case before it. [Citations.] The first of the enumerated circumstances, the marital standard of living, is relevant as a reference point against which the other statutory factors are to be weighed. [Citations.] The other statutory factors include: contributions to the supporting spouse's education, training, or career; the supporting spouse's ability to pay; the needs of each party, based on the marital standard of living; the obligations and assets of each party; the duration of the marriage; the opportunity for employment without undue interference with the children's interests; the age and health of the parties; tax consequences; the balance of hardships to the parties; the goal that the supported party be self-supporting within a reasonable period of time; and any other factors deemed just and equitable by the court. [Citation.]” (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 302-304, fns. omitted (*Cheriton*).

“In making its spousal support order, the trial court possesses broad discretion so as to fairly exercise the weighing process contemplated by section 4320, with the goal of accomplishing substantial justice for the parties in the case before it.” [Citation.] In balancing the applicable statutory factors, the trial court has discretion to

determine the appropriate weight to accord to each. [Citation.] But the ‘court may not be arbitrary; it must exercise its discretion along legal lines, taking into consideration the applicable circumstances of the parties set forth in [the statute], especially reasonable needs and their financial abilities.’ [Citation.] Furthermore, the court does not have discretion to ignore any relevant circumstance enumerated in the statute. To the contrary, the trial judge must both recognize and *apply* each applicable statutory factor in setting spousal support. [Citations.]” (*Cheriton, supra*, 92 Cal.App.4th at p. 304.)

“‘In exercising its discretion the trial court must follow established legal principles and base its findings on substantial evidence. [Citation.] If the trial court conforms to these requirements its order will be upheld whether or not the appellate court agrees with it or would make the same order if it were a trial court.’ [Citations.]” (*Geraci, supra*, 144 Cal.App.4th at p. 1299, fn. 34; see *In re Marriage of West* (2007) 152 Cal.App.4th 240, 246.)

Here, the trial court’s findings on the section 4320 factors included the findings Beverly earned nearly \$99,000 per year as a registered nurse, she received approximately \$32,000 per year in rental income, and she had “needs of approximately \$13,000 per month.” The court based these findings on Beverly’s income and expense declaration dated September 30, 2010. Beverly, however, filed an updated declaration on January 25, 2011, less than a month before trial. The updated declaration stated Beverly’s earnings had dropped to \$7,597 per month (or about \$91,000 per year) and her monthly expenses increased to about \$14,600. Both declarations stated Beverly received the same amount in rental income each month, about \$2,700.

The changes in the updated declaration increased the monthly shortfall between Beverly’s income and expenses from about \$2,400 to about \$4,300. The court found Beverly could make up the shortfall reflected in her September 2010 declaration, but it did not make a finding on whether she could make up the larger shortfall reflected in her January 2011 declaration. The court also found the September 2010 declaration

reasonably stated Beverly's needs, but the court made no finding on the needs stated in the January 2011 declaration.

Based on the court's failure to consider the most recent information on Beverly's income and expenses, we conclude the record lacks substantial evidence to support the trial court's essential finding that Beverly did not need spousal support because her earnings and the assets she received through the division of community property enabled her to maintain or exceed the marital standard of living. (See *In re Marriage of Tydlaska* (2003) 114 Cal.App.4th 572, 575 [“[A]n order for spousal support must be based on the facts and circumstances existing at the time the order is made”].)

Beverly contends the trial court abused its discretion in denying her spousal support because the court's ruling afforded Victor a substantially higher standard of living and prevented her from maintaining the standard of living she enjoyed during the couple's lengthy marriage. We do not decide whether the trial court abused its discretion in making its ultimate decision to deny Beverly spousal support because the record lacks substantial evidence to support the section 4320 findings the court made before reaching that ultimate decision. Instead, we remand for the trial court to make new findings on each of the section 4320 factors based on current information and then to exercise its broad discretion in deciding whether Beverly should receive spousal support, and if so, to determine the amount. We express no opinion on how the court should exercise its discretion after making the section 4320 findings.

E. *No Substantial Evidence Supports the Trial Court's Denial of Beverly's Attorney Fee Request*

The trial court denied Beverly's attorney fee request “[b]ased on the totality [sic] and needs as set forth in Family Code §2030.” In reaching that conclusion, the court expressly “adopt[ed] the findings made earlier in this Judgment relating to the parties['] respective incomes and needs.” As with Beverly's spousal support request, we reverse

because the record lacks substantial evidence to support the court’s findings on Beverly’s income and needs.

Sections 2030 and 2032 authorize a ““need-based”” attorney fee award in a variety of family law proceedings. (*Braud, supra*, 45 Cal.App.4th at p. 827.) The purpose of an award under these sections “is to ensure that the parties have adequate resources to litigate the family law controversy and to effectuate the public policy favoring ‘parity between spouses in their ability to obtain legal representation.’ [Citations.]” (*Ibid.*) “[T]he purpose of section[s] 2030 [and 2032] is *not* the redistribution of money from the greater income party to the lesser income party. Its purpose is *parity*: a fair hearing with two sides equally represented. The idea is that both sides should have the opportunity to retain counsel, not just (as is usually the case) only the party with greater financial strength. [Citation.]” (*Alan. S. v. Superior Court* (2009) 172 Cal.App.4th 238, 251, original italics.)

Section 2030 provides, “When a request for attorney’s fees and costs is made, the court shall make findings on whether an award of attorney’s fees and costs under this section is appropriate, whether there is a disparity in access to funds to retain counsel, and whether one party is able to pay for legal representation of both parties. If the findings demonstrate disparity in access and ability to pay, the court shall make an order awarding attorney’s fees and costs. . . .” (§ 2030, subd. (a)(2).) The court may award fees and costs under section 2030 “where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties.” (§ 2032, subd. (a).)

“In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party’s case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320. The fact that the party

requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances." (§ 2032, subd. (b).)

“A motion for attorney fees and costs in a dissolution action is addressed to the sound discretion of the trial court, and in the absence of a clear showing of abuse, its determination will not be disturbed on appeal. [Citations.] The discretion invoked is that of the trial court, not the reviewing court, and the trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made. [Citations.]' [Citation.]” (*In re Marriage of Keech* (1999) 75 Cal.App.4th 860, 866.) “[A]lthough the trial court has considerable discretion in fashioning a need-based fee award [citation], the record must reflect that the trial court actually exercised that discretion, and considered the statutory factors in exercising that discretion. [Citations.]” (*Braud, supra*, 45 Cal.App.4th at p. 827, fn. omitted.)

Here, the trial court erred because it based its findings on the same outdated income and expense declaration it relied on in denying Beverly's spousal support request. Current and accurate information about the parties' income, needs, and ability to pay is essential to the court's determination whether the parties' relative circumstances make a fee award just and reasonable. We therefore reverse and remand for the trial court to make new findings on all factors relevant to an attorney fee request under sections 2030 and 2032, and then to exercise its discretion to determine whether those factors make an award just and reasonable in this case. We again express no opinion on how the trial court should exercise its discretion.

III
DISPOSITION

The judgment is reversed in part and affirmed in part. We reverse those portions of the judgment (1) awarding Victor a section 2640 reimbursement for the TD Ameritrade account; (2) limiting the community property interest in Victor's medical practice to only half its total value; (3) denying Beverly's spousal support request; and (4) denying Beverly's attorney fee request. All other aspects of the judgment are affirmed. We remand for the trial court to (1) conduct further proceedings on Beverly's requests for spousal support and attorney fees consistent with the views expressed in this opinion, and (2) adjust the division of property to account for the full value of the TD Ameritrade account without any right of reimbursement and the full value of Victor's medical practice as a community asset. In the interest of justice, the parties shall bear their own costs on appeal.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.