

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 07/24/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:)	1 CA-CV 11-0382
)	
JEFFREY GOLDSTEIN,)	DEPARTMENT E
)	
Petitioner/Appellant,)	MEMORANDUM DECISION
)	(Not for Publication
v.)	- Rule 28, Arizona
)	Rules of Civil
STACEY GOLDSTEIN,)	Appellate Procedure)
)	
Respondent/Appellee.)	
)	

Appeal from the Superior Court in Maricopa County

Cause No. FC2009-003278

The Honorable Andrew G. Klein, Judge

AFFIRMED

Mariscal Weeks McIntyre & Friedlander, PA	Phoenix
By Marlene A. Pontrelli	
and Michael J. Plati	
Attorneys for Petitioner/Appellant	

Law Offices of Gregory E. Hinkel	Glendale
By Gregory E. Hinkel	
and	

Law Offices of Robert E. Siesco, Jr.	Phoenix
By Robert E. Siesco, Jr.	
Attorneys for Respondent/Appellee	

H A L L, Judge

¶1 Petitioner/Appellant Jeffrey Goldstein (Husband) appeals the superior court's order denying his request for contribution from Respondent/Appellee Stacey Goldstein (Wife) for his payment of the balance remaining on the parties' purchase-money loan after the sale of the marital residence. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Husband and Wife were divorced on November 30, 2010.

¶3 Prior to the dissolution, pursuant to the court's temporary support order, Wife remained in the marital residence and Husband paid the mortgage, taxes and insurance. The parties agreed to sell the marital residence, and the court directed them to select a real estate agent to list and sell the house. Thereafter, Husband and Wife signed a contract with real estate agent Bobby Lieb and listed the property for sale for \$1,150,000. At the time of trial, the parties had received no offers to purchase the house, and Mr. Lieb recommended that they lower the listing price to \$1,000,000.

¶4 The parties had financed their purchase of the residence with a loan from Bank of America secured by a deed of trust on the property. The remaining principal balance at the time of trial was approximately \$1,077,937. Prior to trial, the parties agreed that Husband would not make any further payments

toward the loan balance, and Husband set aside the monies he otherwise would have paid on the loan.¹

¶15 Wife opposed reducing the listed price and took the position that the parties should reject any offer of less than \$1,150,000 and allow the bank to foreclose on the property. In particular, she cited Arizona's purchase-money anti-deficiency statutes, which provide that a deficiency remaining after the foreclosure of a qualifying deed of trust may not be satisfied by executing on any other property of the judgment debtor. Arizona Revised Statutes sections 33-729(A), -814(G) (2007 & Supp. 2011). Wife argued that she needed to conserve the limited financial resources she would have after dissolution and could not afford to forego the protection of the anti-deficiency statutes by selling the property for an amount less than the parties owed on the loan.

¶16 Husband told the court he wanted to avoid the impairment to his credit a foreclosure would create because, in part, he anticipated that he would soon establish his own medical practice. He asked the court to allow Mr. Lieb an additional 90 to 120 days to market the property and to order each party to place \$50,000 in a trust account to fund the

¹ Husband claimed he ceased making payments on the loan because the lender had indicated it would not negotiate a loan modification if the parties were current on their payments.

difference between the eventual sale price and the principal balance on the loan.

¶7 The court appointed Mr. Lieb as a Real Estate Commissioner to sell the home and set a status hearing for April 18, 2011 (approximately 150 days later). Mr. Lieb offered the residence for sale at \$1,050,000, and received a full-price cash offer within six days. Wife refused to accept the offer, arguing a sale for \$1,050,000 would create a deficiency on the purchase-money loan that she was unwilling to pay. The court ordered Mr. Lieb to accept the offer on Wife's behalf and directed Husband to advance the funds necessary to satisfy any balance owed without prejudice to his ability to seek contribution from Wife for a portion of the payment.² The sale closed escrow on January 24, 2011.³

¶8 Husband paid the balance that remained after the sale proceeds were applied to the loan and asked the court to order

² Wife moved for a new trial on that portion of the decree that appointed the Real Estate Commissioner and ordered the parties to sell the marital residence. She also moved for a stay of the sale pending resolution of her motion for new trial. The family court denied Wife's request for a stay, but ordered that her arguments regarding the deficiency were preserved and would be considered at the April 2011 hearing.

³ The final sale price was \$1,040,000, which reflected a \$10,000 concession the buyers negotiated after the home inspection.

Wife to reimburse him for one-half of the payment.⁴ After conducting a hearing, the court denied Husband's request.⁵ It reasoned that enforcing Husband's right of contribution against Wife would be tantamount to compelling Wife to assume a debt she was not legally obligated to pay.

¶9 Husband timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(2) (2011).

ISSUES

¶10 Husband argues the family court erred by refusing to direct Wife to reimburse him for one-half of the amount he paid to retire the balance remaining after the proceeds of the sale were applied toward the loan.⁶

⁴ Husband paid a total of \$129,545.23. He applied \$59,934.29 he had saved by not making the loan payments prior to dissolution and paid the remainder of the deficiency, \$69,614.94, with his sole and separate funds.

⁵ The court did order Wife to reimburse Husband for \$2,124.65 of the total \$129,545.23 deficiency for a delay in the close of escrow caused by her conduct. Thus, Husband's claim for contribution only concerned one-half of \$127,420.58.

⁶ Husband also argues the court did not exceed its authority by ordering the sale of the marital residence. Wife did not cross-appeal from that ruling and we therefore need not address it. ARCAP 1, 13(b)(3). Nonetheless, we note that the family court's "broad discretionary powers include the power to order a sale of community property when it will facilitate the equitable division of the property." *Lee v. Lee*, 133 Ariz. 118, 121, 649 P.2d 997, 1000 (App. 1982).

DISCUSSION

¶11 We review the family court's division of community assets and debts for an abuse of discretion. *In re Pownall*, 197 Ariz. 577, 581, ¶ 15, 5 P.3d 911, 915 (App. 2000).

¶12 The family court has the "inherent power to allocate both community property and debts upon dissolution." *Cnty. Guardian Bank v. Hamlin*, 182 Ariz. 627, 630, 898 P.2d 1005, 1008 (App. 1995); *see also Birt v. Birt*, 208 Ariz. 546, 548, ¶ 17, 96 P.3d 544, 550 (App. 2004) ("Arizona law makes no conceptual distinction between the division of community assets and the division of community liabilities at dissolution."); *Cadwell v. Cadwell*, 126 Ariz. 460, 462, 616 P.2d 920, 922 (App. 1980) ("Assets and obligations are reciprocally related and there can be no complete and equitable disposition of property without a corresponding consideration and disposition of obligations."); *Lee*, 133 Ariz. at 123, 649 P.2d at 1002 (stating court's authority to equitably divide community assets in a proceeding for dissolution allows it to "properly allocate community liabilities between the parties in effecting an equitable division of all community property").

¶13 The division of marital property and debt is governed by A.R.S. § 25-318(A) & (L) (Supp. 2011), which requires the

court to assign each spouse his or her separate property, equitably divide all jointly-held property, and allocate the parties' obligations if either party requests it do so. The court's division must be equitable, "though not necessarily in kind." A.R.S. § 25-318(A). Generally, marital property should be divided "substantially equally" unless a "sound reason" exists to divide it otherwise. *Toth v. Toth*, 190 Ariz. 218, 221, 946 P.2d 900, 903 (1997).

¶14 To determine whether the family court properly exercised its discretion in making an equitable division of the community property and obligations in this case, it is necessary to consider the relevant anti-deficiency laws. "Arizona has two anti-deficiency statutes: 1) A.R.S. § 33-729(A), which applies to purchase money mortgages and to purchase money deeds of trust that are judicially foreclosed, []; and 2) A.R.S. § 33-814(G), which applies to all deeds of trust foreclosed by trustee's sale whether or not they secure purchase money obligations." *Tanque Verde Anesthesiologists L.T.D. Profit Sharing Plan v. Proffer Group, Inc.*, 172 Ariz. 311, 313, 836 P.2d 1021, 1023 (App. 1992) (internal citation omitted). As we recently discussed in *Helvetica Servicing, Inc. v. Pasquan*, 229 Ariz. 493, 496, ¶ 9, 277 P.3d 198, 201 (App. 2012), the legislation reflects a public policy decision to protect consumers and place the risk of

inadequate security on lenders, rather than borrowers. *Id.* Anti-deficiency protection "is intended to discourage purchase-money lenders from over-valuing real property by requiring them to look solely to the collateral for recovery in the event of foreclosure." *Id.*⁷

¶15 At the time of trial, the remaining principal balance on the purchase-money loan was approximately \$1,077,937. Wife wanted to default on the mortgage, which would have limited the bank's remedy to foreclosure and allowed her to preserve her cash resources. Husband opposed default because he wanted to protect his credit and was willing to sell the house at a loss and pay the difference between the sale price and the loan balance. The court's order that the parties accept the offer to purchase the home for \$1,050,000 resulted in a \$129,545.23 deficiency.⁸

¶16 Although the family court had the power to order the sale of the marital residence as part of its division of the community property, *Lee*, 133 Ariz. at 121, 649 P.2d at 1000, the effect of its approval of the sale over Wife's objection was to

⁷ *Helvetica* concerned the interpretation of A.R.S. § 33-729(A) (2007). 229 Ariz. at 496, ¶ 10, 277 P.3d at 201. Our discussion in that case regarding the legislature's intent, however, concerned both anti-deficiency statutes. *Id.* at ¶ 9.

⁸ The total amount due from the parties at escrow included the real estate agents' commissions and other transaction fees.

deny her the protection of the anti-deficiency statute. In making an equitable division of the community property, the court determined that it would be unfair to require Wife to pay any portion of the deficiency that she could have legally avoided by defaulting on the loan.

¶17 "The touchstone of determining what is 'equitable' is a 'concept of fairness dependent upon the facts of particular cases.'" *In re Marriage of Inboden*, 223 Ariz. 542, 545, ¶ 13, 225 P.3d 599, 603 (App. 2010) (quoting *Toth*, 190 Ariz. at 221, 946 P.2d at 903). "[W]hen making an equitable division of community property upon dissolution of marriage, the family court should consider all factors that bear on the equities of the division, including the length of the marriage; the contributions of each spouse to the community, financial or otherwise; the source of funds used to acquire the property to be divided; the allocation of debt; as well as any other fact that may affect the outcome." *In re Marriage of Inboden*, 223 Ariz. at 547, ¶ 18, 225 P.3d at 604.

¶18 During the parties' twenty-six year marriage, Husband completed his medical training and worked as a pediatric plastic surgeon. In the last several years of the marriage, he earned a salary exceeding \$600,000 per year. Beginning in 1988, Wife was a full-time mother to the parties' two children and supported

Husband's career by managing the household while he devoted himself to his medical practice. She worked only occasional part-time jobs outside the home during the marriage, and at the time of the dissolution, she worked part-time in a retail clothing store earning \$8.40 per hour.

¶19 The court granted Wife spousal maintenance for a period of ten years and, upon the parties' agreement, awarded her one-half of the parties' substantial assets at dissolution. Nonetheless, if the court had allocated one-half of the mortgage deficiency to Wife, it would have significantly depleted her liquid assets⁹ and, given her limited earning capacity, it is unlikely she would have ever been able to replace those funds. The court's order recognized that Wife had insisted throughout the proceedings that she would not agree to sell the house for less than \$1,150,000 because she could not afford to pay the deficiency and wished to avail herself of the protection of Arizona's anti-deficiency statute. By contrast, Husband desired to sell the house, even at a loss, in order to preserve his credit in anticipation of opening a new medical practice.

¶20 Husband contends that the potential effect of the anti-deficiency statutes on the community debt does not constitute a sound reason for the family court's unequal

⁹ Wife was awarded liquid assets totaling approximately \$350,000.

division of the obligation. He argues that because Arizona law provides that both spouses must be joined in any transaction for the "acquisition, disposition or encumbrance of an interest in real property," A.R.S. § 25-214(C)(1) (2007), Wife could not unilaterally disavow the community's obligation on the purchase-money loan. We reject Husband's argument because A.R.S. § 25-214(C)(1) does not limit the family court's power to equitably divide a marital community's debt obligations. Further, although we agree with Husband that the family court had no authority to require him to default on the loan against his will, the court did have the discretion to divide the debt equitably between Husband and Wife. A.R.S. § 25-318(A); *In re Marriage of Inboden*, 223 Ariz. at 545, ¶ 13, 225 P.3d at 603.¹⁰

¶21 Under the circumstances, we find no abuse of discretion in the family court's decision to divide the parties'

¹⁰ We also disagree with Husband that a community debt would have remained for division by the court even if the bank had foreclosed on the marital residence. To the extent that the debt exceeded the proceeds of the sale of the property at auction, it could not have been satisfied from the parties' other marital property. A.R.S. § 33-729(A). *Cf. State v Hayden*, 210 Ariz. 522, 524, ¶ 10, 115 P.3d 116, 118 (2005) (holding when child support judgment that arises by operation of law expires pursuant to statute, underlying obligation to pay child support terminates and may not be enforced via administrative proceedings).

mortgage obligation unequally in this case. *See Toth*, 190 Ariz. at 221-22, 946 P.2d at 903-04.¹¹

¶122 Finally, Husband argues the family court erred by failing to adjust the temporary support credit it awarded him to include one-half of the \$59,934.29 he saved by not paying the mortgage for several months prior to dissolution. The family court determined that Husband overpaid \$22,132.91 for spousal maintenance and community obligations and ordered Wife to reimburse those monies. In calculating that amount, the court did not give Husband credit for the \$59,934.29 he had saved by not making the loan payments during the pendency of the dissolution and ultimately applied to the loan deficiency at the close of escrow. Husband argues this was error because his payment of \$59,934.29 toward the deficiency was really in the nature of an overdue community obligation.

¶123 If Husband had applied the \$59,934.29 to the community loan obligation during the pendency of the dissolution as ordered by the court, the amount of the deficiency ultimately

¹¹ At oral argument, Husband argued for the first time that the trial court implicitly divided the balance owed on the marital residence equally between the parties through the dissolution decree's general statement that all unallocated liabilities would be divided equally. Because Husband did not raise this issue in his appellate briefing, we do not consider it. *See Mitchell v. Gamble*, 207 Ariz. 364, 369-70, ¶ 16, 86 P.3d 944, 949-50 (App. 2004) (explaining that argument raised for the first time at oral argument is untimely and waived).

attributed to him would have been reduced accordingly. Instead, Husband elected to set aside those monies and later applied them toward the balance remaining after the sale of the marital residence. Regardless of the timing of the payments, the effect of the payments was to reduce the deficiency amount that the family court determined was Husband's sole responsibility, and Husband therefore is not entitled to recover a portion of those monies from Wife.

CONCLUSION

¶24 For the foregoing reasons, we affirm. Both parties request an award of costs and attorneys' fees on appeal pursuant to A.R.S. § 12-324 (Supp. 2011). In the exercise of our discretion, we deny both requests. We grant Wife's request for an award of costs on appeal subject to her compliance with Arizona Rule of Civil Appellate Procedure 21.

_____/s/_____
PHILIP HALL, Judge

CONCURRING:

_____/s/_____
MAURICE PORTLEY, Presiding Judge

_____/s/_____
DIANE M. JOHNSON, Judge