

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: 06/21/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

JOYCE ANN FRANGO, ) 1 CA-CV 11-0575  
)  
Petitioner/Appellee, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
)  
KENNETH JAY FRANGO, ) (Not for Publication-  
) Rule 28, Arizona Rules  
Respondent/Appellant. ) of Civil Appellate  
) Procedure)  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. FC2005-003024

The Honorable Thomas L. LeClaire, Judge

**AFFIRMED**

Keil & Keil  
By Martin F. Keil, Jr.  
Attorneys for Petitioner/Appellee

Glendale

Kenneth Jay Frango  
Respondent/Appellant

Phoenix

**G O U L D**, Judge

¶1 Kenneth Frango ("Husband") appeals from the family court's award of post-decree rental income to Joyce Frango ("Wife"). For the reasons set forth below, we affirm.

### ***Factual and Procedural Background***

¶2 This matter arises out of a consent decree that dissolved Husband and Wife's marriage in 2005. In a settlement agreement attached to the decree, Husband and Wife agreed that they would both live in the marital residence until their son reached the age of eighteen in order to "maintain a high level of stability for their son's physical and emotional well being." Husband agreed to pay "the pre-existing mortgage payments, homeowner's insurance, property taxes and HOA dues" until the son reached the age of 18. The settlement agreement states that the value of these expenses paid by Husband "may be considered child support and spousal maintenance," and that the "[a]pproximate value of this Settlement Agreement to the Petitioner would net \$11,865 annually in spousal maintenance and child support." When the child turned 18, the parties agreed that "the primary residence w[ould] be sold for fair market value and the proceeds will be divided equally" between them.<sup>1</sup> The parties also agreed that "[e]ither or both of their adult daughters may live in the residence as may be required and agreed upon by the parents from time to time."

---

<sup>1</sup> This agreement was also summarized in the decree itself.

¶3 On September 15, 2010, Wife petitioned the court to enforce the provisions of the decree and settlement agreement. Among other things, she sought reimbursement for half of the rent the two daughters had paid Husband when they lived in the residence from February 2006 until August 2010. She also sought an order requiring Husband to make mortgage and utility payments until the son turned eighteen in November 2010. On October 12, 2010, the court set a hearing on Wife's petition for December 9, 2010.

¶4 On November 26, 2010, Husband also filed a petition<sup>2</sup> to enforce the settlement agreement, claiming that Wife breached the settlement agreement, stole his property after he moved out of the residence, failed to repay \$500 he had loaned to her in 2005, caused him to incur \$199.80 in storage expenses, and attempted "to force [him] to sell the property for \$4950 less than fair market value." Although he was representing himself, Husband sought attorneys' fees to compensate him for the time he spent working on the case. He also requested that the court hear his petition at the December 9, 2010 evidentiary hearing

---

<sup>2</sup> The full title of Husband's motion was, "Petition for Contempt and Order to Show Cause Re: Fundamental Breach of Settlement Agreement, Claim for Maintenance Costs, Claim for Stolen Property, Claim for Loan Repayment, Claim for Unreimbursed Child Care Expenses, Claim for Damaged Property."

that had already been scheduled to hear Wife's claim. The court denied Husband's request.

¶5 At the December 9 hearing, Wife advised the court that the residence had been sold and that the proceeds from the sale (\$24,715.77) were being held in escrow. The court ultimately found that Husband had an obligation to pay the mortgage payments and utilities that had been incurred by Wife prior to the sale and to "account and pay for half of the rental payments received." Because Husband had received \$33,000 in rent from the two daughters, he was directed to pay Wife \$16,500. Adding the \$16,500, the unpaid mortgage and utility payments, and various other expenses, the court directed Husband to pay Wife \$19,408.47 using the escrow funds from the sale of the residence.<sup>3</sup>

¶6 Husband moved for a new trial, and this motion was denied on July 1, 2011. Husband timely appeals.

#### ***Discussion***

¶7 Husband argues that (1) the trial court lacked subject matter jurisdiction over the disposition of the post-decree rental income; (2) the trial court abused its discretion by awarding Wife half of the rental income because its

---

<sup>3</sup> Though not at issue in this appeal, some of the \$19,408.47 included Husband's portion of his son's uninsured medical costs and Wife's fuel costs.

interpretation of the settlement contract was unsupported by the facts, plain meaning, and intent of the settlement agreement; (3) the trial court erred in continuing his obligation to pay residence-related expenses beyond the minor child's eighteenth birthday; (4) the trial court erred by failing to consider his petition before ruling on Wife's claim; and (5) the trial court abused its discretion by denying Husband's motion for a new trial because it was biased and prejudiced against Husband. We address each claim below.

#### **I. Subject Matter Jurisdiction**

¶8 Husband cites *Thomas v. Thomas*, 220 Ariz. 290, 205 P.3d 1137 (App. 2009), for the proposition that the trial court lacked subject matter jurisdiction over the rental payments made by the daughters. In *Thomas*, the parties deliberately omitted community property (a condominium) from the settlement decree. *Id.* In a post-decree order, the trial court found the condominium to be an undivided marital asset and ordered one former spouse to re-convey a one-half interest in the condominium to the other. *Id.* at 291, ¶ 1, 205 P.3d at 1138. We found that the dissolution court lacked jurisdiction over the condominium because omitted community property transmutes by operation of law into a tenancy in common, with each spouse's ownership interest in the tenancy in common no longer considered

marital property. *Id.* at 292, ¶ 9, 205 P.3d at 1139. Because of the intentional omission (and subsequent transmutation of the ownership interest), we held that “a legal dispute regarding community property intentionally omitted from a dissolution decree by both parties and transmuted by law to separate property is not subject to consideration in a post-decree dissolution proceeding.” *Id.* at 294, ¶ 17, 205 P.3d at 1141.

¶9 Husband’s reliance on *Thomas* is misplaced. This case does not concern property omitted from a settlement agreement; it concerns the enforcement and construction of the parties’ settlement agreement. Both Husband and Wife commenced the subject litigation with petitions to enforce the settlement agreement. Arizona Revised Statutes (“A.R.S.”) Section 25-317(E) (West 2012)<sup>4</sup> provides that terms of a settlement agreement incorporated into a decree “are enforceable by all remedies available for enforcement of a judgment, including contempt.” Wife claims that she is a co-owner of the house, and is entitled to one-half of the rent Husband collected from it. Husband agrees that the settlement agreement applies to the rent collected from the residence, and claims that the daughters’ rental agreement was implied in the settlement agreement.

---

<sup>4</sup> We site the current version of the applicable statute because no revisions material to this decision have since occurred.

¶10 The trial court was faced with the task of enforcing and construing the settlement agreement as it applied to the daughters' rent. While rent per se is not mentioned in the settlement agreement, the agreement specifically contemplated the daughters might live in the residence "as may be required and agreed upon by the parents from time to time." Thus, charging rent to the daughters was within the scope of the settlement agreement because it was an agreement made "by the parents" to have the daughters "live in the residence." Accordingly, we reject Husband's argument that we lack subject matter jurisdiction over this appeal.

## **II. Interpretation of the Settlement Agreement**

¶11 We review a superior court's order granting or denying post-decree or post-judgment relief for an abuse of discretion. *City of Phoenix v. Geyler*, 144 Ariz. 323, 328, 697 P.2d 1073, 1078 (1985). An abuse of discretion occurs if the trial court commits an error of law in exercising its discretion. *Fuentes v. Fuentes*, 209 Ariz. 51, 56, ¶ 23, 97 P.3d 876, 881 (App. 2004). Husband asserts that the trial court abused its discretion in awarding Wife half of the rental income because its interpretation of the settlement contract was unsupported by

the facts, plain meaning, and intent of the settlement agreement.<sup>5</sup>

**A. Inequitable**

¶12 We begin by quickly disposing of Husband's argument that the court's interpretation of the agreement was "inequitable." The parties had agreed to share the house; it was not an abuse of discretion for the court to determine that it was equitable for the parties to share in any income generated by the house.

¶13 Husband argues that he would not have spent as much money and time maintaining the house as he did had he known that he would not get to keep all of the rent. However, pursuant to the Decree and the settlement agreement, Husband's duty to maintain the house was independent of any rental income. The Decree states that Husband will pay for all "maintenance cost"

---

<sup>5</sup> He also lists the following subtopics under his "Rent Argument": oral agreement, ignoring the evidence, impeachment evidence, motion for new trial or reconsideration, affidavit evidence, rent claim not timely, promissory estoppel, right of survivorship, tenants in common, and equal distribution of expenses. We have reviewed these arguments and deem them to essentially repeat his main thesis about rent – that the trial court abused its discretion because its interpretation of the settlement agreement was unsupported by the facts, evidence, and plain contract meaning – or to "preview" his arguments addressed below (that the court should have also addressed his petition at the hearing and that the court was biased and erred in denying his motion for a new trial). Therefore, we do not separately address them.



for the residence, and the settlement agreement provides that Husband "will maintain (at a cost of approximately \$2,000 annually) the primary residence in a condition that will meet or exceed current market resale value." This obligation was not contingent upon receiving rental income from the daughters, who may or may not have decided to move back into the residence. Moreover, Husband's claim for the money he spent improving the residence is one of Husband's claims in his separate petition, and the trial court explicitly declined to consider these claims at the hearing.

**B. Plain Meaning**

¶14 The court's division of the daughters' rent did not violate the "plain contract meaning" of the settlement agreement. We review the trial court's interpretation of the dissolution decree *de novo*. *Cohen v. Frey*, 215 Ariz. 62, 66, ¶ 10, 157 P.3d 482, 486 (App. 2007). "A final judgment or decree is 'an independent resolution by the court of the issues before it and rightfully is regarded in that context and not according to the negotiated intent of the parties.'" *Id.* at ¶ 10. In construing the terms of a decree, courts apply the general rules of construction applicable to any written instrument. *Id.* at ¶¶ 11-12 (citing *Lopez v. Lopez*, 125 Ariz. 309, 310, 609 P.2d 579, 580 (App. 1980)).

¶15 The settlement agreement did not award the parties' community interest in the residence to either party but instead provided that the parties would "continue as co-owners" of the residence "until the minor child turns 18 years of age," at which point the residence was to be sold and the proceeds to be divided equally between both parties. This provision strongly suggests that the parties intended any benefits flowing from the residence to be shared equally.

¶16 In addition, nothing in the settlement agreement stated that despite the parties' co-ownership of the residence, Husband was entitled to keep 100% of all rental income generated by the residence. The settlement agreement simply states the daughters could live in the residence "as may be required and agreed upon by the parents from time to time."

**C. Lack of Evidence**

¶17 Contrary to Husband's assertion, there is no "lack of evidence" to support the trial court's award. Wife testified that there was no agreement between her and Husband that Husband keep 100% of their daughters' rent. Although Husband disputes Wife's testimony, the trial court decided to believe Wife. We defer to the trial court's determinations regarding credibility given that such determinations are within the discretion of the trial court. *Reynolds v. United Producers and Consumers Co-op,*

17 Ariz. App. 145, 147, 495 P.2d 1352, 1354 (1972) (explaining that "[t]he trial court, sitting without a jury, is judge of the credibility of witnesses, the weight of the evidence, and the reasonable inferences to be drawn therefrom").

¶18 Nor do the affidavits of the daughters prove the existence of an oral agreement that Husband could keep all the rent. The daughters' affidavits were identical and stated:

I was allowed by my parents, Kenneth J. Frango and Joyce Frango, to move into their residence at . . ., on or about February 26 . . . until August 2010 if I paid rent to my father.

These affidavits are not dispositive; they do not state, as Husband contends, that Wife agreed to let Husband keep all the rent that was paid. In the words of the trial court, the affidavits do not "preclude a division of the rents between the two owners."

¶19 Similarly, Wife's notes regarding the settlement agreement make no mention of an agreement that Husband keep 100% of the daughters' rent. The notes simply state, "[I]f Melinda or Nicole have to move back home it will be okay and they will pay rent." Nothing in Wife's notes precludes the sharing of the rental income.

¶20 Husband also argued that Wife had orally agreed that he could keep all of the rent money. However, Wife testified

that there was no such oral agreement, and the trial court determined Wife's testimony was more credible. We defer to the trial court's determination on this credibility issue. *Reynolds*, 17 Ariz. App. at 147, 495 P.2d at 1354.

### **III. The Termination Date**

¶21 Husband also argues the trial court erred in terminating his obligation to pay all expenses related to the residence eight days after his minor child's eighteenth birthday (the escrow closing date, November 19, 2010) rather than the date of his minor child's eighteenth birthday (November 11, 2010). The consent decree specified that when the child turned eighteen, "the home shall be sold and all net proceeds shall be divided equally or [as] otherwise agreed by both parties." However, the consent decree did not state that the residence had to be sold *by*, or exactly on the child's eighteenth birthday. Moreover, as the trial court noted, Husband's obligation to pay all expenses related to the home was in lieu of child support. Husband objected to the use of the term "in lieu of" by the trial court because this phrase is not found in the decree. Whether or not the phrase "in lieu of" is contained in the decree, the fact remains that under the terms of the settlement agreement Husband did not have to pay traditional or typical child support and spousal maintenance because of his obligations

to pay all expenses related to the residence. Under A.R.S. § 25-320(F),<sup>6</sup> child support obligations continue until the child turns eighteen or finishes high school, whichever comes later (but only until the child reaches the age of nineteen). On this record, it was not an abuse of discretion for the court to rule that Husband's support obligation (in the form of expenses related to the residence) continued eight days beyond child's eighteenth birthday.

#### **IV. Nonconsolidation of Husband's Claims**

¶22 Husband argues the trial court erred in refusing to consolidate his petition with the December 9, 2010 evidentiary hearing previously scheduled for his Wife. However, Husband's petition was filed only 13 days prior to the December 9 hearing and asserted no less than twelve separate counts against Wife, ranging from such disparate subjects as custody, an air

---

<sup>6</sup> The full text of this section is as follows:

If a child reaches the age of majority while the child is attending high school or a certified high school equivalency program, support shall continue to be provided during the period in which the child is actually attending high school or the equivalency program but only until the child reaches nineteen years of age unless the court enters an order pursuant to subsection E of this section.

conditioning unit upon which Wife had allegedly allowed her dog to urinate, an allegedly stolen toaster, various appliances, optometrist expenses of the child, the repayment of a \$500 loan made seven years ago, and storage unit expenses. Expanding the hearing to include all of Father's claims would have greatly increased the length of the hearing and likely required the court to reschedule other cases. The trial court has the inherent discretion to manage its docket. See *Findlay v. Lewis*, 172 Ariz. 343, 346, 837 P.2d 145, 148 (1992) ("A trial court has broad discretion over the management of its docket.").

¶23 Without citing any authority, Husband also argues that the trial court erred in making its judgment final before hearing Husband's claims. However, if Husband's assertion that Wife was unjustly enriched by the amount of time and money he put into the house turns out to be correct, nothing in the court's ruling prevents him from seeking payment from Wife for these expenses in a later action.

#### **V. Motion for A New Trial**

¶24 Husband argues that the trial court denied his motion for a new trial because of bias and prejudice. He contends that a new trial was required because material terms concerning the existence of an agreement to settle are in dispute, citing *Callie v. Near*, 829 F.2d 888, 890 (9th Cir. 1987). However, the

court already had a hearing regarding the daughters' rental income; it chose to believe Wife. *Callie* does not apply. Besides ruling against Husband, Husband has not identified any other conduct by the judge that could be deemed bias or prejudice. See *Smith v. Smith*, 115 Ariz. 299, 303, 564 P.2d 1266, 1270 (App. 1977) (explaining that adverse rulings do not demonstrate bias or prejudice).

**Conclusion**

¶25 For the foregoing reasons, we affirm.

/S/

---

ANDREW W. GOULD, Judge

CONCURRING:

/S/

---

JOHN C. GEMMILL, Presiding Judge

/S/

---

PETER B. SWANN, Judge