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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 07/31/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:) 1 CA-CV 11-0598
)
LEE JOSEPH FOX,) DEPARTMENT B
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules
) of Civil Appellate
BRENDA ANNE FOX,) Procedure)
)
Respondent/Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. FC2009-005707

The Honorable Thomas L. LeClaire, Judge

VACATED IN PART AND REMANDED

Lee Joseph Fox
Petitioner/Appellee in *Propria Persona*

Coronado, CA

The McMurray Law Offices
By Stanley D. Murray
Attorney for Respondent/Appellant

Scottsdale

O R O Z C O, Judge

¶1 Appellant Brenda Anne Fox (Mother) appeals the family court's Decree of Dissolution (the Decree) and its order denying her motion to amend/motion for new trial. For the following

reasons, we vacate the court's denial of Mother's request for spousal maintenance and remand this matter for further proceedings on the issues of spousal maintenance, child support, and attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Mother and Appellee Lee Joseph Fox (Father) were married in 1996 and have two minor children. During the marriage, Father served in the United States Navy while Mother cared for the parties' young children. Father filed for dissolution in September 2009.

¶3 In March 2010, the family court ordered Father to pay Mother \$3000 per month as spousal maintenance and \$1049 per month as child support, pending the dissolution proceedings. Prior to trial, Father asked the court to modify the support order because of a decrease in his pay and an increase in his living expenses. The court held a hearing but did not rule on Father's petition before trial.

¶4 At trial, Father asked the court to terminate his spousal maintenance obligation. He argued that Mother was capable of becoming self-sufficient through appropriate employment and instead willingly chose to remain unemployed. Mother noted that Father admitted in the petition that she was entitled to spousal maintenance and asked the court to award her

maintenance for five years to enable her to complete a master's degree program and find employment as a school counselor. The parties also disputed the appropriate parenting time and child support calculations, and each party requested an award of attorney fees and costs incurred in the dissolution.

¶15 On April 15, 2011, the family court entered the Decree which in relevant part: (1) denied Mother's request for spousal maintenance on the grounds that she did not qualify for an award of maintenance under the applicable law; (2) ordered Father to pay \$928.39 per month as child support; and (3) denied Mother's request for an award of attorneys' fees because the record did not establish sufficient financial inequality between the parties and both acted unreasonably during litigation.

¶16 Mother filed a motion to amend/motion for reconsideration/motion for attorneys' fees/motion for new trial. The court denied the motion.

¶17 Mother timely appealed from the Decree and the order denying her motion to amend/motion for new trial. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101.A.1, 2 (Supp. 2011).¹

ISSUES

¹ We cite the current version of applicable statutes when no revisions material to this decision have since occurred.

¶18 Mother argues the family court erred in: (1) denying her request for an award of spousal maintenance; (2) calculating the amount of Father's child support obligation; and (3) denying her request for an award of attorneys' fees. She also challenges the court's denial of her motion to amend/motion for new trial.

DISCUSSION

A. Spousal Maintenance

¶19 Mother contends the family court erred by denying her request for spousal maintenance. "An award of spousal maintenance is within the sound discretion of the trial court and we will reverse only upon a finding of an abuse of that discretion." *In re Marriage of Pownall*, 197 Ariz. 577, 583, ¶ 31, 5 P.3d 911, 917 (App. 2000) (citation and internal quotation marks omitted). "We consider the evidence in the light most favorable to the non-appealing party and will sustain the judgment if any reasonable evidence supports it." *Id.* at 583-84, ¶ 31, 5 P.3d at 917-18. However, an abuse of discretion occurs when the court "commits an error of law in reaching a discretionary conclusion, it reaches a conclusion without considering the evidence, it commits some other substantial error of law, or 'the record fails to provide substantial evidence to support the trial court's finding.'" *Flying Diamond*

Airpark, L.L.C. v. Meienberg, 215 Ariz. 44, 50, ¶ 27, 156 P.3d 1149, 1155 (App. 2007) (citation and internal quotation marks omitted).

¶10 To be eligible for spousal maintenance, Mother was required to establish that she met any of the following conditions:

1. Lacks sufficient property, including property apportioned to [her], to provide for [her] reasonable needs.
2. Is unable to be self-sufficient through appropriate employment or is the custodian of a child whose age or condition is such that [she] should not be required to seek employment outside the home or lacks earning ability in the labor market adequate to be self-sufficient.
3. Contributed to the educational opportunities of [Father].
4. Had a marriage of long duration and is of an age that may preclude the possibility of gaining suitable employment adequate to be self-sufficient.

A.R.S. § 25-319.A (2007).

¶11 The family court found Mother failed to prove any of the statutory grounds that would entitle her to spousal maintenance. Mother argues the court erred because she is entitled to spousal maintenance pursuant to the first three factors. We determine the court abused its discretion in denying Mother's request for an award of spousal maintenance. The evidence showed Mother qualified for spousal maintenance, as

a matter of law, because she is unable to be self-sufficient pursuant to A.R.S. § 25-319.A.2.

¶12 At trial Mother stated she holds a bachelor's degree in psychology but had not worked outside the home for seven years. Father offered evidence that Mother worked as a behavioral specialist in 2000, before completing her bachelor's degree, and earned \$15 per hour.²

¶13 The court found that based on Mother's work-history, experience, training and education, she was capable of obtaining employment in excess of minimum wage and attributed wages to her of \$14 per hour (\$2240 per month). Mother's affidavit of financial information, which was unchallenged by Father and admitted at trial, states that Mother's reasonable living expenses totaled \$5473³ per month.⁴ Thus, accepting the court's finding that Mother is capable of earning \$2240 per month, Mother lacks sufficient income to meet her reasonable needs and

² Although Mother disputed this evidence and testified that she never worked as a counselor or earned more than \$9 per hour, we view the evidence in the light most favorable to Father. *Pownall*, 197 Ariz. at 583-84, ¶ 31, 5 P.3d at 917-18 (citation omitted).

³ Mother states in her reply brief that her reasonable living expenses are \$5447 per month. This \$26 discrepancy is not material to our analysis.

⁴ Although the family court had the discretion to reject Mother's evidence regarding her reasonable expenses, it did not do so.

therefore qualified for an award of spousal maintenance pursuant to A.R.S. § 25-319.A.2.

¶14 However, the court found Mother would be able to be self-sufficient through appropriate employment based on her attributed wages *coupled with* the assets she would received upon dissolution and her interest in Father's pension. Mother received a \$30,000 equalization payment at dissolution, plus the marital residence, the household furnishings, and a vehicle.⁵

¶15 "[A] court should not require a spouse seeking maintenance to 'use up' her property when determining if she is eligible for maintenance but should consider the income potential of that property." *Cullum v. Cullum*, 215 Ariz. 352, 354, ¶ 11, 160 P.3d 231, 233 (App. 2007) (citation omitted). The marital assets awarded to Mother had no income-producing potential,⁶ and Mother testified that she needed the equalization money as savings for emergencies. In addition, Mother's anticipated future receipt of a portion of Father's military pension benefits, in an amount not known when the court entered the Decree, was not a proper basis for the court's determination that Mother had sufficient assets and income to enable her to

⁵ Mother also received a Vanguard account as her sole and separate property. The only evidence in the record as to the value of that account, however, indicates it had a zero balance.

⁶ In contrast, Father received three rental properties owned by the community.

provide for her current reasonable needs. See *id.* at 357, ¶ 23, 160 P.3d at 236 (rejecting husband's argument that, because she would receive pension benefits in the future, the trial court erred in granting wife spousal maintenance and determining that such benefits should only be considered as part of future modification proceedings "if and when" they were received).

¶16 In addition, Mother qualified for an award of spousal maintenance under § 25-319.A.2 because the parties' younger child was of such an age that Mother should not be required to seek employment. At trial, the evidence showed that the children were ages four and six at the time of trial. When the court entered the Decree, the youngest child was five but not yet attending kindergarten. The child was therefore of such a young age that Mother should not be required to seek employment pursuant to § 25-319.A.2.

¶17 The family court erred in finding that Mother does not qualify for spousal maintenance pursuant to A.R.S. § 25-319.A.2. We therefore vacate the court's denial of Mother's request for an award of spousal maintenance and remand this matter for the purpose of allowing the court to calculate an appropriate spousal maintenance award.⁷

⁷ Because we determine Mother qualified for spousal maintenance pursuant to A.R.S. § 25-319.A.2, we do not address whether she is eligible under any of the other statutory grounds

B. Child Support

¶18 We recognize that the child support calculation may change after the family court determines an appropriate spousal maintenance award. Accordingly, we vacate the child support calculation and remand so that the court may calculate child support anew based on the proper spousal maintenance award.

C. Attorney Fees

¶19 Wife argues the family court abused its discretion by failing to award her attorney fees pursuant to A.R.S. § 25-324 (Supp. 2011). We note the court has the discretion to award attorney fees in a dissolution action "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." A.R.S. § 25-324 (emphasis added); see also *Mangan v. Mangan*, 227 Ariz. 346, 352, ¶ 26, 258 P.3d 164, 170 (App. 2011) (we review an award of attorney fees pursuant to § 25-324 for an abuse of discretion). Wife argues, with some support, that the family court looked only to the reasonableness of the positions of each party, ignoring the financial resources of both parties. However, given our remand on spousal maintenance, which clearly implicates a financial resources determination, we need not

for an award of maintenance.

decide this issue and, instead, remand to the family court to address the attorney fees issue anew.

D. Motion to Amend/Motion for New Trial

¶20 Finally, Mother contends the family court erred in denying her motion to amend/motion for new trial, which was based on the legal issues Mother raises in this appeal. Because we vacate the court's rulings regarding spousal maintenance, child support, and attorney fees and remand this matter for further proceedings, we need not address this issue.

E. Costs and Attorney Fees on Appeal

¶21 Mother also requests an award of attorneys' fees on appeal pursuant to A.R.S. § 25-342.C. In the exercise of our discretion, we deny the request. We grant Mother's request for an award of costs on appeal subject to her compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶22 For the foregoing reasons, we vacate the family court's denial of Mother's request for spousal maintenance and remand this matter for further proceedings on the issues of spousal maintenance, child support and attorney fees.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

JON W. THOMPSON, Judge

/S/

SAMUEL A. THUMMA, Judge