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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: 06/19/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:) No. 1 CA-CV 11-0660
)
TERRY K. MCCLELLAN,) DEPARTMENT C
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
SUSAN E. MCCLELLAN,)
)
Respondent/Appellee.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FN2008-002907

The Honorable David J. Palmer, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

Terry K. McClellan
Petitioner/Appellant *In Propria Persona*

Tempe

B R O W N, Judge

¶1 Terry McClellan ("Husband") appeals the trial court's order awarding the proceeds from a Nevada lawsuit to his former spouse, Susan McClellan ("Wife"). For the following reasons, we affirm that portion of the court's order denying Husband's request for all of the proceeds but we vacate the portion

awarding the entire amount to Wife and remand for further proceedings.

BACKGROUND

¶12 In September 2008, Husband petitioned for dissolution of marriage. The decree of dissolution entered by the court in April 2009 noted that the parties had purchased a condominium in Nevada as community property. At the time of the decree, a lawsuit was pending regarding flood damage to the condo. The decree provided that any award from the lawsuit "constitutes community property and must be shared equally by the parties."

¶13 In June 2009, the parties filed a second amended settlement agreement, providing that Wife would relinquish her interest in several properties owned by the parties for consideration previously received, valuable items Wife had taken from the community property, and for an additional payment of \$5000. The agreement stated that Husband had given Wife "\$1000 this date against the \$5000 [Husband] agreed to pay."

¶14 After the Nevada lawsuit was resolved, the sum of \$9500 was deposited with the clerk of the Maricopa County Superior Court. Husband filed a request to have the entire amount released to him. In Wife's response/counter-petition, she requested half of the funds pursuant to the dissolution decree as well as the rest of the \$9500 because she had "not yet received the full \$5000 payment from Husband" for the quit claim

deeds. Wife also alleged that Husband had prevented her from obtaining her personal belongings previously awarded to her. Apparently neither party requested a hearing, and the trial court entered an order releasing the \$9500 to Wife upon her execution of the quit claim deeds, explaining that "[e]ven though [Husband's] share of that amount is \$4,750, the Court finds that given the other findings of the Court, that [Wife's] receipt of that amount is sufficient to equitably discharge [Husband's] obligations under that agreement." Husband's timely appeal followed.

DISCUSSION

¶15 At the outset, we note that Husband's opening brief fails to cite applicable legal authority and therefore does not comply with our rules. See ARCAP 13(a)(6). Husband's brief also includes many irrelevant and unsupported allegations which are clearly not helpful in resolving the issue before us. Wife, on the other hand, did not file an answering brief. See *Geiler v. Ariz. Bank*, 24 Ariz. App. 266, 268, 537 P.2d 994, 996 (1975) (noting that failure to respond could constitute a confession of reversible error). In our discretion, we reach our decision on the merits of this appeal based on our own review of the record. See *Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342, 678 P.2d 525, 527 (App. 1984) (recognizing that courts prefer to

decide each case upon its merits rather than dismissing on procedural grounds).

¶16 Husband argues the trial court abused its discretion in awarding his share of the lawsuit proceeds to Wife because he has already paid Wife the entire \$5000 he owed under the second amended agreement. In support, Husband directs us to the second amended agreement, which contains a signed statement acknowledging that Wife received \$1000 against the \$5000 at the time of the signing. Husband also asserts that \$2000 he paid on execution of the first amended property settlement agreement counted against the \$5000 debt, and that Wife's failure to attend a meeting resulted in an additional \$2000 being credited against the \$5000.

¶17 We review the trial court's order awarding the lawsuit proceeds to Wife for an abuse of discretion. See *Davies v. Beres*, 224 Ariz. 560, 562, ¶ 6, 233 P.2d 1139, 1141 (App. 2010) (reviewing trial court's reapportionment of community property in post-dissolution proceeding for abuse of discretion). In exercising its discretion, a court "is not authorized to act arbitrarily or inequitably, nor to make decisions unsupported by facts." *City of Phx. v. Geyler*, 144 Ariz. 323, 328-29, 697 P.2d 1073, 1078-79 (1985). A court abuses its discretion when it reaches a conclusion that ignores, mistakes, or is not justified

by the evidence. *Id.* at 329, 697 P.2d at 1079; *Porter v. Porter*, 21 Ariz. App. 300, 302, 518 P.2d 1017, 1019 (1974).

¶18 A trial court may reapportion an award of property to equitably discharge one party's obligations to another. See Ariz. Rev. Stat. § 25-317(E) (2007) (court has power to enforce settlement agreements by all remedies available for enforcement of a judgment); *Neal v. Neal*, 116 Ariz. 590, 594, 570 P.2d 758, 762 (1977) (trial court has considerable discretion to allocate both community property and debts). Because the trial court is in the unique position of being "able to weigh all of the nuances of a dissolution proceeding which may not appear in the printed record . . . we normally defer to its discretion in arriving at an equitable solution." *Neal*, 116 Ariz. at 594, 570 P.2d at 762. On this record, however, we cannot find evidence supporting the trial court's decision to reallocate all of Husband's share of the lawsuit proceeds to Wife. *Id.* (noting that "the record must offer some reasonable evidence to support the judgment of the superior court"). Instead, the evidence indicates that at a minimum, Husband has paid \$1000 toward the \$5000 obligation. Therefore, we vacate the portion of the court's order awarding Husband's share of the lawsuit proceeds to Wife. On remand, the court shall resolve the conflicting positions of the parties by considering evidence as to whether Husband has any remaining obligations under the second amended

property settlement agreement and apportion his share of the \$9500 consistent with that determination.

¶19 Husband also asserts that he should receive Wife's share of the award as compensation for her commission of waste and failure to contribute to maintaining the properties and that in addition to forfeiting the lawsuit proceeds, Wife should be further ordered to pay half of the \$140,000 he claims he incurred in maintenance expenses. However, Husband has waived this argument because he did not raise it in his request for release of the \$9500. See *Odom v. Farmers Ins. Co. of Ariz.*, 216 Ariz. 530, 535, ¶ 18, 169 P.3d 120, 125 (App. 2007) ("Generally, arguments raised for the first time on appeal are untimely and deemed waived."). Similarly, Husband also failed to preserve his argument that Wife should be held responsible for part of the property devaluation that occurred as a result of Wife's delay in signing the quit claim deeds. See *id.*

CONCLUSION

¶10 Based on the foregoing, we affirm the trial court's denial of Husband's request for Wife's share of the Nevada lawsuit proceeds. We vacate the court's decision granting Wife all of Husband's share and remand for reapportionment based on the extent to which Husband has paid the \$5000 owed to Wife.

/s/

MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Judge

/s/

RANDALL M. HOWE, Judge