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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 08/07/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:) 1 CA-CV 11-0664
)
SUE LYNN CRAIG,) DEPARTMENT E
)
Petitioner/Appellant-Cross) **MEMORANDUM DECISION**
Appellee,) (Not for Publication-
) Rule 28, Arizona Rules
v.) of Civil Appellate
) Procedure)
ROGER THOMAS CRAIG,)
)
Respondent/Appellee-Cross)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FN2004-092607

The Honorable Dean M. Fink, Judge

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

Slaton Law Office PC Scottsdale
By Sandra L. Slaton
Attorneys for Petitioner/Appellant-Cross Appellee

Keith R. Lalliss Mesa
Attorney for Respondent/Appellee-Cross Appellant

O R O Z C O, Judge

¶1 Appellant Sue Lynn Craig (Wife) appeals from the decree
of dissolution of her marriage to Appellee Roger Thomas Craig

(Husband). Wife contends: (1) the family court erred by denying her request for treble damages, fees and costs arising out of her claim that Husband wrongfully recorded a lis pendens against her separate property; and (2) she was denied due process when Husband's divorce attorney, Keith Lalliss, had previously represented both Wife and Husband in a tort lawsuit, thereby creating a conflict of interest in the dissolution proceedings. Husband cross-appeals, arguing that: (1) the family court's division of community property was inequitable; and (2) the court abused its discretion by denying Husband's request for attorney fees and costs. For the reasons set forth herein, we affirm in part, vacate in part, and remand for further proceedings.

PROCEDURAL AND FACTUAL HISTORY

¶2 Wife and Husband married in 1991. In 1999, the parties jointly acquired real property in Mesa, Arizona (the Cielo Property). The Cielo Property was sold in October 2004, with net proceeds of approximately \$30,000.

¶3 During the marriage, the parties hired Lalliss to represent them in a tort lawsuit. The lawsuit was settled in January 2004 and resulted in a recovery of approximately \$100,000.

¶4 In January 2004, the parties jointly signed a purchase agreement to acquire another residence in Mesa, Arizona (the Valle Verde Property). However, at the escrow closing, Wife took

title to the Valle Verde Property solely in her name and Husband signed a notarized disclaimer deed in which he attested, in part:

2. [The Valle Verde Property] is the sole and separate property of [Wife] having been purchased with the separate funds of [Wife].

3. [Husband] has no past or present right, title, interest, claim or lien of any kind or nature whatsoever in, to or against said property.

4. This instrument is executed not for the purpose of making a gift to [Wife], but solely for the purpose of clearly showing of record that [Husband] has and claims no interest in and to said property.

¶15 After Wife filed a petition for dissolution of marriage in November 2004, Lalliss filed a notice of appearance as counsel for Husband in the dissolution proceedings. In December 2005, Wife filed for bankruptcy and the family court stayed the dissolution proceedings. The stay was lifted with respect to the dissolution proceedings in December 2007.

¶16 In May 2005, Lalliss filed a notice of lis pendens against the Valle Verde Property on behalf of Husband, claiming that in the dissolution proceedings, Husband was seeking to enforce rights that could affect title to the property. Wife claims the lis pendens prevented her from refinancing or selling the Valle Verde Property in 2007, resulting in a loss of equity in the property and higher monthly mortgage payments. Wife's counsel subsequently advised Husband that the lis pendens was

causing financial harm to Wife and requested that the lis pendens be released.

¶17 In December 2007, Wife filed a motion to clear title to the Valle Verde Property, asking the family court to discharge the lis pendens and requesting an award of treble damages, attorney fees and costs. In the motion, Wife argued the disclaimer deed constituted dispositive proof that Husband held no right or interest in title to the Valle Verde Property and that the notice of lis pendens was therefore meritless and groundless. Wife alleged she sustained damages as a result of the recording because the lis pendens prevented her from refinancing or otherwise disposing of the Valle Verde Property. After the bankruptcy stay was lifted, the family court took the lis pendens issue under advisement and consolidated it with the ongoing dissolution proceedings.

¶18 In June 2008, the family court held a one-day trial. Wife claimed the Valle Verde Property was her sole and separate property and that she made the down payment on the property using her separate funds from an inheritance and the proceeds from the sale of the Cielo Property. She testified that she refused to take joint title to the Valle Verde Property with Husband and that she never promised to give him an ownership interest in or title to the property after he signed the disclaimer deed.

¶9 Husband disputed Wife's testimony and claimed the Valle Verde Property was purchased using only the settlement proceeds from the tort lawsuit. He testified that he initially complained that his name was not listed as a grantee on title to the property and refused to sign the disclaimer deed because he thought the parties were to own the property jointly. Husband claimed that Wife fraudulently induced him to sign the disclaimer deed by promising to later grant him a joint interest in title to the property.

¶10 Husband also testified that the marital community made contributions toward the furnishing and improvement of the Valle Verde Property and argued that the community was therefore entitled to reimbursement and/or an equitable lien for the increase in value to the property attributable to those contributions. Wife admitted that Husband made some minor improvements to the Valle Verde Property using community funds but disagreed with Husband's contentions regarding the scope, extent and value of the contributions.

¶11 The parties also disagreed about whether there existed any equity in the Valle Verde Property. Wife claimed she had no equity in the property because she owed more on the mortgage than she believed she could obtain from a sale, basing her opinion on recent comparable sales. Based on Wife's estimated value per square foot of the property, however, Husband argued the property

had at least \$40,000 in equity, to which he claimed he was entitled to half.

¶12 Finally, the parties disputed whether the settlement proceeds from the tort lawsuit should be considered community property and to what extent Wife was entitled to share in those proceeds. The parties also disputed the amount of the settlement proceeds, the accounting and distribution of the proceeds by Lalliss from his law office trust account and how much of the proceeds the parties actually received and how the proceeds were eventually used.

¶13 On September 9, 2008, the family court entered the decree of dissolution. In the decree, the court rejected Husband's fraud claim and awarded the Valle Verde Property to Wife as her sole and separate property, finding the disclaimer deed to be "dispositive proof that [Husband] has no real or acquired right to title in [the Valle Verde Property]." The court found, however, that "Husband's contributions toward the Valle Verde home constituted an equitable lien, which made the *lis pendens* he placed on the home appropriate." Accordingly, the court denied Wife's request for treble damages caused by the recording of the *lis pendens*. Nevertheless, the court refused to award Husband an equalization payment for his interest in the Valle Verde Property because "any community interest that Husband may have in the Valle Verde home based on his contribution

thereto, are off-set by losses created in the value of the home during the course of this proceedings, and by Husband's refusal to work with Wife regarding re-financing of the home." The court therefore quashed the notice of lis pendens and quieted title to the Valle Verde Property in favor of Wife.

¶14 Regarding the other assets of community property, the court awarded two cars to Wife and one to Husband and divided various items of personal property between the parties. The court refused to award Husband an equalization payment for his interest in a joint bank account because Husband withdrew more than his one-half interest in the account after the filing of Wife's petition for dissolution. The court further ordered that "any debts incurred by the parties after the filing of this dissolution action shall be the sole and separate obligation[s] of the party incurring such debt."

¶15 Finally, the court refused to award attorney fees or costs to either party because "both parties have taken positions throughout this litigation that are unreasonable" and "[b]oth parties gave testimony at trial that lacked credibility, and which the Court [believed] to be false."

¶16 Wife filed a notice of appeal from the decree, and Husband filed notice of cross-appeal.¹ We have jurisdiction

¹ After the family court entered the decree of dissolution, Husband filed a "Motion for New Trial or for Amendment of

pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101.A.1 (Supp. 2011).²

DISCUSSION

¶17 We first address the parties' claims regarding the family court's division of property. Within that discussion, we address each of Husband's claims to an interest in the Valle Verde Property: (1) whether the family court erred in rejecting Husband's fraud claim; and (2) whether the court properly interpreted and applied the law regarding Husband's claim to an

Decree" on September 24, 2010. On October 8, while Husband's motion was pending before the family court, Wife filed notice of appeal from the decree. Husband then filed notice of cross-appeal on October 17, also while his motion was still pending. The family court subsequently denied Husband's motion on November 7.

Noting that Husband's "Motion for New Trial or for Amendment of Decree" was pending before the family court when the parties filed their respective notices of appeal, a divided panel of this court dismissed the appeal for lack of jurisdiction. *Craig v. Craig*, 225 Ariz. 508, 509, ¶¶ 1-4, 240 P.3d 1270, 1271 (App. 2010). Upon review, our supreme court affirmed the dismissal of the appeal for lack of jurisdiction, holding that appellate courts lack jurisdiction if a party attempts to appeal when a time-extending motion, such as a motion for new trial, is still pending before the trial court. *Craig v. Craig*, 227 Ariz. 105, 107, ¶ 13, 253 P.3d 624, 626 (2011).

On September 1, 2011, the family court vacated the original decree of dissolution and immediately thereafter reinstated the judgment to "recommence the time within which both [Wife] and [Husband] can file their notices of appeal." Both Wife and Husband subsequently filed second notices of appeal on September 8 and September 19, respectively. Husband did not appeal the denial of his motion for new trial.

² We cite the current version of applicable statutes when no revisions material to this decision have since occurred.

equitable lien. We then address Wife's argument that the family court erred in rejecting her claim that Husband wrongfully recorded notice of lis pendens against the Valle Verde Property, focusing on whether either of Husband's claims to an interest in the property could constitute a basis for the recordation. We next address Wife's claim that Husband's trial counsel had a conflict of interest in the dissolution proceedings. Finally, we address the parties' arguments regarding attorney fees and costs.

PROPERTY DISTRIBUTION

¶18 The trial court has broad discretion in apportioning community property between the parties at dissolution to achieve an equitable division. *Boncoskey v. Boncoskey*, 216 Ariz. 448, 451, ¶ 13, 167 P.3d 705, 708 (App. 2007). We will not disturb the trial court's apportionment of community property in a marital dissolution absent an abuse of that discretion. *Kohler v. Kohler*, 211 Ariz. 106, 107, ¶ 2, 118 P.3d 621, 622 (App. 2005).

The Valle Verde Property

¶19 Property acquired during marriage is presumed to be community property. *Brebaugh v. Deane*, 211 Ariz. 95, 97-98, ¶ 6, 118 P.3d 43, 45-46 (App. 2005). That presumption can be rebutted, however, through the execution of a disclaimer deed stating that certain property is the sole and separate property of one spouse, unless the deed was executed as a result of fraud

or mistake. *Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, 524, ¶ 10, 169 P.3d 111, 114 (App. 2007). Nevertheless, the expenditure of community funds to enhance the value of separate property entitles the community to a share of any equity attributable to those efforts. *Id.* at 524, ¶ 12, 169 P.3d at 114.

¶20 At trial, Husband made two separate claims to an interest in the Valle Verde Property. First, Husband claimed he was fraudulently induced to sign the disclaimer deed and, thus, the Valle Verde Property would presumptively be community property. In the alternative, Husband claimed the marital community made contributions toward the purchase and improvement of the Valle Verde Property and the community was entitled to an equitable lien for the increase in value attributable to those contributions. We will deal in turn with each argument.

Fraudulent Inducement

¶21 The family court concluded that Husband did not meet his burden of proving that he was defrauded or forced to sign the disclaimer deed. Both parties contend the court's factual findings regarding this issue are unclear and seemingly contradictory. On the one hand, the court found that "Husband failed to produce any witness testimony, or credible, tangible evidence whatsoever to support the claim." On the other, the court noted in a footnote that "[a]lthough Husband has not met

his burden of proof that he was defrauded . . . [t]here is certainly some colorable evidence to support such a claim, albeit insufficient."

¶22 However, to the extent Husband contends the court erred by rejecting his fraud claim, we disagree because neither of the court's findings support Husband's position and we cannot say the court abused its discretion in finding that Husband failed to present sufficient evidence that he was fraudulently induced to sign the disclaimer deed. See *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347-48, ¶ 13, 972 P.2d 676, 680-81 (App. 1998) ("We will defer to the trial court's determination of witnesses' credibility and the weight to give conflicting evidence." (citation omitted)); *Hrudka v. Hrudka*, 186 Ariz. 84, 91, 919 P.2d 179, 186 (App. 1995) (noting that appellate courts will sustain the trial court's factual findings unless clearly erroneous or unsupported by any credible evidence).

Equitable Lien

¶23 Husband next argues the community is entitled to an equitable lien for the increase in value to the Valle Verde Property attributable to community contributions. "The existence and the value of an equitable lien present mixed questions of fact and law." *Valento v. Valento*, 225 Ariz. 477, 481, ¶ 11, 240 P.3d 1239, 1243 (App. 2010). "We will uphold the court's factual findings unless clearly erroneous or unsupported by any credible

evidence," but "we draw our own legal conclusions from the facts found or implied by the family court." *Id.*

¶24 Although the court found that Husband made contributions to the Valle Verde Property, which "constituted an equitable lien," the court noted that "[t]he evidence of the specific amount that Husband put into the Valle Verde house, however, was inconsistent and unclear." Nevertheless, the court ultimately determined that "any community interest that Husband may have in the Valle Verde home based upon his contributions thereto, are off-set by losses created in the value of the home during the course of this proceeding, and by Husband's refusal to work with Wife regarding re-financing of the home."

¶25 Because Husband did not request findings of fact or conclusions of law pursuant to Rule 82(A) of the Arizona Rules of Family Law Procedure, we presume that the family court "found every fact necessary to support the judgment, and such presumptive findings must be sustained if the evidence on any reasonable construction justified it." *Neal v. Neal*, 116 Ariz. 590, 592, 570 P.2d 758, 760 (1977) (citation and internal quotes omitted). Thus, we review any factual findings for clear error. Ariz. R. Fam. L.P. 82(A); see also *Hrudka*, 186 Ariz. at 91, 919 P.2d at 186.

¶26 The loss or complete absence of equity in the separate property of a spouse does not prevent the court from imposing a

lien to enforce a community interest in the property. See *Valento*, 225 Ariz. at 482, ¶ 14, 240 P.3d at 1244; *In re Marriage of Crawford*, 180 Ariz. 324, 327-28 884 P.2d 210, 213-14 (App. 1994). Thus, in situations where the separate property has depreciated or has negative equity, the court must first determine the value of the property and then compute the depreciated value of any community interest in the property. *Valento*, 225 Ariz. at 482, ¶ 14, 240 P.3d at 1244.

¶27 Here, it was undisputed that the Valle Verde Property depreciated during the course of the marriage and dissolution proceedings. However, the parties' conflicting valuations of the property created a contested issue of fact as to the value of equity, if any existed, in the property at the time of trial. It was therefore the duty of the family court to determine the value of the property and then compute the value of any community interest therein. See *id.*

¶28 Wife presented reasonable evidence at trial to support the court's finding that Husband's conduct during the course of the proceedings caused a loss in value to the Valle Verde Property, which off-set any community interest that Husband may have had in the home. Accordingly, we presume the court made every finding of fact necessary to support its judgment and we cannot say the court abused its discretion. See *Neal*, 116 Ariz.

at 592, 570 P.2d at 760; *Kohler*, 211 Ariz. at 107, ¶ 2, 118 P.3d at 622.

Division of Community Property

¶29 Lastly, Husband claims the family court's division of community property was inequitable. However, significant portions of Husband's briefs fail to comply with the Arizona Rules of Civil Appellate Procedure. See ARCAP 13(a)6 (appellant's brief shall contain arguments "with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on"). Most importantly, Husband's counsel fails to cite to the record in support of his contentions that the family court inequitably divided several banking accounts, the Valle Verde Property, items of "personalty," and several undocumented community properties. Because counsel failed to provide us with the information necessary to address these claims, we find Husband waived any argument regarding these issues. See *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, 93, ¶ 50, 977 P.2d 807, 815 (App. 1998) (rejecting assertions made without supporting argument or citation to authority); *Milam v. Milam*, 101 Ariz. 323, 326, 419 P.2d 502, 505 (1966) ("We have read the record but we will not search it for possible error favorable to either of the parties. The members of this court are not advocates and their obligation

is to pass upon specific questions upon which counsel for the opposing party has had an opportunity to speak.”).

THE NOTICE OF LIS PENDENS

¶30 Arizona Revised Statutes § 12-1191.A (Supp. 2011) authorizes the filing of a lis pendens in any action “affecting title to real property.” However, the wrongful recordation of a lis pendens entitles the property owner to statutory treble damages, attorney fees, and costs pursuant to A.R.S. § 33-420 (2007). See *Richey v. W. Pac. Dev. Corp.*, 140 Ariz. 597, 601, 684 P.2d 169, 173 (App. 1984). The issues before us are whether the dissolution action in this case constituted an action “affecting title to real property” and whether Husband wrongfully recorded the lis pendens.

¶31 Wife claims the family court erred by finding that “Husband’s contributions toward the Valle Verde home constituted an equitable lien, which made the *lis pendens* he placed on the home appropriate.” However, we find it immaterial whether an equitable lien actually existed because the relevant question under § 12-1191 is whether Husband asserted a claim that could affect a right incident to title to the Valle Verde Property at the time he recorded the lis pendens. See, e.g., *Santa Fe Ridge Homeowners’ Ass’n v. Bartschi*, 219 Ariz. 391, 395, ¶ 11, 199 P.3d 646, 650 (App. 2008) (“the court need find only ‘some basis’ that the action is one affecting title to real property”); *Tucson*

Estates, Inc. v. Superior Court, 151 Ariz. 600, 605, 729 P.2d 954, 959 (App. 1986) ("The issue then is whether any of the three counts of the amended complaint sets forth a cause of action which will involve an adjudication of rights incident to title to any or all of the real property described in the notice of lis pendens.").

¶132 "[A] lawsuit affects a right incident to title if any judgment would expand, restrict, or burden a property owner's rights as bestowed by virtue of that title." *Santa Fe Ridge Homeowners' Ass'n*, 219 Ariz. at 396, ¶ 16, 199 P.3d at 651. In determining whether a party's claim affects title, the court should not consider which party will ultimately prevail on the merits of the underlying litigation. *Id.* at 395, ¶ 11, 199 P.3d at 650. However, a lis pendens is groundless when "the claim that the action affects title to real property has no arguable basis or is not supported by any credible evidence." *Id.* (citation and internal quotation omitted).

¶133 In this case, Husband's fraudulent inducement and equitable liens claims could affect a right incident to title. If Husband had been successful in the fraudulent inducement claim, it would transform the character of the property from the sole and separate property of Wife to a community asset.³ In the

³ The family court's finding that Husband "failed to produce any witness testimony, or credible, tangible evidence whatsoever

equitable lien claim, if Husband had been successful, he would have a lien against the property for any reimbursement for community contributions to the Valle Verde Property. However, we are unable to ascertain from the record or the appellate briefs whether Husband actually asserted the fraudulent inducement or equitable lien claims before recording the notice of lis pendens. Wife claims that at the time of recording, Husband had not yet made the fraudulent inducement claim or equitable lien claims in the divorce proceedings.

¶134 Based on our independent review of the record, however, it appears Husband may have made these claims in either his Resolution Statement filed on April 12, 2005 or his Pre-Hearing Statement filed on April 29, 2005. Nevertheless, because we do not have access to the recorded lis pendens to determine its contents and only know that the notice of lis pendens was filed in the dissolution action on May 6, 2005, but do not know when it was recorded, we cannot determine whether Husband actually

to support the [fraud] claim" could arguably be a finding that the claim had "no arguable basis or [was] not supported by any credible evidence." See *Santa Fe Ridge Homeowners' Ass'n*, 219 Ariz. at 395, ¶ 11, 199 P.3d at 650. We reject that interpretation, however, because Husband did in fact testify that he would not have signed the disclaimer deed if Wife had not promised to later grant him an ownership interest in the property. Furthermore, the court explicitly declined to find that "Husband's fraud claim was wrongfully or unreasonably made," and the court further found "[t]here is certainly some colorable evidence to support such a claim." We therefore do not find that Husband's fraud claim was legally insufficient to be the basis for a lis pendens pursuant to *Santa Fe Ridge*.

asserted the fraudulent inducement claim before recording notice of lis pendens. Accordingly, we remand for the family court to determine whether Husband asserted the fraudulent inducement or equitable lien claims prior to recording the lis pendens.

CONFLICT OF INTEREST

¶135 Wife claims she was denied due process because Lalliss's representation of Husband in the divorce proceedings created a conflict between the interests of his current client (Husband) and the interest of his former client (Wife). Wife concedes, however, that she did not formally object to the alleged conflict of interest during the dissolution proceedings before the family court. We therefore find that Wife has waived this argument on appeal. See *Pflum v. Pflum*, 135 Ariz. 304, 306-07, 660 P.2d 1231, 1233-34 (App. 1982) ("Matters not raised below will not be considered on appeal." (citations omitted)).

¶136 We note, however, that the Arizona Rules of Professional Conduct prohibit an attorney from representing a "person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of [a] former client unless the former client gives informed consent, confirmed in writing." Ariz. R. Sup. Ct. 42, ER 1.9(a). The Rules of Professional Conduct also prohibit an attorney from using information relating to the representation of a former

client to the disadvantage of that client. Ariz. R. Sup. Ct. 42, ER 1.9(c)(1).

¶137 Based on our review of the record, it appears Lalliss may have violated the Rules of Professional Conduct. On at least one occasion, it appears Lalliss used confidential communications from his previous representation of Wife to impeach her credibility during cross examination in the dissolution proceedings.⁴ We further note that this violation may have

⁴ During cross examination, the following exchange took place between Lalliss and Wife:

[Lalliss:] But the money that you - that I gave you and [Husband] in some form out of my trust account that came to about \$90,000, what is your position as to what claim you have against that money?

[Wife:] For half.

[Lalliss:] And why do you claim that you're entitled to half of that?

[Wife:] Because [Husband] promised me half and because I was your client and we had winnings.

[Lalliss:] Well, you've already denied this once, but let me give you -- do you remember sitting in my conference room and me telling you that the insurance company paid the money only to [Husband] because your claim was a consortium claim and I couldn't show that you had a loss of consortium because of the fact that you were in and out and in and out of your relationship. Do you remember that conversation at all?

[Wife:] Absolutely not.

prejudiced Wife because Lalliss's conduct may have contributed to the court's statements that Wife has "significant credibility issues" and that Wife "gave testimony at trial that lacked credibility, and which the Court believes to be false." Upon remand, Wife is free to raise this argument to the family court and the court may then consider whether Lalliss's continued representation of Husband violates Ethical Rule 1.9.

ATTORNEY FEES AND COSTS

¶138 Husband argues the family court abused its discretion by failing to award him attorney fees. In light of the court's finding that "both parties have taken positions throughout this litigation that are unreasonable," we find the court did not abuse its discretion. See A.R.S. § 25-324.A (Supp. 2011); *Hrudka*, 186 Ariz. at 95, 919 P.2d at 190.

[Lalliss:] You believe that half of the money was yours by claim, even though it was *his* personal injury lawsuit?

[Wife:] It was per agreement.

[Lalliss:] What agreement? When was the agreement made?

[Wife:] Our agreement with you in the contract and [husband]'s agreement with me.

[Lalliss:] Well, the agreement with *me*, unfortunately, doesn't say what money - how it's to be distributed because personal injury funds under Arizona law are sole and separate property.

¶39 Lastly, we address the parties' requests for attorney fees and costs on appeal. Specifically, Husband requests an award pursuant to A.R.S. § 25-324, while Wife requests an award pursuant to A.R.S. § 12-341 (2003). After review of the parties' arguments, we decline to award attorney fees or costs to either party.

CONCLUSION

¶40 For the reasons set forth above, we affirm in part, vacate in part, and remand for further proceedings consistent with this memorandum decision.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

PHILIP HALL, Judge

/S/

JOHN C. GEMMILL, Judge